PARLIAMENT OF VICTORIA

LEGISLATIVE COUNCIL

LEGISLATION COMMITTEE

Assisted Reproductive Treatment Bill

Wednesday, 19 November 2008

Chair

Mr B. Atkinson

Deputy Chair

Ms C. Broad

Members

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

Substituted members

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

Staff

Mr R. Willis, secretary

Also present

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

ASSISTED REPRODUCTIVE TREATMENT BILL

Legislation Committee

Referred from Legislative Council.

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

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

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

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

Clause 1

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

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

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

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

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

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

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

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

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

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

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

Mr DRUM — I have a question for the purposes.

The CHAIR — Yes, okay.

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

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

I am just wondering where that is in the bill.

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

Ms BROWN — Clause 100(1)(f).

Mr JENNINGS — Clause 100(1)(f).

Ms PENNICUIK — Thank you.

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

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

Ms BROWN — About 4500.

Mr JENNINGS — Four and a half thousand.

Ms BROWN — Approximately.

Mr DRUM — That is live births?

Ms BROWN — Births? No.

Mr DRUM — That is couples?

Mr JENNINGS — Yes.

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

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

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

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

Mr DRUM — Increase?

Mr JENNINGS — Underpinning your assumption is a dramatic increase.

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

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

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

Mr PAKULA — Why would it be more expensive?

Mr DRUM — I beg your pardon?

Mr PAKULA — Why would it be more expensive?

Mr DRUM — It is already a very expensive procedure.

Mr PAKULA — Why would this make it more expensive?

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

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

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

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

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

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

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

Mr JENNINGS — Pardon?

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

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

Mr DRUM — It is true.

The CHAIR — Mr Drum, most unhelpful.

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

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

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

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

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

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

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

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

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

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

Mr JENNINGS — Let me just — —

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

The CHAIR — That is fair enough.

Mr JENNINGS — Yes.

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

Another question I have is in regard to a submission that most people have received regarding the setting up of the moving of the keeping of records from the Infertility Treatment Authority to births, deaths and marriages. Does the minister have any comments about challenges to that? I am sure the minister would have received the submission we have received on whether the existing place for those records is the best place and moving them to another place is not the best thing to do?

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

Ms PENNICUIK — Just the rationale, Minister.

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

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

> The decision to relocate the donor registers and associated counselling services from the ITA to BDM is based on the principle that donor information is for the basis of children born as a result of donor treatment procedures.
>
> As noted by the VLRC, a child's access to birth and genetic information should be treated separately from the infertility or treatment needs of his or her parents. The parent(s) infertility should not prevail upon the child throughout his or her life.
>
> Centralising all information about a child's birth would also help to normalise donor conception, and will see donor conceived persons who have a desire for information about their genetic parentage accessing this information in the same way as other children in a similar position.
>
> BDM is the key agency in Victoria for the collection and management of identity-related data and accordingly has protocols to internally validate data that is received and protect its privacy.
>
> Existing working arrangements between the registry and adoption and family records services will provide each donor register applicant access to prescribed counselling before identifying information is released.
>
> Adoption and family records services has built an impressive reputation over a long period for is sensitive and confidential service to adoption applicants and, more recently, wards of the state.

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

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

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

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

Mr DALLA-RIVA — It was about clause 1.

Mr PAKULA — What was the question?

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

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

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

Mr DRUM — Thank you, that is my question.

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

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

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

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

That is another specific provision.

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

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

The CHAIR — Pardon?

Mr JENNINGS — I have just assisted our jumping clauses.

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

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

Mr DRUM — Sure.

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

Clause 2

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

Clause 3

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

Mr JENNINGS — My adviser is echoing that in fact the answer to this is the parent, under normal circumstances including this bill, has a common-law meaning, a common understanding and that is what would be relied on. I know there are specific provisions in relation to categories of parent, as you would be aware, because in

fact 'commissioning parent', for instance, is a definition that is here and to which we specify a subset of parent or a specific circumstances by which parenting comes about. So that has been the element where the definitions and delineation have occurred. Within the context of parents and parenting we would expect that to be within common usage.

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

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

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

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

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

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

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

Mr DRUM — That is the maximum.

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

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

Mr JENNINGS — Yes.

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

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

Ms PENNICUIK — My question is, Minister, regarding the definition of criminal record check. Can the minister tell me why, given that the Victorian Law Reform Commission recommended — whether people accept this or not — a presumption against treatment for people convicted of certain offences. But this criminal records check includes any convictions, any findings of guilt, any charges or any other matters. Why is it so broad ranging when elsewhere in the bill it only refers to certain offences?

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

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

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

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

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

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

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

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

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

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

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

Clauses 1 to 3 postponed; clause 4 postponed.

Clause 5

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

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

which I do not think anyone can object to, and its relationship to clause 5(c) that:

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

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

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

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

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

Mr JENNINGS — Yes.

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

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

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

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

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

line about who should have the ability to be a parent in the state of Victoria. That was the research that we have relied on and the evaluation that the government has accepted.

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

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

The CHAIR — Yes.

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

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

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

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

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

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

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

Mr JENNINGS — In fact the broad power to enable the authority — the Victorian Assisted Reproductive Treatment Authority — to undertake the monitoring and evaluation of the question you put to me is available under

clause 100 of part 10 of the bill. In terms of the head of power, the expectation that monitoring and accountability frameworks be put in place is given to the authority and outlined in that bill. While we have not specified over what time frame, I think it is reasonable for the community to expect that the authority will evaluate these matters and the wellbeing of the act and the procedures under the act on a regular basis. There is nothing beyond what I have described, but in fact I would agree with your supposition that it is appropriate for the authority to make sure that that work is accountable.

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

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

The CHAIR — Thank you, minister.

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

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

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

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

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

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

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

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

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

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

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

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

Clause 5 postponed; clause 6 postponed.

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

Clauses 7 to 10 postponed.

Clause 11

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

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

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

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

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

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

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

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

Mr JENNINGS — I do not make any assumptions about the integrity of anybody who actually has a criminal conviction, because there might be a whole range of circumstances that in fact may explain it and justify it in some ways. I do not actually start from a position of having any preconceived views about anybody who has a criminal record necessarily. I assume that this is the mindset that a counsellor should have in relation to this matter. They would be required under the act to verify what that criminal record is, to make the other inquiries in relation to child

protection orders, and in the nature of a counselling relationship form an honest, well-informed view within the scope of what is available to them — if in fact there has not been anything there that precludes the applicant going forward — about the appropriateness for this person to proceed through the process.

Coming from that framework and that mindset, I think that people who are embarking upon this process would have an expectation that in fact disclosure and appraisal of their circumstances, who they are and their history on any matter that may reflect on their ability to be a good parent, is relevant to the conversation and the relationships that they briefly form with the counsellor in relation to these decisions. On that basis, anybody who is going through this process should not form the view that in fact they should withhold information from the counsellor that may be relevant to going through the process.

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

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

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

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

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

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

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

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

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

The CHAIR — That might be a very dangerous thing!

Mr FINN — In that case, I will stay.

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

Clause 12

The CHAIR — In clause 12, minister, just as an overview position, because Ms Pennicuik may well in particular pursue the matters of police checks, can I suggest to you that some people put to me, and no doubt to Ms Pennicuik and others, that police checks was an onerous proposition and a proposition which created two classes of parents, quite an anomaly in terms of the way we treat different people, and that perhaps maybe a less intrusive or, on the other hand, maybe a compromise position might well have been to run with something that I understand is used interstate, which was the statutory declarations. In terms of that overview position, did the government consider statutory declarations and what brought the government to this position of initiating police checks, given that it created a significant difference to people presenting for this treatment to other citizens?

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

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

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

The CHAIR — Yes.

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

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

Mr DALLA-RIVA — To clause 14?

Ms BROWN — Yes, clause 14.

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

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

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

Mr JENNINGS — What is the difference?

Mr DALLA-RIVA — Yes.

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

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

Mr JENNINGS — No.

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

Mr JENNINGS — It is the parent.

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

Mr JENNINGS — Yes.

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

Mr JENNINGS — Yes.

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

Clauses 11 and 12 postponed.

Clause 13

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

Clause 13 postponed.

Clause 14

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

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

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

Ms PENNICUIK — Minister, I am not necessarily arguing with you about what sort of information might need to be collected — it is the process by which that is done. Did the government give consideration to the South

Australian example or any other way of obtaining information that would be relevant to the parenting skills of prospective parents?

Mr JENNINGS — I will possibly not be able to provide you with any documentary evidence of that consideration, but the government considered this bill for a long period of time after the Victorian Law Reform Commission's report, and on balance we arrived at the mechanisms within the bill. I can assure you that within the process within government a lot of consideration was given to the matter to arrive at the balance that we did.

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

Ms BROWN — Yes.

Mr JENNINGS — Yes.

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

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

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

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

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

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

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

Mr PAKULA — Nor can we.

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

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

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

Ms PENNICUIK — It would be good.

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

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

Ms PENNICUIK — Sorry, could you repeat the question?

The CHAIR — Here.

Ms PENNICUIK — No, not here.

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

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

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

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

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

Ms PENNICUIK — Thank you, Chair.

Ms BROAD — Unaffected.

The CHAIR — What is unaffected? Me?

Ms BROAD — Sorry, it is just language.

The CHAIR — I thought you meant me.

Ms BROAD — 'Sacrosanct' has a particular connotation.

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

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

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

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

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

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

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

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

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

Ms BROAD — What about members' diaries?

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

Mr PAKULA — Members can substitute.

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

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

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

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

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

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

Mr TEE — Was that an offer for 2 hours?

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

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

Committee adjourned.

PARLIAMENT OF VICTORIA

LEGISLATIVE COUNCIL

LEGISLATION COMMITTEE

Assisted Reproductive Treatment Bill

Tuesday, 25 November 2008

Chair

Mr B. Atkinson

Deputy Chair

Ms C. Broad

Members

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

Staff

Mr R. Willis, secretary

Substituted members

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

Also present

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

ASSISTED REPRODUCTIVE TREATMENT BILL

Legislation Committee

Resumed from 19 November.

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

Mr JENNINGS — Not at this stage, no.

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

Clause 15

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

Clause agreed to.

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

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

Ms PENNICUIK — I was just clarifying that.

Clause 16

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

Clause agreed to.

Clause 17

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

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

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

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

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

Mr HALL — Thank you.

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

Clause agreed to.

Clauses 18 and 19

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

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

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

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

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

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

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

The assumption that people may not have thought about the diversity of their options and the considerations probably does not do justice to either the gravity or the rarity with which people would come to this service lightly.

I think whilst there may be some consideration, and we should always be mindful in terms of monitoring of the effectiveness of the impact of this piece of legislation, whether we should be mindful of this issue in future if it seems to be a feature of the field — I think the government would be alive to it — we are not coming off the basis of any evidence of cumulative concerns apart from the theoretical concern, which I acknowledge is real or has the potential to be real, but in the circumstances we have found ourselves in up until now it has not warranted a stand-alone separate entity to deal with these matters.

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

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

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

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

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

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

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

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

Clauses agreed to; clauses 20 to 28 agreed to.

Clause 29

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr JENNINGS — No, all of those factors were considered together, so I appreciate the opportunity for me to come back and clarify that. It is the basket of the issues that I have outlined in relation to the availability of supply. The ethical considerations, the risk in terms of genetic inheritance that were considered, and the last element of the equation which determined that 10 was the appropriate consideration within all of that was the availability of supply.

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

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

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

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

Clause agreed to; clauses 30 to 38 agreed to.

Clauses 39 to 42

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

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

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

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

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

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

Mr JENNINGS — The logic and concern that underpin this set of provisions come from a philosophical place not too different from the one that is in the question, and obviously is a concern to a number of people in the community who are concerned about this matter. Assuming that we are going to allow and regulate a form of ultruistic surrogacy within Victoria — and in fact that is what is provided for within this bill — beyond that, what

are the appropriate frameworks that are in place to try to protect the interests of all parties, including the woman who will ultimately relinquish the child?

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

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

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

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

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

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

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

The CHAIR — I would like to take the opportunity to add to that. It is my understanding that the practice of IVF practitioners is that they specifically tell young women who have never had a child that they ought not participate in the procedure in terms of even giving their eggs to someone else. They do that because of concerns about certain dangers, that things might go wrong with the procedure, and because they have not had children and have not had that experience themselves. So there is already a best-practice situation that involves counselling women who had not previously had a child against participating in IVF donation. In that context, this is a particularly important question.

Mr JENNINGS — It is an extremely important question. No-one should enter into this consideration on the inbuilt assumption that they know how any individual will respond to any circumstance and absolutely assert that

that is what is going to happen. It would be inappropriate for us as people who are determining the way in which legislation is written, for those who sit on the review panel, for those who provide counselling, for those who provide the clinical service to make inbuilt assumptions on how any individual will respond.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms PENNICUIK — I agree with you in that respect.

Mr JENNINGS — Yes. So what the review panel has to do is it actually has to make, on the basis of its professional focus and its understanding, in accordance with the law and on balance with the wherewithal of the woman who comes into its company to discuss this matter, the best decision that it can make. I would assert that it is a very, very hard decision to make in any circumstances. I have not got a lot of dividing lines or clearly defining lines along that continuum of concerns that actually say, 'Now we have reached the threshold', but ultimately on the cumulative weight of consideration they need to arrive at the decision that in fact it may be appropriate. That is the answer to that part of question, and that is about as good as I am going to do.

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

Ms PENNICUIK — The cost of that.

Mr JENNINGS — When it may be most relevant or most required would involve some degree of speculation, and I think that warrants some degree of depth of consideration in the very first instance of the counselling arrangement. Beyond what would be seen as a reasonable time — and I cannot actually define what a reasonable

time of after-care counselling consideration would be within the clinic, and I think it is appropriate for us to have an expectation that that would be provided within the clinic — there may be ongoing counselling required, and people certainly should be made aware of that and of what the cost consequences in all forms of that are over a longer period of time.

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

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

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

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

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

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

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

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

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

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

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

Ms PENNICUIK — No.

Mr JENNINGS — I do not baulk at a reasonable question that the Chair asks. This is one aspect of a provision where the government has been very specific in relation to matters that the patient review panel should be mindful

of, but there are general provisions, and clause 91(2) of the bill provides for both the expectation or the requirement of the panel to act in accordance with the guiding principles and any other relevant information or criteria it may see fit to be mindful of in its appropriate delivery of its requirements under the act. That is a general provision on which I think you are quite right to give the committee and give the government guidance and subsequently the panel guidance about what might be the range of research and the contemporary nature of research that it may apply to its appropriate application of a number of its considerations across a number of the provisions of the bill.

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

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

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

Ms PENNICUIK — I cannot see one.

Mr JENNINGS — Okay, clause 44(3).

Ms PENNICUIK — Yes, under reimbursement. Thank you.

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

Ms PULFORD — Perhaps in responding to that — —

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

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

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

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

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

Mr TEE — We have had no regulation.

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

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

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

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

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

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

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

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

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

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

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

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

Ms PENNICUIK — Minister, I do not know if you have fully answered my questions because in this discussion we have been talking about a very difficult issue that involves, as I said, a surrogate parent but also a partner of a surrogate parent and children of a surrogate parent, who would be siblings or half-siblings of the donor-conceived person. You admitted yourself that if things go wrong, they could go very wrong. While there are happy stories, there are also unhappy stories that have been brought to my attention and, I am sure, to everybody

else's I am sure. My question is: is the government assured or satisfied that this approach has enough caution in it, and is there a process whereby it will be monitored in terms of looking to see whether it needs amendment or adjustment further down the track?

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

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

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

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

Clauses agreed to.

Clause 43

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

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

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

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

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

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

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

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

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

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

Ms PENNICUIK — Minister, I think it is important that we follow these issues up, and this will be my last question. Given that there may not be goodwill, and there may be separation, under the terms of information that is available in the voluntary register, for example, would the existing siblings be able to follow up and perhaps make contact with a sibling born in those circumstances with whom they had lost contact, but they know that that sibling is around — an older sibling?

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

Ultimately, in terms of the availability through the registry of births, deaths and marriages, which will ultimately be the repository of this documentary trail of a person's genetic inheritance or the means of their birth, those administrative practices will develop over time. I know this is an issue that will probably be the subject of bitter contest for us a little later. I know there will be some expectations about trying to guarantee access to evidence and open up access to information.

I can understand the reasons — including the reasons that you have outlined, and I am sure a whole range of other cases which you will perhaps outline later on — as to why that should be appropriate. The government is alive to the need for the appropriate disclosures so that all the relevant parties have access to reasonable forms of

information, but we are also particularly mindful of privacy provisions and of the respect that needs to be shown for all people within the regime that we are regulating here. Our concern has been to try to make sure that the appropriate balance was struck.

In the specific example that you have asked me about, I think the inbuilt assumption is that the starting point is the surrogate mother. The surrogate mother will be acutely aware of the relevant information, and if her other children seek access to that information, I would have thought that a relevant place to start would be through her, because she would have access to it.

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

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

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

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

Clause agreed to.

Clause 44

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

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

Mr HALL — Loss of income?

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

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

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

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

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

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

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

The CHAIR — I had this question too.

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

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

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

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

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

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

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

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

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

Mr JENNINGS — In terms of the absolute, I do not know that I am going to give you an absolute commitment, although we are all perhaps pleased to know that the house may have an opportunity to get me further down the clarity line. The reason I asserted that lost wages are not part of the consideration is because in the

existing provision — section 40 of the Human Tissue Act — they are not accounted for. That is consistent with my answer, although I have subsequently been shown that some provisions of the law reform commission's report suggest that lost earnings up to maximum period of two months may be considered to be a prescribed payment that may be appropriate. There is some consideration that we will need to give to that matter, because the existing provisions and the recommendations of the law reform commission are the field in which we are trying to prescribe those under section 24.

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

Mr JENNINGS — Yes, of course.

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

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

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

Clause agreed to; clause 45 agreed to.

Clause 46

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

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

However, having said that, there is nothing within this bill and nothing within the way in which our community and societies around the world organise themselves in relation to assumptions about single parents and single parenting. The evidence that is attached to the success of children who are born in a whole variety of circumstances and live in single-parent families is an example. Children can grow up and as long as they are cared for, are provided with love and care and have the good fortune to have a healthy upbringing and their development needs cared for, they can live rich and fulfilling lives. That in-built knowledge and assumption mean that this opportunity is provided for within the bill, because it does not make any hard-and-fast ruling about a predetermined likelihood of a child living a happy and fulfilled life through different circumstances if this bill allows for it.

In terms of trying to field that basket of philosophical, emotional and developmental issues, the patient review panel, I am sure, will exercise its mind and its wisdom greatly about exercising and providing the appropriate authority for such a procedure and such an arrangement to take place, because in the rare circumstances where they will be confronted with it they will have to take their responsibilities very seriously.

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

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

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

Clause agreed to; clauses 47 and 48 agreed to.

Clauses 49 to 54

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

Ms PENNICUIK — Clauses 55 and 56.

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

Mr JENNINGS — We have spent a bit of time contemplating what might be at the heart of this concern, Chair, because the relevant agencies and practitioners — the clinical practice that currently exists, let alone what we will be moving to — will be covered by the relevant provisions of the Health Records Act, and expectations of recordkeeping. We expect the accountability within that act to be maintained. We start from the assumption that whilst obviously we want to make a smooth transition to the new arrangements administratively, we do not believe that records are kept in a variety of circumstances which are included within your question even though the community might have concerns about appropriate recordkeeping. We believe a higher standard applies in the field now and is accountable to the relevant act, and we would have that expectation in the future.

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

Clause 55

Ms PENNICUIK — If I could just ask a question on clauses 55 and 56 together, clause 55 allows for the donor to apply for and receive information about the woman or partner for which their gametes have been used and

clause 56 allows for the donor to apply for and receive information about a child that is conceived using their gametes. The Victorian Law Reform Commission was quite strong on that point in recommending that those provisions be removed and that the only circumstance under which a donor should be able to apply for that information would be if they had knowledge of a genetic condition which they wished the donor-conceived person and/or the parents to know about. I want to know the rationale of the government for including it.

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

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

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

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

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

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

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

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

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

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

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

Clauses agreed to; clause 56 agreed to.

Clauses 57 to 81

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

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

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

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

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

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

The CHAIR — We have appreciated your goodwill, Minister.

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

The CHAIR — Are there other matters that — —

Ms PENNICUIK — Yes.

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

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

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

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

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

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

The CHAIR — What are your two clauses?

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

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

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

Mr HALL — It is also in the definitions.

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

Ms PENNICUIK — I had a question — —

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

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

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

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

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

Mr DALLA-RIVA — Is that 4.30 a.m.?

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

Ms PENNICUIK — Yes.

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

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

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

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

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

Mr JENNINGS — Yes, all right.

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

Mr JENNINGS — All right.

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

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

Between 1988 and 1997 a different regime was in place, and that material which has been kept in a better form could be made available and would be made available with the consent of the donor. That is a different set of circumstances to those prior to 1988. We hope to encourage a regime where that consent may be provided and the information may be able to be made available in an accessible form so that people can exercise their rights and opportunities to know their genetic inheritance.

Certainly the government is mindful of that, but our concern about the overriding of some of those privacy issues and our concerns about the practical implementation of being able to provide the information are the reasons why we have currently not allowed for it within the bill. However, it should be understood that we are interested in increasing access to information, and the government would assert that our electronic consolidation of information through the registry of births, deaths and marriages has provided a better repository of information and may lead to improvements in both the collation and dissemination of information in the future.

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

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

and

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

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

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

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

The CHAIR — Anything further in regard to those clauses?

Clauses agreed to.

Clauses 82 and 83

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

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

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

Mr DALLA-RIVA — Thank you.

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

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

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

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

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

Whether in fact there is any particular — —

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

Mr JENNINGS — Consumer.

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

Mr JENNINGS — In fact that is right. The overriding issue is an appreciation of the role which the panel will undertake and the ability of members of the panel to undertake their responsibilities. You would hope panel members would have compassion, consideration and an ability to acquit themselves in terms of their responsibility. We would hope there is a high degree of recognition and understanding of the process that people who embark on ART would have to undergo, and the emotional consequences of that. If in fact that comes through somebody

having gone through the process, it would be appropriate for them to considered to be part of the panel. We see this as a relatively open process under which people will be encouraged to apply to be members of the panel.

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

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

The CHAIR — Infertility Treatment Authority?

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

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

Clauses agreed to; clauses 84 to 89 agreed to.

Clause 90

Mr DALLA-RIVA — In respect of conduct of hearings, a guiding principle under clause 5(a) is:

> the welfare and interests of persons born or to be born …

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

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

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

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

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

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

Ms PENNICUIK — That is a different thing.

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

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

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

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

Mr JENNINGS — Yes.

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

Clause agreed to; clauses 91 to 98 agreed to.

Clause 99

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

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

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

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

Clause agreed to; clauses 100 to 146 agreed to.

Clause 147

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

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

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

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

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

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

Clause agreed to; clauses 148 to 152 agreed to.

Clause 153

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

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

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

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

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

Mr JENNINGS — Pardon?

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

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

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

The CHAIR — Minister, this is one of the key issues. It is a really important issue with many organisations that have actually approached me and no doubt other members, about the right to true and accurate information about a person. There is a lot of discussion about things like the stolen generation, and so forth, and identity is essential to all of us. The issue that has been raised by quite a number of organisations, and particularly some young people from TangledWebs, for instance, who have been through some of these processes in one way or another, have all indicated that the accuracy of that birth certificate in recording all those people who are associated with that birth, not just the social upbringing of the child but indeed the conception of the child, is absolutely paramount. I am not

sure that your and the government's apparent consideration of the importance of people having that knowledge at an early stage is actually represented by the legislation. The proposition put by Mr Dalla-Riva is right, that unless you happen to stumble upon it you might never know. In this day and age there are medical conditions and so forth that might well be resolved by having that information, quite apart from the identity issues that seem so central to so many of the people who have actually raised these issues with us.

Clause agreed to; clauses 154 to 159 agreed to.

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

Mr JENNINGS — I share that hope. Thanks.

Committee adjourned.

PARLIAMENT OF VICTORIA

LEGISLATIVE COUNCIL

LEGISLATION COMMITTEE

Water (Commonwealth Powers) Bill

Wednesday, 19 November 2008

Chair

Mr B. Atkinson

Deputy Chair

Ms C. Broad

Members

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

Substituted members

Ms G. Barber (for Ms S. Pennicuik)
Mr S. Leane (for Ms J. Mikakos)
Ms W. Lovell (for Mrs A. Coote)
Mr M. Pakula (for Ms J. Pulford)

Staff

Mr R. Willis, secretary

Also present

Mr G. Jennings, Minister for Environment and Climate Change
Mr P. Harris, Secretary, Department of Sustainability and Environment
Mr P. Heaphy, director intergovernmental, Department of Sustainability and Environment
Ms F. Harris, senior policy officer, Department of Sustainability and Environment

WATER (COMMONWEALTH POWERS) BILL

Legislation Committee

Referred from Legislative Council.

The CHAIR — I formally declare the hearings open and welcome the minister and his accompanying departmental and policy advisers. Thank you for making yourselves available to the committee to go through the bill.

I indicate that substitute members for this hearing are: Wendy Lovell, Greg Barber, Shaun Leane and Martin Pakula.

The purpose of the committee is to go through the bill as it was referred by the house. The bill is being enacted to refer certain matters relating to water management to the commonwealth Parliament for the purposes of section 51(xxxvii) of the constitution of the commonwealth and to amend the Murray-Darling Basin Act 1993 to provide for the carrying out of an agreement between the commonwealth, New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory with regard to the water resources of the Murray–Darling Basin, to repeal all provision in that act as to any former agreement revoked by that agreement, to make consequential amendments to the Snowy Hydro Corporatisation Act 1997 and the Water Act 1989 to repeal the Murray-Darling Basin Amendment Act 2007 and for other purposes.

I understand from members of the committee so far — and I would ask members to indicate if there are other matters they wish to pursue in regard to specific clauses — that the members who sought the reference of this bill to the committee are principally concerned with the purposes clause, clause 1, rather than a lot of the more detailed clauses.

Mr BARBER — I would add definitions, and any bit that runs through part 2 of the bill, but not so much part 3 of the bill.

The CHAIR — Thank you, Mr Barber. Minister, I invite you to make to the committee any remarks with regard to an introduction to the legislation.

Mr JENNINGS — I will not take up 5 minutes. In fact, I will be quicker than that because I just want to go from first principles of what this bill is about and then talk about my role here and the people who are advising me and providing assistance to the committee, and how that all fits into place.

In relation to what the bill does, it has been designed to deliver on Victoria's obligations as part of the jurisdictions to deal with the all-state Murray-Darling Basin agreement (MDBA) and the conditions that actually cover that. It is to harmonise with other jurisdictions our approach to matters that come under the auspices of schedule 1 of the commonwealth's Water Amendment Bill 2008 to try to enable the Murray-Darling Basin Authority to exercise its powers and functions as have been reached at a level of agreement between the jurisdictions, and for it to undertake its responsibilities under the modified or new Murray-Darling Basin agreement. There is a specific referral power or a specific additional requirement that the basin plan consider, which would be amended to include specific provisions to deal with the conveyancing of water and critical human needs, and to extend the reach of the water charge and water market rules within the basin to cover all the bodies that charge regulated water charges and all irrigation infrastructure operations within the terms of that agreement and that referral to the Murray-Darling Basin Authority.

That is basically the reason why we are here. It is in the form that it is in here to actually get jurisdictional alignment between the commonwealth and the states in terms of the harmonisation of that in the legislation, the agreements that are in place and the jurisdictional responsibilities that will actually fall out of these arrangements, and to make sure that within the operation of the basin plan there is consideration of the critical human need that has been incorporated. That is in identical terms within all those jurisdictions.

My role in terms of my understanding of why I am here, which is consistent with what would be happening if I was in the committee of the whole, is that I am representing the Minister for Water who is the responsible minister here. I know it might be tempting for people to try to make me act in a schizophrenic way between my acting responsibilities representing the Minister for Water or my role as the Minister for Environment and Climate Change, but I very clearly understand my role here is in terms of dealing with this legislation rather than being a commentator on the provisions of the bill from my portfolio's perspective. I thought I would just share that with you. The people who are with me are the people who have been part of the negotiations with the other jurisdictions in relation to this, so they are totally relevant people to be part of this conversation.

The CHAIR — Thank you. We will proceed to any questions that members might have under clause 1, which is the purposes clause.

Clause 1

Ms LOVELL — Minister, under the commonwealth Murray-Darling Basin plan, sustainable water diversions can be set, and that would alter the quantity of water available to each state, yet under the state Water Act, no permanent qualification of water rights can occur under section 33AAB of that act until August 2021. If the federal minister determines a reduction of water rights in Victoria before 2021, which law will take precedence — Victoria's or the commonwealth's?

Mr JENNINGS — I will take some technical advice on that matter, but it is a starting point of this story because this may be a feature about whose laws may take precedence over the other. The reason why the referral has been made in this form is so that there will not be confusion about that, so there will be harmonisation of the legislative arrangements, the agreements that are actually in place, and the operations of the Murray-Darling Basin Authority, which would mean that there will not be a misalignment of either the legislation or jurisdictional responsibility. That is the intention. That is the longwinded answer in terms of the concept.

In relation to the specifics about water allocations, I understand that part of the agreement arrangements covered by this is that the commonwealth respecting water allocations that come into Victoria up until 2019 is the building block of the agreement, which would cover the vast majority of the time frame that you have actually indicated in your question, but beyond that if there is any further technical explanation — —

The CHAIR — I think the default position in most of these situations is that if there is a difference between state law and federal law, federal law usually takes precedence, doesn't it?

Mr HARRIS — The commonwealth has made specific provision for the 2019 limitation to apply in the case of the state of Victoria and by 2014 in the case of all the other jurisdictions. That in effect means the state provisions will remain unless the state chooses to negotiate them subsequently with the commonwealth at a later point.

Mr BARBER — Can you just tell us where we find that within the material that is in front of us?

Mr HARRIS — It is in the commonwealth's original Water Act and it remains there.

Mr BARBER — Okay. It is not in the amendment bill?

Mr HARRIS — No. It is not in this legislation. It is in the original commonwealth Water Act.

Mr DRUM — So we can take it as given that if Victoria signs up, which we have, to this federal shifting of powers, that we will not have any realignment or readjustment of those water shares into the future before 2020–21.

Mr HARRIS — As I said, unless the state — —

Mr JENNINGS — By agreement.

Mr DRUM — By agreement.

The CHAIR — Thank you, minister. Are there any further questions on the purposes clause?

Mr BARBER — Is it the purpose of this legislation to provide a referral power which could be used by the federal government to make ongoing amendments to some sections of its act? Or alternatively, is it the case that the federal government will never be able to make amendments beyond what we have seen in front of us through its bill and our bill?

Mr JENNINGS — I would understand it that the referral authority in relation to the bill, as I described it in my introduction, is within the limits of what I have described.

So in terms of any further amendments, you would assume that if they impinge on either undertakings or the agreements that have been reached that relate to their act and how it harmonises with our act, how it harmonises with entitlements, how it harmonises with the operations of the authority, we would be operating on the assumption that there would not be actions of the commonwealth jurisdiction outside of the scope of that referral, and if there was intention to do it, it would be subject to negotiation and agreement, which would be the best way in which to achieve the most desirable outcome, I would have thought, for all parties concerned.

Mr BARBER — Maybe, Chair, when we do specific provisions, but I am really just asking a simple question: is there anything in this legislation, having referred state powers, or anything in the federal legislation that says they cannot ever amend those same provisions relying on this referral of power in the future, whether or not with agreement from the state? Is there anything that blocks them from doing it, apart from the state, of course, withdrawing from the entire scheme, which is a feature of the bill?

Mr JENNINGS — I think that is a mechanism that the commonwealth or the state would not exercise lightly, and I would have thought that really the answer that I have given you, even though it might not be necessarily as black and white in law as you might have liked, would cover the field in the reality of how this would be dealt with.

The CHAIR — I think Mr Barber is mindful that we never got the income tax back. Are there any further questions?

Mr DRUM — I was just interested in the actual basin plan and the way that it will be set down to determine Victoria's water availability as opposed to our water share. Will the basin plan effectively override the normal sharing arrangement, or can it?

Mr HARRIS — No.

Mr DRUM — In any circumstances?

Mr HARRIS — We have preserved our water shares under the revised agreements — Murray-Darling Basin agreements — and they are part of this legislation. In fact, a core issue where we have been in dispute with the commonwealth has been the preservation of state water shares.

Mr DRUM — Will the basin plan be a moving feast, though, from year to year?

Mr HARRIS — Subject to contradiction, my recollection is the basin plan is regularly repeated every five years. Is that right, Phil, do you know?

Mr HEAPHY — Yes. As much as we understand at the moment, there is not a provision for an annual process on it. They will be periodic — and my recollection is it is every 10 years, the basin plans.

Mr DRUM — What mechanism will the authority use to cater for the changing climatic conditions and the change in inflows to work out what amount of water is going to be allowed for each of the states when they all have the share which is set in this legislation?

The CHAIR — The question actually takes the purposes clause a fair way. Minister, I am happy to entertain an answer and to have some assistance from Mr Drum in this matter, but I am mindful that we do not stray too far from what this bill actually says and into provisions that are clearly outside the bill.

Mr DRUM — The basin plan is very clearly in the bill.

The CHAIR — Yes, but when we start talking about mechanisms — —

Ms LOVELL — I think what Mr Drum is trying to get at is that if there is a permanent requalification of water rights there is compensation available, at least from the commonwealth, anyway, and if it was able to be changed on an annual basis, it may qualify as a temporary qualification rather than a permanent requalification of the rights and then not be compensatable.

Mr JENNINGS — I am happy to take advice on that one.

Mr HARRIS — I think the proposition that will apply is one where the commonwealth will come up with the basin plan and it will propose a set of changes. The commonwealth has outlined under the national water initiative a set of compensation arrangements for variations to water entitlements, and Victoria, again under the national water initiative, which predates this, had a different set of arrangements. To date the commonwealth, to the best of my knowledge, has not aligned those arrangements, and it is likely therefore that those arrangements will be considered again by the commonwealth at a time when it finalises the basin plan, but in terms of a scenario which said, 'We are only making a temporary variation to water entitlements', again to my knowledge that is not envisaged. The purpose of the basin plan is to review long-term impacts, not make temporary adjustments, as I understand it. Certainly that has been the thematic, I think, from the commonwealth from the very start, that they are here to adjust, if adjustments are required, for the long haul, not for temporary arrangements.

The CHAIR — Ms Lovell, did you want to check on those compensation arrangements in the context of that answer?

Ms LOVELL — Yes. It just concerns me that they could change it each year temporarily so they become temporary changes rather than a permanent qualification which would attract — —

Mr HARRIS — As I said, that is not my understanding. My understanding is the basin plan is a long-term addressing of water allocation issues across the Murray–Darling Basin and not a temporary shift. To the best of my knowledge the commonwealth has not designed the basin plan, so we have not seen the document, but I think this is about long-term and not about short-term changes or temporary incremental shifts. I do not think any of the debate between us and the commonwealth has been at all around that kind of issue, because we have taken at face value the assertions of both the previous government and the current government that they are here to fix the problem for the long term.

Mr DRUM — In relation to the very genesis of the Victorian government deciding to sign up to the national water plan and to transfer its powers over to the federal government, what modelling did the Victorian government use to effectively outline its future so that it could then be in a position to transfer its powers over, knowing that it would be in a sound position going forward?

The CHAIR — Again, I am happy to have an answer, but I am conscious that this question is sailing close to the wind in terms of the purposes clause.

Mr JENNINGS — I suppose Mr Drum and I should not volley questions one way, back to the other. We are talking about a field — entitlements; water allocation regimes; a system, the Murray-Darling Basin Commission, operating for a long period of time; recognised water entitlements right across various jurisdictions that have been subject to a high degree of both a regulatory environment and market-based mechanisms — that has well and truly been established. They all relate to the regime that relates to the allocation of water in accordance with its reliability or availability depending on what the inflow availabilities of supply are. If that is what he is talking about modelling — —

Mr DRUM — Modelling of inflow availability is the main issue I was looking at.

Mr JENNINGS — Okay. Building on everything I have just described to you is a whole allocation regime. Within that there have been historic scenarios about water allocations that have been built up over a long period of time that are shown not to account for the existing very low inflow levels in terms of what has happened over the last few years.

There needs to be some reflection on their appropriateness going forward. In terms of projections going forward about what we could reasonably expect to be the inflows in climate change scenarios, many different scenarios have been analysed, and regardless of the outcomes of any of them ultimately we need to be able to account from the existing agreements and existing allocations on the basis of a combination of share, on a combination of the capacity to deliver, the capacity to pay. They will be the determinations of how shares will be allocated in the future.

We do not actually have a whole new world order of modelling, with the exception that we, as a community, have to account for the fact that under climate change scenarios there may be less water coming into the inflows than there has been previously.

Beyond that, in terms of the plan, the plan will try to be structured in a way that accounts for those shares, those entitlements, those allocations, the capacity to deliver and to pay, going forward. In many ways that will be reflected in the nature of the plan. There has been a lot of work; to plonk it on the table and say, 'Here is the Harvard Business School modelling' — it does not exist in that form.

Mr DRUM — There must have been some rather alarming modelling undertaken by the government, because some of the actions taken by the government in relation to the adoption of this plan and within the definitions of the Murray–Darling Basin, with the excising of the Goulburn River — which is all a part of the government's handing over of its water powers to the federal government — are quite extreme. There must have been some quite extreme modelling to have pushed the government to adopt this holistic package of reforms.

Mr JENNINGS — I will volunteer. We are now going into a field where of course we are concerned — the whole community is concerned about the lack of availability of water. Now that you invite me to talk about a whole range of actions that have taken place in relation to the food bowl modernisation, the reforms of the Goulburn system, the reform of water allocations and infrastructure in northern Victoria to try to address those situations, yes, of course we have been particularly mindful of the need to take decisive action, action that requires a high degree of investment by Victoria, by the commonwealth, just for the very reasons that are implied in your question.

Interestingly enough, they are a very contested issue between us politically, but nonetheless I think all of us can agree that there is a dire and urgent need to act. You might argue the toss about the way in which we are acting, and you reserve your right to box on in relation to that, but we are very determined to invest in infrastructure to support the allocation of water, to make sure we do not lose any water within the system and that we can allocate that for productive purposes and for environmental purposes and to address critical human need. They are the drivers of what we have been doing.

Mr DRUM — Irrespective of political opinion about certain aspects of your policy, what I am mainly concerned about is the modelling that you have used that has led you to believe that there is a dire and urgent need to act. What is the modelling? What modelling or projected inflows has put you in the position to believe that we have a dire and urgent need to act?

Mr JENNINGS — I will not be mischievous in the way in I respond to that, but I think you would probably be in this position — to be able to make some decisions — and probably Ms Lovell would be in a position to be able to make those assessments too. The ongoing inflow scenarios that have occurred in Victoria in the last decade warrant urgent action.

We have responded with that urgent action in terms of all the elements that I have actually described to you, in terms of the conceptual building blocks of that framework and in terms of northern Victoria, as outlined in the *Northern Sustainable Water Strategy*, which is a published document — the community has been engaged in it; in its last iteration it was quite thick in size. All those issues are well and truly canvassed in terms of the approach to scenarios about inflows; they are all accounted for there.

The community has been invited to express its view about the appropriate way in which allocations and entitlements could be made within those scenarios. The government has not hidden from this issue; it has actually engaged the community in this issue, so there is a significant piece of work about.

The CHAIR — Would it not also be true, Minister, though, that this bill is not simply predicated on Victoria's water position but on an interest in bringing together the various states, and indeed the ACT and federal government, to have a broader view of water policy and water action in the interests of the country, as much as Victoria?

Mr JENNINGS — Absolutely. I was responding to Mr Drum's questioning about our appreciation of the issues within Victoria, as I understood it — perhaps that is a question of interpretation; I did not mean to necessarily limit it. Ultimately whilst the availability of inflow is very dire in Victoria, and in fact CSIRO modelling would actually suggest that south-eastern Australian inflows are about as dire as any part of the nation, a similar — to varying degrees — analysis applies across the whole of the basin. I do not want to abuse the fact that we are in the Victorian Parliament and use that as an opportunity to complain about inefficiencies in jurisdictions to our north, just as people in South Australia may accuse every other jurisdiction of these maladies. We all have to be mindful that all the way through the system the appropriate efficiencies should be found to make sure that right from the north, right through to the lower lakes in South Australia and everywhere in between, we are as efficient at allocating water as we possibly can be. Exactly the same scenario covers the basin.

Ms LOVELL — Minister, you have just said the availability of inflows is dire in Victoria, and yet part of the government's plan is to move water around Victoria, from the north to the south. Last week in relation to this hearing today, and also to the Senate hearing, the Minister for Water said that there was a real risk of Melbourne running out of water by 2010 if the pipeline was not built. Has your modelling for future inflows into Victoria taken into account the water that will be available to Melbourne from the north if current climatic conditions that would have Melbourne's water storages empty by 2010 were the same in northern Victoria?

Mr JENNINGS — Again, we are talking about matters that are related conceptually but are not necessarily reflected in the bill. To demonstrate some goodwill, I will indicate to you that basically what is consistent through all of this in relation to water for any purpose — including critical human need, and relating, in this case, to the human needs of the citizens of Melbourne — is that inflows are a concern; the availability of water is a concern. The quality of the infrastructure that supports water allocations in Victoria is identified as a shortcoming in our capacity to make sure that we are as efficient as possible in allocating the available water in Victoria for all the variety of purposes that it could be put. In this case water made available through the modernisation of the food bowl would be water available to come into Melbourne, water available for productive purposes in the Goulburn Valley and beyond and water available for environmental purposes. The modelling that is embedded in what I have been talking about — the projections — indicate there are significant savings to be found from better infrastructure and water efficiencies that would enable all of those allocations to be made; that has been the assumption.

Mr DRUM — I was just interested in the intergovernmental agreement on Murray-Darling reform from 2008, which formed the basis behind what we now have in this bill here before us. It relates to the new section 74A, that is included in the tabled text:

> (1) The Minister must, in writing, determine that a Basin State is a State to which this section applies if the Minister is satisfied that a State water management law of the State:
>
> …
>
> (b) has applied that framework by, and at all times since:
>
> (i) 30 June 2009; or
>
> (ii) a later day specified in the regulations.

Do we intend to amend the state Water Act to include this, and if so, when can we expect the state to legislate?

Mr JENNINGS — I am going to take some advice on that one.

Mr HARRIS — Subject to contradiction, which Alison will look up, I think the answer is we do not need to legislate in order to do that. My understanding, from what you read out, is that it would not require us to legislate. Perhaps we could come back to that, and Alison can give me some advice.

Ms LOVELL — Can you tell us whether it would apply to the entire state or just that area within the Murray–Darling Basin?

Mr HARRIS — This is related to the implementation of the basin plan itself, so the construct would be the plan itself will provide advice to the federal minister on what adjustments the developers of the plan think are necessary, and they will frame it, if you like. At this stage no-one can be sure whether they will do a valley-by-valley analysis. Obviously, having gone into the sustainable water strategy business ourselves a few years ahead of them, we would recommend that the commonwealth adopt a process not unlike the Central Region Sustainable Water Strategy and now the Northern Region Sustainable Water Strategy, to be followed up by the other ones which we are just starting. We would be saying it is more likely they would do it on a broader basis than valley by valley, but it is quite possible the commonwealth will decide on a valley-by-valley approach, in which case the federal minister will still have to make that attestation that you have referred to from that provision on the efficacy of the state in implementing the requirements of the basin plan.

To the best of my knowledge, and subject to contradiction from our legal adviser, Alison, I do not think that is a requirement that obliges us to legislate. In other words, our debate between the commonwealth and the state all through this process has been about the fact that they could set the revised requirements and we would be happy for them to do so on a comprehensive basin-wide assessment, but we would implement them. We would use state law to implement them. That, now, has been agreed. That is the construct that is now in front of us, by comparison with the construct that was in front of us last year.

Mr DRUM — That is likely to change?

Mr HARRIS — No, I am saying we have achieved what we needed to achieve. We will be the implementing agency for the, if you like, revised basin plan requirements. We, the state of Victoria, will be the implementing agency, therefore we will use state legislation to be the implementing entity. That is why state legislation need not vary, unless we find something that is in the legal analysis now going on behind me that suggests that it does. I do not think it will.

Mr DRUM — I have one more question in relation to the purposes before we move on to definitions. It has to do with the 4 per cent annual cap on water trade between irrigation districts. Is this legislation likely to make that harder to maintain — the current 4 per cent cap that we have on trade from one water district to another water district?

Mr JENNINGS — This is something that has been subject to media and community commentary and subject to negotiations between the jurisdictions about this issue, so that is a challenging enough issue under the existing framework.

Mr DRUM — It is something that is very important, Minister, to a lot of the communities out there.

Mr JENNINGS — Too right it is, because I have witnessed many, many front page articles about the leader of my party actually defending the interests of the Victorian community in relation to this matter, so I am acutely aware of how important it is, and the government is. Again, one of the reasons that Victoria is very, very mindful of the rate at which we should move from that cap is for the issue that I was very circumspect about raising before. I am not interested in jurisdictional bashing by talking about inefficiencies in other states and other places, and in terms of making sure that Victoria plays its role in reform. This is an issue where Victoria is saying, 'Let's all get our acts together, let's all be very clear about how efficient we are in terms of our water allocations', in terms of whether we have used water very efficiently, and we allow the market to find its appropriate level in terms of where the availability of water could be best used for a variety of purposes, which in some instances is determined by entitlement provisions, some by market-based mechanisms. We have said that until we have confidence that everybody has got their act together in relation to the efficiencies, we are very reluctant to disadvantage any user of water entitlements in Victoria, beyond the 4 per cent until we are satisfied that there is the ability to efficiently deliver water right throughout the basin in accordance with the efficiencies that we believe in Victoria.

That is not to be parochial, but it is parochial to the extent that we are protecting Victorian interests by protecting the 4 per cent cap. This is a matter that will continue to exercise all our minds about the way in which we might move from that target over time because in an ideal market where water was available you would not actually have

mechanisms like caps. But we are not in an ideal market and we are not in an ideal situation in relation to the availability of water. There are urgent and appropriate needs in all parts of the basin that we have to be respectful of. As a first order issue we will never lose sight of the interests of Victoria in trying to move to a national regime. That is the dynamic that we are in.

Mr DRUM — When you mentioned, Minister, that you would make sure that other areas — you said 'others' — had their house in order in relation to efficiencies, are you talking about other states?

Mr JENNINGS — Pretty much, yes.

The CHAIR — Mr Harris, did you want to make any other comment in terms of the previous answer?

Mr HARRIS — Only a slightly clarificatory one if I can, Chair. This provision, clause 74A, relates to the national water initiative that I referred to earlier and the risk management arrangements under that, and, as I think I advised earlier, Victoria has a different arrangement in place. This is an option therefore under 74A, so my primary advice earlier is correct. We do not need to legislate.

Mr DRUM — Could you speak up, please.

Mr HARRIS — My primary advice is that we do not need to legislate. This is an option available and it is likely that it will be dealt with, probably by negotiation, at a subsequent point, if at all, but right now it is not required and it will not require state legislation in the immediate future because we have not agreed to take up this formula. We can if we choose, but we have not agreed to it.

Mr DRUM — If we did choose then we would have to legislate?

Mr HARRIS — I am not certain about that. Is the NWI (national water initiative) in legislation?

Mr HEAPHY — No it is not in legislation, Chair, the requirement that is now in the commonwealth Water Act through this is that the commonwealth minister would seek to see a recognition by a jurisdiction in adopting that formula through legislation. So yes, the answer is you would have to change the Victorian Water Act to adopt that revised risk-sharing formula that is reflected in these arrangements and, I suppose, spelt out to its best degree in the July IGA.

Mr DRUM — That would be optional for Victoria, to opt in to that risk?

Mr HEAPHY — That is right, yes.

Mr DRUM — I have some other questions that are better fitted into the definitions but I indulge the committee.

The CHAIR — Thank you. Are there any further questions in regard to clause 1, the purposes clause?

Ms LOVELL — Yesterday the chief executive officer of the Murray-Darling Basin Commission, Wendy Craik, told Louise Rae on ABC radio in Mildura that contractual arrangements for the Living Murray required Victoria's share be delivered in 2009.

Is Victoria going to be non-compliant if the Living Murray water is be stored in Eildon to be delivered for Melbourne in 2010–11, and what will happen if Victoria cannot meet the 2009 deadline?

Mr JENNINGS — I will probably take some advice on the availability of water and our ability to deliver on those Living Murray arrangements and under what circumstances all of us will be able to deliver on those, which I think is a concern. I am not quite sure if that is a complete quote from Wendy Craik, but I — —

The CHAIR — The thing that concerns me more is whether or not the subject matter actually fits in the jurisdiction of this legislation as part of the purposes of this legislation.

Ms LOVELL — The legislation is about management of the Murray River and the Living Murray environment flows to the Murray River.

Mr BARBER — Does the basin plan envisaged by this expect to cover Living Murray waters?

Mr JENNINGS — Yes, it does. But the thing about it is that there is a disconnect between the line of inquiry that Mr Drum has been pursuing with some vigour, and he is quite right to actually talk about what the inflows are saying. What are they saying? They are actually saying that the availability of water right across the basin is in fact at an all-time low, that in fact in terms of all the entitlements that have been entered in and all the allocations that are to take place off the historical charts that have been created and maintained for 50 years or so about the way in which water allocations are made, none of those charts is relevant to the contemporary situation. In terms of the ability to deliver on some things such as the Living Murray, the Living Murray was predicated on an ability for water that was available to be within those charts and at the moment — —

Mr BARBER — So it is out the window now?

Mr JENNINGS — No, we are not on the chart at the moment on the basis of the availability of water. I would think — —

Ms LOVELL — There was some water on the chart, but it has now been quarantined for other uses.

Mr JENNINGS — I would think that Wendy Craik would be mindful of where the availability of water is on the charts and so I would not assume that you have given a complete quotation from what comments she would have made before she would have gone on and started to speculate about what Victoria would do with our internal water allocations. I doubt that she would have — —

Ms LOVELL — She was not speculating about what Victoria would do with its share. She was just saying that the contractual arrangements were that Victoria's share was to be delivered by 2009. It is the Brumby government that has said that it is going to quarantine water that was earmarked for Living Murray and Water for Rivers in order to send water to Melbourne in 2010–11.

Mr JENNINGS — We sit here today within the dire circumstances that we are confronting and have been talking about with the intention of meeting our obligations as described under the Living Murray. That is what we sit here with the intention of doing.

Mr BARBER — But, Chair, if I can follow this up: clause 18H, which is in part 1A of the federal bill, says:

(1) The Authority must, if the Living Murray Initiative so provides, manage the rights and interests that:

(a) are:

(i) water access rights, water delivery rights, irrigation rights …

…

(b) are held for the purposes of the Living Murray Initiative.

If we pass this bill and the feds pass that bill, and that Living Murray water is sitting in Lake Eildon or wherever it is sitting, will the federal government be delivering that water to the Living Murray versus Ms Lovell's proposition, which is you may be taking some of it down the pipeline to Melbourne?

Mr HARRIS — The original question actually mixes up two or three unconnected propositions and the subsequent — —

Mr BARBER — Just start with mine, though.

Mr HARRIS — The subsequent question focuses on one of the propositions. The bottom line is the water to be supplied to Melbourne will not compromise any of the Living Murray requirements from the existing projects. It will not compromise any of the Living Murray requirements from the existing projects of the Victorian government, so the savings to be devoted to Melbourne will not come at the expense of any Living Murray commitments. The clause that Mr Barber has outlined is effectively I think an operational management clause which says in practice that the Murray-Darling authority will take over the operations of what is River Murray Water and they will be responsible for the delivery of that water. So that takes — —

Mr BARBER — It actually says 'manage the rights and interests'.

Mr HARRIS — That is right, but I believe that — —

Mr BARBER — That are water access rights, water delivery rights, irrigation rights or other similar rights relating to water, or interests in, or in relation to, such rights.

Mr HARRIS — My answer remains exactly the same, regardless of what text you read out. There is an operational requirement here. The Murray-Darling authority will take over operations of River Murray Water. Currently River Murray Water is the Murray-Darling commission entity which calls and manages, if you like, the river flows to ensure that, rather than cascading over banks, they are delivered efficiently, and I believe that provision will be designed for that purpose. Certainly that is the intent, that the Murray-Darling authority will be able to coordinate, if you like, the delivery of those required waters. But the nub of the question, if I understand it correctly, is directed towards 'Will Melbourne compromise the Living Murray waters?', and the answer is no, it will not.

Ms LOVELL — Mr Harris, can you just explain how it will not be compromised, considering that water that has been funded under programs for Water for Rivers and the Living Murray and the CG1–4 and the Shepparton irrigation area modernisation, water that was funded under those programs that was to be delivered to the Living Murray by 2009, it has been said by this government that water will be stored in Eildon to be delivered to Melbourne in 2010. So how can it not compromise the Living Murray or Water for Rivers?

Mr HARRIS — The Shepparton irrigation modernisation project provides water savings both for the Living Murray and for effectively the government. In other words, there were more savings than were just required for the Living Murray. The non-Living Murray component, the Shepparton irrigation modernisation project, will be used to supply Melbourne.

Mr DRUM — Mr Harris, would you be able to inform the committee as to how much of the Living Murray commitment has still to be found?

Mr HARRIS — My rough recollection is we are required to provide 214 gigalitres. The projects are under way. Some of them involve water purchasing and some of them are in other jurisdictions, so we have a sharing arrangement where we purchase the rights to sharing water created in the other jurisdictions as well as in Victoria, but I think we are about 10 to 12 — if you like I can provide you a written answer on that, because it is quite a complex calculation. It does shift even now as a result of revised estimates of different projects, likelihood to deliver savings, particular savings in other jurisdictions — for example, water purchase programs in other jurisdictions. People forecast how much they will get under water purchasing, but they are not sure until they have actually completed the project.

Anyway, we are on course to deliver our Living Murray commitments. I think you have Wendy Craig coming before the committee. I think she will be able to confirm the same for you. When I say, 'We are a little short', it is a little short because we do not know the time frames in which projects will deliver water. The objective is to deliver them by 30 June 2009 for Living Murray. We have not got an absolute lockdown on all of the water savings at this point, but we are substantially advanced. We are probably in the 80 to 90 per cent certain category for what we have got. The last little bit we are quite confident will be made available, and we will meet our Living Murray obligations.

Mr DRUM — In the last three or four years since the Living Murray project was signed on to and agreed to, at what stage were the savings all of a sudden split between, 'These savings are going to be allocated to Living Murray, and these savings are actually going to head towards Melbourne'?

Mr PAKULA — Chairman, if I could jump in, I think we are really straying from the bill. We can talk about water policy generally, but we have got a house of Parliament to do that. We are supposed do be considering this bill. The minister has been extraordinarily generous in trying to answer everything, but I am wondering whether we should start willowing it down to the bill.

Mr DRUM — In my opinion, Chair, I think it is all related to, in effect, the decision that the government has made to hand over these powers to the federal government for the betterment of Victoria. It is all of these factors that have been combined that have given the government the opportunity to be confident that it can make this decision. But all of these factors have a role to play in the government making its decision. Therefore, once you start drilling down, that is where we are at at the moment.

Ms BROAD — Can I equally make the point that under the previous federal coalition government The Nationals and the Liberals in Victoria were content to hand over all of these matters without any constraints at all to the federal government.

Mr DRUM — That is not true, Ms Broad.

Ms BROAD — It is true The Nationals and the Liberals took slightly different positions on this matter, but eventually they arrived at the same point. It is somewhat hypocritical to now be putting the position that you are.

Ms LOVELL — This is straying from the bill.

Mr BARBER — On this point of order or whatever it is, which seems to be to do with relevance, it depends on what the answer is to my earlier question, which was: does 18H of the federal bill make the federal government responsible for delivering the Living Murray program. If it is, then Mr Drum's question as to whether Victoria has yet found that water becomes quite important. But Mr Harris seems to say it is only in relation to delivery. In the clause it actually says water access rights and water delivery rights. I would still like to get a description as to what the distinction is between those two different things. It would seem that if Victoria's Living Murray water is not yet fully available and the federal government becomes responsible for delivering various rights, it could be a role for the federal government to simply takeover.

The CHAIR — Coming back to Mr Pakula's point, I am keen to contain the questions and discussions to the legislation before us. I am not so interested in debates that might advance the cause of anyone in regard to broader debates or other projects that are not specifically covered by this legislation. I agree that the minister and Mr Harris have both been quite generous in addressing some of those questions and there has been a basis for, if you like, some of the subsequent questions provided by those answers. I am not going to shut it down in that sense, but I share Mr Pakula's concern about the direction in terms of any broadening of discussion on these matters. There is a piece of legislation before us. It is a significant piece of legislation, but it nevertheless is fairly specific in terms of powers conferred and geographies associated with those powers, and I think we need to be mindful of that.

In regard to the tete-a-tete and matters that Ms Broad raised, I think they are also matters of political conjecture and outside the scope of the bill, notwithstanding that they might inform some members' positions.

Mr Harris, Mr Barber raises the point about access as a concept as well as the delivery, which you had particularly spoken of. Mr Heaphy, I would invite you to address the term contained in that clause in regard to access.

Mr HEAPHY — Thank you, Chair. I take you back to the decision of the Murray-Darling ministerial council in 2003 for Living Murray First Step. The principle behind that agreement was that governments would work together to bring together a pool of environmental entitlement to the average annual value of 500 gigalitres. The principle there that that was a pool to be jointly managed at that time by the ministerial council for environmental outcomes along the six icon sites. As we get to the end of the period of pulling that pool of water together, you get this set of rights, entitlements and other legal instruments to that pool of water that come together.

What this clause is working to do is to make sure that the ability of the successor arrangements to continue to manage that pool of water collectively is secured. What is envisaged to underpin that in a practical documented form between the parties is a Living Murray asset agreement, which at the moment is being negotiated at an officials' level, that would spell out the arrangements by which the authority, still responsible to the new ministerial council, will use that water in the manner agreed to by the ministerial council for environmental outcomes.

Mr BARBER — Where it says 'If the Living Murray initiative so provides …', you are talking about this agreement that is being worked on which by itself would become part of how this bill defines the Living Murray

initiative — that is, the 2004 agreement, the 2006 agreement and section 3.9.2 of the Murray-Darling Basin reform?

Mr HEAPHY — That is right.

Mr BARBER — When that agreement is in place, it is the responsibility of this federal agency — the authority — to manage the water access rights and the water delivery rights? It has the power to do so?

Mr HEAPHY — That is right, and if you see that in the context that the Living Murray, as is spelt out in the July IGA, it is one of those matters of business under the new arrangement that still falls under the direct control of the Murray-Darling Basin Ministerial Council, and it is effectively saying the arrangements the council agreed for itself in 2003 and has continued to sort of augment over that time are still the province of the council to continue on in control of.

Mr BARBER — Yes, except this amendment falls under the category of amendments based on referral of power — it is in schedule 1 of the federal bill — so why does it need that federal referral of power to do the thing you just described, if you are saying it was just part of business as usual anyway?

Mr HEAPHY — For that one — —

Mr BARBER — Why is it not just in the other part of the MDBA? In schedule 2 or something?

Mr HEAPHY — The practical reason for that was that the Living Murray initiative was never formally part of the Murray-Darling Basin agreement. It came in the end.

Mr BARBER — It will be now?

Mr HEAPHY — It came through the decision of the council in 2003 that was then supplemented by the COAG agreement in June 2004, which provided the money for it. It has never been then translated in under the formal umbrella of the Murray-Darling Basin agreement.

Mr BARBER — But it will be now?

Mr HARRIS — If I could, Chair, it is covered in my earlier answer. The provisions of the first part are to create the MDBA; it needs to take that responsibility from the MDBC, and that is what the first part is about. That is, therefore, a function of the MDBA, and thus it needs legislative support.

Mr BARBER — Why does it need referral of power to do that specific thing?

Mr HARRIS — Because we expect them to undertake this level of activities. That is what we want to give the MDBA the ability to do. Our whole focus as Victoria throughout this has been to say there are certain things which we want you to run for the commonwealth — —

Mr BARBER — I am not saying it is a bad thing.

Mr HARRIS — I understand that, but I am just trying to be vehement here.

Mr BARBER — I am just asking the question: will the federal government have the power it needs to go ahead and implement requirements of the Living Murray at that point, pretty much regardless of what the state government law might provide?

Mr JENNINGS — The interesting thing about this conversation is that Mr Barber is surrounded by people at this table who might have a different desire for the outcome of water allocations than the one he has. But if you actually see this beyond the political dynamic that I have just described, what you have seen between the state of Victoria, other jurisdictions and the commonwealth has been dealing with the politics as well as a whole range of existing agreements, entitlements and market mechanisms that are in place that have been winnowed through over a number of years to arrive at this situation that describes the appropriate harmonisation between the legislative and other mechanisms available for the state of Victoria and what we have been prepared to refer to the commonwealth

in the name of broader national objectives to try to achieve those results. We are now talking in fine grain detail about a specific element of that within the context of all of these things.

The authority has to be mindful of not only what is in the agreements but what people are entitled to and in fact what is available to it to allocate. When it puts the plan together on a national scale it cannot abrogate a whole range of pre-existing entitlements and agreements that are in place. It has to be mindful of it, just as we are. What we have been trying to do is to narrow down the potential overlap or disconnect between what we might take responsibility for and what it might be able to get entitlements for. In terms of being able to satisfy all of those obligations, the good news from our perspective is that without ripping up entitlements or going beyond the scope of what the climate has done to inflows we have not intruded on anybody who has got entitlements. Whether they be private entitlements or public entitlements or environmental entitlements to water, we have been able to do our best to maintain those within what is available to us and to be able to try to create a structure and a mandate for the authority to deal with those across the basin. I think it is a very good story that we are able to save 214 gigalitres of our Living Murray obligation, notwithstanding the pressures and the low inflows, and we are pretty close to be able to deliver on those. I think that is overall a pretty good story.

Ms LOVELL — The creation of the Murray-Darling Basin Authority, the new one, involves the referral of powerful management of certain tributaries within the Murray–Darling Basin. There are some tributaries that have been excluded. I just wondered if you would tell us how the basin plan will apply to Victorian tributaries, and can you explain how it will improve the operation of the basin plan to exclude certain tributaries?

Mr JENNINGS — In terms of the dividing line about the nature of the tributaries, in fact I might take some subsequent advice on that. Basically my answer that I have just given creates the framework and the mindset and the objectives that have tried to be achieved. On the overlay of that with the various tributaries and the waterways in Victoria, I would probably be wise to take some advice on the way in which they have been determined to be able to satisfy those range of expectations and pre-existing agreements that have tried to be harmonised through this referral. May be Mr Harris will volunteer for that?

Mr HARRIS — Under the commonwealth's original plan it was seeking comprehensive control of all water management in the basin, including operational control of all systems, including the Goulburn and the Murrumbidgee. It did not have that under the Murray-Darling Basin agreements; the commonwealth did not have that ability. Victoria did not agree to that proposition last year from the former commonwealth government. The former commonwealth then passed the Water Act 2007 based on its own constitutional powers, but it did not have the ability to takeover river operations — for example, in the Goulburn — under that act. Under the new arrangements, however, the ones that we are proposing to enter into with this legislation, operation of the Goulburn River thus remains with the state government. It has always been an objective of ours — and indeed of New South Wales with the Murrumbidgee — that we would maintain our operational control of the Goulburn River.

Mr DRUM — Excuse me, Mr Harris, when you say 'always', what do you mean by 'always'?

Mr HARRIS — Always — from the start of the Howard plan announcement. It was always one of the state's objectives that we did not want to cede total operational control to the commonwealth. Our proposition has always been: 'If you wish to reduce the water allocation arrangements within the basin and use good science to do that, excellent; go right ahead and we will be happy to work with you, but we will implement the revised arrangements under state legislation'. That has been a consistent position of the state throughout this.

Mr PAKULA — Are you saying New South Wales had the same concerns in regards to the Murrumbidgee?

Mr HARRIS — New South Wales certainly had the same operational concerns, but I think New South Wales would have been prepared to have conceded probably substantially more than the state of Victoria was prepared to concede, but had the same operational concerns. Thus the new position now advanced in this legislation is consistent with the objective the state had from the start.

Mr DRUM — In relation to the Campaspe, the Loddon and the Kiewa and those other tributaries, what was the state government's position on those tributaries? And the King — —

Mr HARRIS — As I said, operationally we wanted the commonwealth to determine revised water availability across the basin under its proposed reforms, but we would implement the changes. That was our proposition to them, and it remains our proposition. Indeed I think the commonwealth is quite happy to work with us on this basis. Thus you will see a draft Murray-Darling Basin plan published. It will be discussed with the state, presumably beforehand. It will be discussed with the state in the new revised arrangements that exist in this legislation, and then it will be put forward by the commonwealth as something that it expects to implement in conjunction with us. This has always been the crucial issue, and we expect to see that occur.

Mr PAKULA — Are you saying, Mr Harris, that those implementation arrangements which the state of Victoria retains control over in regard to the Goulburn is also the case for those other tributaries that Mr Drum has referred to?

Mr HARRIS — I am saying when we come to implement the basin plan, which is, I think, the nub of the question — that is what I am saying — we expect that the state will be an active participant with the commonwealth in implementing the basin plan, and I think the commonwealth expects that.

Mr DRUM — So there is no real difference between the Campaspe, Loddon, Goulburn, Kiewa, King, Ovens — they are all in the same category as to who controls them?

Mr HARRIS — The reason I cannot give you a black-and-white answer to this question is because you envisage a particular kind of basin plan, and it is not clear to me what kind of basin plan we will end up with. Clearly your question I think presumes that they will, say, limit the Kiewa River to a certain allocation or something like that.

Mr DRUM — No, it is not; it is based around responsibility — who takes responsibility and onus for operation.

Mr HARRIS — I can only answer you generically. We expect to be the party that the commonwealth would want to see implementing the basin plan in Victoria.

Mr DRUM — I am sorry, could you repeat that again, please?

Mr HARRIS — We expect to be the party that the commonwealth would want to see implementing the plan in Victoria.

Mr DRUM — You meant the basin plan?

Mr HARRIS — The basin plan.

Mr DRUM — To do with the Murray and all the other tributaries?

Mr HARRIS — You keep naming rivers and I cannot help you on naming rivers because I have not seen the basin plan, so all I can give you is the answer I have given you, and then it is terms of implementation.

Mr DRUM — I was going to leave this question until we got to definitions, but seeing that Ms Lovell has brought it up, does the state have any definition difference in relation to the Goulburn as opposed to any other tributaries?

Mr HARRIS — No. What is in the legislation is a reflection of the current reality. I guess that is what I am saying. Does that help you?

Mr PAKULA — Mr Harris, I think I can help. I think what Mr Drum is driving at is that he is suggesting there has been a particular and specific excision of the Goulburn River as distinct from all of the others he has named. I do not want to put words into his mouth, but — —

Mr DRUM — That is effectively what I am after, but Mr Harris was saying that is not the case.

Mr HARRIS — No, I do not think I am saying it is not the case. I am trying to answer your question in terms of the basin plan and tell you that we will be the implementing agency. The purpose in the Goulburn River being specified in legislation is because it is a reconfirmation of the arrangements that have always applied.

Mr DRUM — So it will be treated exactly the same as every other tributary, because they have also been applied in that way forever?

Mr HARRIS — You seem to be looking backwards here. I can only comment on this legislation in terms of the intent of the commonwealth to develop a basin plan.

Mr DRUM — Sure.

Mr HARRIS — My response to you has been that with the Goulburn River and all the other water allocation arrangements in Victoria, to the extent they are varied by a basin plan we would expect to see the commonwealth come to us and say, 'Here is our revised basin plan based on the best science that is available. We would like you to implement this via your state legislative arrangements'. We have designed this legislation to ensure as far as we can in any legal sense — noting that the commonwealth has constitutional powers of its own — that that will remain the case. In other words we are attempting to preserve our legislative basis, as per my earlier answers. That is what we are trying to do.

Mr DRUM — When the federal government goes to the Queensland government and says, 'We would like you to do this on the Darling', and they tell them to go jump in the lake, what happens then?

Mr BARBER — I would say, 'What lake'?

Mr DRUM — The federal government would be asking the state government — in that case, Queensland — to be the agency.

Mr HARRIS — It depends entirely on the constitutional ability of the commonwealth to enforce then a go-jump-in-the-lake proposition. Thus I cannot answer the question because it depends on what is stated in the basin plan and its legal link to the commonwealth's constitutional ability to enforce something.

Mr DRUM — So you would imagine that under this new plan once the federal government has the power referred to it, it will be able to direct a state government how to act in relation to a certain tributary?

Mr HARRIS — No.

Mr JENNINGS — No.

Mr HARRIS — I would not imagine anything. I would deal with the legal situation as it applies when it applies.

Mr JENNINGS — Exactly. There are two parallel elements; there are two concepts. One is the concept that Mr Harris has actually been talking about — the fact that you would hope that there would be a wise plan that is developed by the Murray-Darling authority which would be implemented in conjunction with the relevant state agencies, and in this case the Victorian element of it being implemented by us. So that is one concept that you should be mindful of, okay? That is the lengthy answer in relation to that.

The other parallel issue that you should talk about is in relation to the very neat construction that Mr Pakula put on your question: is there a conspiracy about the Goulburn? No, there is not. Why we assert there is not is because all the tributaries you mentioned previously, including the Goulburn and all the others, are not covered by the Murray-Darling agreement. That is the pre-existing arrangement that is in place, okay?

The CHAIR — Can I just establish, which I think goes to the heart of this anyway, that the plan itself will be developed on science; correct?

Mr JENNINGS — Yes.

The CHAIR — And it will be developed collaboratively? In other words there will be consultation?

Mr JENNINGS — Yes.

The CHAIR — And therefore the plan will not come upon us as a great surprise, and Victoria's ability to actually implement will be already established to a large extent by the science and by the collaboration on developing the plan.

Mr JENNINGS — Yes.

The CHAIR — Is that correct?

Mr JENNINGS — Yes, that is what we believe.

Mr BARBER — Yes, but in relation to getting the water it needs for critical human needs the federal government is in a position to bring forward a basin plan that provides that water, and certainly one of the places it can get that water is from the Goulburn or any other significant tributary with any significant amount of water in it — at the end of the day.

Ms LOVELL — It is the main tributary of the Murray.

Mr JENNINGS — This is actually, finally, where you invert your logic or your principal concern to say that the commonwealth can send the water down the pipe to Melbourne. That is basically where you do your double backflip with pike in logic and concern to actually postulate that, because in fact the referral is in relation to critical human need.

Mr BARBER — Yes. So let us do that bit.

Ms LOVELL — I just want to take up something from Mr Harris's response. He said the commonwealth will revise the allocations under the basin plan but the state will implement them. Given we earlier explored the section of the tabled text that allows for compensation under the commonwealth act, and we were told the state would not be legislating to provide compensation, does that mean there will be no compensation for the reduction of allocations in Victoria?

Mr JENNINGS — Reductions in allocations on what basis? Because in fact at the moment what people actually get in their allocation is based upon the availability of water, so at the moment it might be running at 19 per cent.

Ms LOVELL — If the basin plan revises allocations by greater than 3 per cent under the commonwealth legislation there is a provision for compensation.

Mr JENNINGS — Yes, but a long time ago — and in this conversation about an hour ago — we talked about the fact that this is the long-term allocations, a long-term determination by the authority rather than short-term positioning. That is a different scenario to the one you are probably implying by your question, which is that if people do not get water from one year to the next there should be an opening up of provisions for compensation, which is not a feature of the existing arrangements, and I do not think it will be a feature of the future arrangements.

Ms LOVELL — It is a feature of the commonwealth legislation, and yet you are saying that the basin plan would be reviewed under the commonwealth legislation and that will be implemented by the state, and it is not a feature of the state legislation. I am seeking clarification on whether Victorians will still qualify for compensation under the federal legislation if the state implements a reduction in allocations?

Mr JENNINGS — I think I have answered that question. I think two issues have been confused, but if anyone else has a different interpretation or anything to add?

Mr HARRIS — No.

Ms BROAD — Can I ask the minister to confirm, since the Goulburn River has been such a focus of this conversation, that under the provisions of the bill before us and the agreement that it implements, operational responsibility for the Goulburn remains with the Victorian government, and that under the proposals put forward by the former commonwealth government that that would not have been the case; that it would have been in the hands of the commonwealth?

Mr JENNINGS — There are two questions there, and the answer to both of them is yes.

Ms BROAD — Thank you.

Mr BARBER — What does operational responsibility encompass in law? It does not mean the guy who turns the big wheel that makes the water come out only. It means other things too, doesn't it? It means the decision on how much water is to be released. It means the issue of a range of rights over that water.

Mr DRUM — The extraction caps.

The CHAIR — Collection of data.

Mr BARBER — Bulk entitlements.

Mr JENNINGS — I reckon Mr Atkinson's summation about 10 minutes ago about the way in which this would be done in terms of making operational decisions and the wisdom of the implementation of the plan, who does various elements of making the plan work — all the basket of issues we have been talking about right from the contractual ones, the legislative ones, the infrastructure delivery ones — all of those are trying to maximise the degree of harmonisation in approach and the knowledge and the science on which it is based, the transparency of that, and in fact in terms of hierarchy of responsibility to pare back some of that. But ultimately this is a scheme that only works by maximum buy-in of all the relevant places, so the answer to your question really depends upon which aspect of the operation you are talking about.

The CHAIR — I draw the committee's attention to the fact that it is 3.23 p.m.. If possible I would like to discharge the minister today. I will ask for further questions but perhaps if members could make them fairly rapid fire questions?

Mr DRUM — Again, in relation to Mr Harris's comments as to how the directions may be created from the plan, which is in effect the Murray-Darling Basin Authority, but the state will be the agency which will implement the actions, what sort of dispute resolution is in place for when the directions within the plan are not agreed to by the state?

Mr BARBER — It is in the bill; you take your bat and ball and go home.

Mr DRUM — Out of the whole lot?

Mr JENNINGS — That is the ultimate sanction. Obviously we are entering into this arrangement to try to maximise goodwill and compliance and agreed agendas. We are not entering into this on the basis that we are assuming there is no goodwill, no common sense and not an ability to do it, but just in case, there is a reserve exit clause.

Clause 1 postponed; clause 2 postponed.

Clause 3

Mr BARBER — I refer to the definition of 'express amendment' on page 4 of the bill. Do I take this to mean that we will be referring the power for the federal government, if it chooses, to make further or later amendments to those parts, above and beyond those that are just in the scheduled one?

Mr JENNINGS — Is this another version of the question that you asked before?

Mr BARBER — It is just a question.

Mr JENNINGS — No, no, I am just asking you: is it?

Mr BARBER — And I am asking about the powers that we are giving them — this is the Parliament of Victoria now, not government-to-government. If the Parliament refers this power up to the federal government and it makes the changes that we have already seen in the bill that it has shown us, using clause 4(1)(a), the text referral, and it also gets its clause 1(b), the subject referral, what I want to know is: will the federal government be able to make further amendments to parts 1A, 2A, 4 and 4A of its legislation, using this one referral that Parliament has given it?

Mr JENNINGS — This is the same question that I have been asked twice before, but you have not got a satisfactory answer, have you? Is that what you are worried about?

Mr BARBER — I think I asked you the other day. I do not think I asked you earlier.

Mr JENNINGS — I reckon you did.

The CHAIR — The question is, in effect, does the bill contain all of the referral or are there expanded referral possibilities under this definition and the referral of clauses?

Mr JENNINGS — I have wasted our time because what I am saying is that you had already asked this question three times, and now it is four times, and my answer is that there is an agreement in place that actually says that the commonwealth will not change their act beyond the scope of this referral without our agreement; and that is part of our agreement.

Mr BARBER — Where is that? Where can I see that agreement in these two bills?

Mr HARRIS — In the second part.

Mr BARBER — The second part of this definition?

Mr HARRIS — In the revised Murray-Darling Basin agreement.

Mr HEAPHY — It is the provision in the referral intergovernmental agreement that the first ministers have signed — that is that commitment that the commonwealth will not progress any amendments to this legislation until they have the consent of the first ministers of the basin governments.

Mr BARBER — But not with the express consent of the Parliament of Victoria?

Mr HEAPHY — No, you are right. It is the first ministers of the basin governments.

Mr PAKULA — You have to take the view that intergovernmental agreements are either worth something or they are not.

Mr BARBER — They are not.

Mr PAKULA — Either they are or they are not.

Mr BARBER — Once this Parliament votes, two things happen: the text of the federal government bill gets put into the federal government bill, and we have also handed it the power, at any stage in the future, to make amendments to parts 1A, 2A, 4, 4A, 10A and 11A of its act, with some other acts that it may bring up. And he is saying that it needs agreement from the government of Victoria according to the intergovernmental agreement, but there is nothing in the legislation that says that it cannot do it.

Mr JENNINGS — But there is nothing in the constitution of Australia that can prevent that either; and that is the reason why this is a bit cute; because you know — and in fact earlier in this conversation, you have reminded me, as has Mr Drum, Ms Lovell and the Chair — that in fact if there is a piece of legislation where there is inconsistency between the commonwealth and the state, the High Court will usually, depending on whether there is scope of power, and whether in fact it is consistent with the constitution, fall on the side of the commonwealth legislation. You know that.

What you know in asking this question is, regardless of what we put in this legislation, that could be the outcome, and so it is only a cute question. It does not matter at law because ultimately the way in which we can rely on it is through the goodwill and the good sense of the commonwealth Parliament to act within its constitutional scope of authority to actually pass law, and then beyond that we are relying on not only the referral and the scope of it, which has been clearly outlined in this legislation, but also the terms of the agreement and acting on the assumption that those jurisdictions would act in a sensible way which is consistent with their constitutional rights and the terms of the agreement. That is what we are relying on, and the Parliament of Victoria cannot rely on anything more than that.

Mr BARBER — I did not say I was against it, minister. I just asked: is that the situation?

Mr JENNINGS — I am just saying that ultimately, whatever the outcome of this conversation, we would not be able to enhance the Victorian bill to protect the concern that you have.

Mr PAKULA — I think either yourself or Mr Harris said earlier that the reference would only be terminated in extreme or extraordinary situations. It is not something you would seek to do. May the breaching of the intergovernmental agreement by the commonwealth be one of those extreme circumstances?

If the commonwealth just decided to ignore it in the way that Mr Barber is suggesting that it might — —

Mr BARBER — I did not say it would ignore it. I said the state government could turn around and sign another intergovernmental agreement to do the thing that the federal government then turns around and does. I am just saying the Victorian Parliament will not have any say over it.

Ms BROAD — The Parliament can change its position as well.

Mr BARBER — The Parliament is not in a position to withdraw the referral, by the way.

The CHAIR — Can we contain this? I am particularly mindful of the time.

Mr BARBER — No, we are getting to the nub of it.

The CHAIR — Yes, but I also think the minister has explained it. I am not sure that there is much further to go.

Mr BARBER — I still have got a couple of other questions on this bit though.

The CHAIR — Can I just confirm that Mr Barber has the only other questions to the minister? Okay, then I propose that we continue for a couple minutes more so that I have the opportunity, as I said, to discharge the minister today on this investigation.

Mr BARBER — The last five lines of that same definition say:

> … but does not include the enactment by a commonwealth act of a provision that has or will have substantive effect otherwise than as part of the text of those parts or those definitions;

Is that another bit of cuteness to say that we cannot go and bung some other provision into 1A, 2A or 4 that is way outside the scope of those provisions? Is that meant to be a further protection? Or is that telling me something different to what I am reading? It still says that if I am the commonwealth government, I can make further amendments to those sections of my legislation.

Mr JENNINGS — I think that is probably a parliamentary counsel way of saying that the commonwealth government can amend its legislation if there is some technical reason for it to amend it within the context of the referral that has been given.

Mr BARBER — Really? You are sure about that? Because I was seeing it quite differently, so that if we go to part 2A of the commonwealth government's Water Amendment Bill, as long as we stay broadly within the aims of what 2A is doing and we do not bend the rules too far, we can down the track make some other amendments to 2A — for example, section 86A(3), definition of the River Murray system; or section 86A(2), definition of critical human water needs.

Mr JENNINGS — I am advised, and I am grateful for it, that the answer that I gave is the answer that is technically correct and is the answer I should sit on.

Mr BARBER — Good on you.

The CHAIR — If there are there no further questions, I thank the minister for his time and indicate that when the committee reconvenes, he is excused from those deliberations. As we go through the bill clause by clause, it would probably be helpful to us though to have at least one of the advisers here to help us as we go through the clauses. Are there any amendments proposed to any of the clauses?

Mr BARBER — Not in this forum.

Ms LOVELL — Only in the committee of the whole.

The CHAIR — We do not need to worry about the support staff in that regard. Minister, Mr Harris, Mr Heaphy and Ms Harris, thank you for your attendance today and your assistance in going through the bill. The minister no doubt will await the report with some enthusiasm.

Mr JENNINGS — Exactly, I will.

Clause 3 postponed.

Committee adjourned.

PARLIAMENT OF VICTORIA

LEGISLATIVE COUNCIL

LEGISLATION COMMITTEE

Water (Commonwealth Powers) Bill

Monday, 24 November 2008

Chair

Mr B. Atkinson

Deputy Chair

Ms C. Broad

Members

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

Substituted members

Ms G. Barber (for Ms S. Pennicuik)
Ms W. Lovell (for Mrs A. Coote)
Mr B. Tee (for Ms J. Mikakos)

Staff

Mr R. Willis, secretary

Also present

Ms W. Craik, chief executive officer, Murray-Darling Basin Commission

WATER (COMMONWEALTH POWERS) BILL

Legislation Committee

Resumed from 19 November.

The CHAIR — I call the committee to order; we will resume our hearing. I have asked for the minutes from last week to be circulated. There was a view that we might take the minutes after each of the hearings and work on them together, given they contain the same subject matter and refer to a resumed hearing, but my concern with that is that there are some substitute members, so I think it is important to adopt them separately. We will adopt them a little later.

I extend a warm welcome to Dr Craik, and thank her for joining us today to help us in our consideration of the legislation. As I think you have been informed, the Legislation Committee is a creature of the Legislative Council, and by way of motion the Legislative Council suggested that this committee should go through the legislation and clarify some elements of it, and possibly consider amendments — although as I understand it, the amendments, such as they are, are likely to be pursued back in the committee of the whole rather than in the this Legislation Committee.

I do not know if you want to make any introductory remarks?

Dr CRAIK — No, I do not.

Clause 4

The CHAIR — At the moment we are on clause 4 of the legislation, having previously considered clauses 1 to 3.

Clauses 4 to 26 postponed.

Postponed clause 1

The CHAIR — We will resume deliberations on clause 1, and I would invite any members who have any questions in regard to that clause to ask them of Dr Craik.

Mr DRUM — Thanks, Dr Craik, very much for making yourself available so we can ask you some questions in relation to how this legislation is likely to operate. In relation to the intergovernmental agreement on the Murray–Darling Basin, looking predominantly at clause 3.28 in relation to how the basin plan will let each of the states know exactly how much water can be taken through their state water share, does the basin plan actually override the state's water share?

Dr CRAIK — I am probably not the right person to ask detailed questions about the legislation simply because I am in the Murray-Darling Basin Commission, and I do not have any continuing role in the new arrangement. So while, yes, I read through earlier versions of the act and read the IGAs, given my non-continuing role I have to say that I have not made a feature of studying either the legislation or the detail around it.

Mr DRUM — In relation to the basin plan under which the new authority will effectively be put into place, do you envisage that the basin plan is going to be constructed in a manner that it could effectively override the state's water share?

Dr CRAIK — Again I do not actually really want to speculate on things that I am not particularly involved in, not particularly close to any more. I just do not think it would be appropriate for me to comment. I am not trying to avoid all these questions but it is just not the area that I focus on at the moment. My responsibility really is for the commission and our obligations under the existing Murray-Darling Basin agreement.

Mr DRUM — Is your role going to roll over into the new authority?

Dr CRAIK — No, my personal role will not. I do not have a role in the new agency, so I will be looking for another job basically.

Ms LOVELL — Dr Craik, what advice has been given to the Murray-Darling Basin Commission and to the basin states regarding the differences between the current basin states water shares and the sustainable diversion limits that will be implemented in the future? And how is it envisaged the proposed sustainable diversion limits will be implemented in Victoria given that Victoria's current water shares or bulk entitlements are enshrined in legislation until 2021?

Dr CRAIK — No formal advice has been given to the commission. What is available is what is in the IGA and what is in the basin plan. Other than that, formal advice has not been conveyed to the commission as such on that issue.

Ms LOVELL — You have no idea of how it is going to impact on or work in with Victoria's legislation?

Dr CRAIK — I know there are going to be new sustainable diversion limits for each of the valleys in the basin. I know that any change to state water shares under the existing arrangements will be a matter for the ministerial council and the basin officials committee, and I guess beyond that I am not in a position to comment.

Ms LOVELL — There has been no discussion about the fact that Victoria's water shares are enshrined in legislation until 2021?

Dr CRAIK — I could not say there has been no discussion but certainly it has not been an issue in the commission. I assume it would have been an issue in the discussions in relation to the new legislation, but I have not been involved in those for a couple of months now.

Mr DRUM — Dr Craik, in relation to the current state of the Living Murray initiative, we had some evidence last week from one of the DSE executives who in effect stated that it is going reasonably well and they are reasonably close to fulfilling their obligations. Is that your understanding?

Dr CRAIK — Yes, that is correct.

Mr DRUM — And do you know how close?

Dr CRAIK — How close you are? You have got four projects on the eligible measures register. We have got 120 gigalitres of water from the initial Goulburn Murray water recovery package on the — —

Ms LOVELL — 80:20.

Dr CRAIK — Yes, on the environmental water register, and of course the actual water depends on allocations against those entitlements. We have only got 167 gigalitres in total on the environmental water register, so 120 comes from Victoria in the sales water package, and there would be a little bit more — I do not know how much, but it would not be a great amount — from the purchase project that the commission undertook. We have purchased a little bit of that in Victoria. All the other projects that Victoria has add up to over 200 gigalitres and Victoria's target is 214. As we understand it, the majority of those projects will be such so that in June next year the water entitlements will be available to the Living Murray program. I guess I would say from Victoria's point of view, it is travelling pretty well. We have over 540 gigalitres of projects in total to recover 500 gigalitres, so projects are generally progressing pretty well. There may be some payments in 2009–10 to finalise the projects, but I think we are pretty well on the way to the 500 gigalitres that was required to be got.

Ms LOVELL — You just said then, though, that Victoria had 120 gigalitres on the register and you only had 167 in total?

Dr CRAIK — Yes. What I am saying is Victoria has a reasonable percentage of the ones that are on the environmental water register at the moment.

Ms LOVELL — So the other two states have only got 47.

Dr CRAIK — Yes, around about that because there is a bit of difference, but on that environmental register, that is when the projects are complete and the water is actually delivered. We have got 540 gigalitres of projects in total on the eligible measures register.

Ms LOVELL — How could Victoria have 120 actually delivered when that regarded sales water, and we have not actually had an allocation of sales water in Victoria so really there is no water delivered, full stop?

Dr CRAIK — That applies to everybody's entitlements. How much actual water we get in a year obviously depends on the allocations against the entitlements, but 120 gigalitres of Victorian entitlements have been credited to the Victorian environmental water register, just as about 47 gigalitres of entitlements have been credited from the other states to the environmental water register. In total we have only got about 2.5 gigalitres of real water this irrigation year.

Mr BARBER — 2.5?

Dr CRAIK — It is about 2.5 against all the entitlements that we have got, that is right.

Ms LOVELL — In other words you are saying that states can allocate water that may never ever be delivered, because it is quite possible that we will not get sales water again in this state, and yet they get a credit for that.

Dr CRAIK — Under the agreements for the Living Murray, which were put together in 2003–04 which was a different kind of water year at that time than we have been seeing in the last couple of years, the agreement — and the agreement still is in place — was that all entitlements of water were able to be credited, but they have to be credited to a standard, which is a long-term cap equivalent. We have sales water from Victoria, we have a number of supplementary water projects from New South Wales, which is a similar sort of entitlement. The good thing about that is we are going to need a variety of entitlements to deliver the environmental outcomes, and if there is a lot of water around in a flood year, in a water-abundant year, we will get the sales water from Victoria, we will get the supplementary water from New South Wales. It is part of the package.

Ms LOVELL — Last week Mr Harris, the secretary of DSE, gave evidence that supplying water to Melbourne via the north–south pipeline will not compromise Living Murray waters as not all of the water from the Shepparton modernisation, which is a Living Murray project, will go towards the Living Murray. Is that your understanding of that particular process?

Dr CRAIK — That is correct. We get a certain amount from the Shepparton modernisation; 30 gigalitres comes to the Living Murray and, as I understand it, there is another 52 gigalitres or something that is part of the project that is not part of the Living Murray.

Mr BARBER — Who is the 'we' who holds this water? You keep saying the program and we get it, but what I have seen is bulk entitlements from Victoria being modified to say these are now the entitlements for the Living Murray. My understanding is that often it is the CMAs down here that apply the water.

Dr CRAIK — Yes, the 'we', I suppose, is the program in the commission. Yes, the states retain the entitlement, but in Victoria they are becoming part of an environmental entitlement. In New South Wales I think they are ministers or environmental entitlements. Some of them will go to a CMA in South Australia. I think they are on a ministerial environmental register. They are held in the state according to the normal arrangements in that state, but the decision about where they are made, once they are signed over to the Living Murray program, is collectively made by the commission based on criteria that are set up and agreed in any one year — for instance, this year the criteria are things like supplying water to a drought refuge, supplying water to somewhere where you might lose a species, that sort of thing.

Mr BARBER — I have looked at all your plans so I understand where the water is meant to be going.

Dr CRAIK — So the 'we', I guess, is the commission or the Living Murray program.

Mr BARBER — But in Victoria it is the Minister for Environment and Climate Change that is actually getting these allocations.

Dr CRAIK — Victoria retains control over the Victorian entitlements in the system, that is correct.

Mr BARBER — In the bill that we are examining, and particularly the reference to the federal bill, there are some referrals of power coming from the states and there is a section in the federal bill that allows for managing water access rights and water delivery rights for the Living Murray initiative by — it would be your organisation — this new body.

Dr CRAIK — The authority.

Mr BARBER — Yes. The form of the referral power is actually just to refer powers to do things that have already been agreed to — that is, under the 2004 and 2006 versions of the Living Murray agreement.

Dr CRAIK — Intergovernmental agreement, yes.

Mr BARBER — So why would that agency need that — I cannot ask you why, because it is not up to you to decide what goes, but what are the implications of that power being referred up to the federal government to deliver on the Living Murray program, when it could have just been continued the way it was, as a set of agreements?

Dr CRAIK — I cannot actually answer the detail of your question. It may be that the authority implements those things. The decisions may be made by the Basin Officials Committee and the ministerial council, as to where the actual water goes in a year, but I cannot actually answer that question.

Mr BARBER — Let me read you just a little bit of text:

> The Authority must, if the Living Murray Initiative so provides, manage the rights and interests that:
>
> (a) are:
>
> (i) water access rights, water delivery rights, irrigation rights or other similar rights relating to water …
>
> (b) are held for the purposes of the Living Murray Initiative; in accordance with and in a way that gives effect to the Living Murray Initiative.

Then it describes what is the Living Murray initiative, by reference to the actual written agreements.

Dr CRAIK — What that might be referring to is the fact that the Murray-Darling Basin Commission purchased water on behalf of all four governments — for instance, we purchased 12 gigalitres. The water will be transferred to the authority, to the commission. Those water entitlements are being transferred to the commission, so I assume that legislative reference is talking about those entitlements that have been transferred to commission. That is a very small amount, about 2 gigalitres — no, it is a very small amount; I do not know the precise number from Victoria. That is what I assume that is referring to, just the stuff that the commission purchases, because looking after those assets would translate, I assume, to the Murray-Darling Basin Authority, if that makes sense.

Mr BARBER — So there are some water access rights that are held by the commission for the Living Murray program?

Dr CRAIK — Correct.

Mr BARBER — I still do not understand why we would be providing a referral of state power up to the federal government to allow you to apply those rights, when you already have them.

Dr CRAIK — To allow the federal government to apply those rights.

Mr BARBER — Yes. Why is this going up in a package of measures?

Dr CRAIK — Because right now it is agreed by all the states that we will do it — all the jurisdictions agree that we will do it — and we do it under the Murray-Darling Basin agreement, where all the jurisdictions have agreed that we will do it. I would assume that you are referring powers to the commonwealth, to allow them to do that, because the new entity will not be an interjurisdictional entity, it will be a commonwealth entity.

Mr BARBER — Is that the only reason, convenience?

Dr CRAIK — There may be more, but I cannot answer the question.

Mr BARBER — I can understand the critical human water needs and the power being referred off, but what I am trying to get to the heart of is: what is the practical difference of referring that matter up?

Dr CRAIK — I think the only practical difference is that it will enable the authority to do what the commission currently does, or what we would currently do, in terms of that water for the Living Murray program.

Mr BARBER — Just one other question I have, too, but I need to understand: what was your involvement with the drafting of the IGA?

Dr CRAIK — None — well, very little. One of the IGAs, I think it was the July one, I sat on a committee that met a number of times, but certainly the final rounds of the IGA were not involving the Murray-Darling Basin Commission staff; it involved just the states and the federal government, because it is an IGA between the states and the federal government.

Mr BARBER — Yes, I am not suggesting you were sitting at the table when it was negotiated. The section on critical human needs, which is 7.3 of the IGA, says that:

> The parties agree that the arrangements for meeting critical human water needs for those communities dependent on the River Murray system … and the potential input from tributaries that can provide significant volumes of water to the River Murray (i.e. the Murrumbidgee, Darling and Goulburn rivers), will be a mandatory part of the basin plan.

That part about the tributaries seems to have been excluded from the various definitions and various parts of the mechanics of this legislation that we have seen. Do you think there is a practical difference in terms of how this agency is going to continue? You have been managing the waters of what they call the River Murray.

Dr CRAIK — That is correct.

Mr BARBER — Which is the Hume, the Dartmouth, the locks — the actual river.

Dr CRAIK — The Murray and the Lower Darling; that is right. And the tributary inflows belong to the states; that is correct. They are not regarded as the shared water resources of the Murray, under the current Murray-Darling Basin agreement. What we have been doing when it has been a point of trying to make sure that could meet critical human requirements for all the states, the states would, as part of the contingency measures, 'lend' their tributary water to the system, to ensure that every state had enough water to meet its critical human need arrangements. Then that water would be subsequently repaid by the states which received that lent water, as water became more available.

Mr BARBER — So all this IGA is saying is that that, including the water from the tributaries, will be a mandatory part of the basin plan?

Dr CRAIK — The tributaries would be a part of the basin plan, as any other river would be a part of the basin plan in relation to the new critical sustainable diversion limits that will be set for each of the rivers in the basin — each of the valleys in the basin. I think what that would be saying would be that in terms of the basin plan there is a section on critical human need, and that section on critical human need will include not only the Murray but will pick up the issues of the tributaries into the Murray, simply because, I think, of the issues that we have already encountered in dealing with that critical human need, the need to have contingency measures that rely on borrowing, as it were, from the tributaries.

Mr BARBER — So the difference — when this bill passes, if you like, and that is what I am trying to get to get to the bottom of — is that the basin plan, in its section on critical human water needs, will look at the potential input from those tributaries and formalise it, and the federal government will then have power over it, as it does to create the basin plan, and that will be different to the current operation that you have been running?

Dr CRAIK — I do not know if the federal government will have power over it, whether that is an area that is being a referred power or not. The preparation of the basin plan, certainly it will involve it, because right now it is

something that has been agreed, and voluntarily agreed, by the states and signed up under first ministers agreements.

From what you say, it sounds like the arrangements will change in the new arrangement, but I am only assuming that.

Mr BARBER — You also said earlier that there will be a sustainable diversion limit for each major valley in the basin plan.

Dr CRAIK — In the basin plan; that is correct.

Mr DRUM — Is that not already the case?

Dr CRAIK — Right now under the arrangements in the Murray-Darling Basin Commission each river in the basin has a cap, an extraction limit. Those limits were set mostly in 1995 and 1996. There are still a few being set in Queensland, and the Barwon-Lower Darling was set only just a year ago, and the ACT was only just set. They were set to limit further extractions. Rather than necessarily being at an environmentally sustainable level of extraction, they were set to put a cap on any further extractions. Yes, there is a limit.

It may in some cases be equivalent to an environmentally sustainable level of extraction but the one thing that the caps do not do at the moment is adequately or evenly — between the environment and consumption — reflect the impact of the very severe water shortages that we have had in the last couple of years. They are climatically adjusted but they just do not cope nearly as well with a really big climatic change; they cope with a small one pretty well but not the big ones we have been having in recent years. So that has got to be picked up in the new sustainable diversion limits as well, and they also have to pick up groundwater and a couple of other things that we do not currently pick up.

Mr DRUM — My understanding is a little bit different from Mr Barber's in relation to the authority going forward. I was of the opinion that those tributaries will come under the state?

Dr CRAIK — It will not have control in the same way it does over the Murray and the Lower Darling, but there is obviously some arrangement in relation to critical human need, because we do not have control over those tributaries; the commission as a whole does not. But they have been picked up under critical human need under a voluntary arrangement in the last few years, and I assume that voluntary arrangement is somehow going to be reflected in the basin plan in relation to critical human need.

Mr DRUM — I understand that your level of expertise sort of ceases in some respects at the implementation of this bill, but in relation to any of the dispute resolution that may take place into the future, where the authority is, like yourself, set up as effectively the governing body and the states are going to implement the action plan that is being put forward, do you understand how it is likely to work in relation to dispute resolution, when the states do not agree with the direction that is being given to them?

Dr CRAIK — As I understand, it goes up to the ministerial council for resolution of issues, much the same way as it does now. I am not sure what happens if the ministerial council does not agree.

Mr DRUM — What happens at the moment?

Dr CRAIK — At the moment there is a provision in the Murray-Darling Basin agreement that if agreement cannot be reached on a dispute, a Tasmanian judge will arbitrate on the dispute. To my knowledge that has been sufficient deterrent, that it has never actually been used.

Mr DRUM — In relation to the Murray, that will not be the case? Effectively the authority will lay down the law?

Dr CRAIK — The authority; that is correct. And the minister.

Mr DRUM — The federal minister?

Dr CRAIK — The federal minister; that is correct.

Mr DRUM — Yes, the federal minister will lay down the law, and the states will simply implement whatever they are told to implement?

Dr CRAIK — Well, they will be able to provide advice on the plan and things going through. Advice from the ministerial council is sought on the plan, and as I understand it, the ministerial council has one round where they can have input, but ultimately it is the authority that makes recommendations to the minister; yes, that is right.

Mr DRUM — But it will change when you talk about the tributaries? It will be effectively significantly different?

Dr CRAIK — In terms of sustainable diversion limits, the plan will have a role, and clearly there is a role in terms of critical human need in relation to the tributaries.

Ms LOVELL — Dr Craik, there have been two tributaries that have been specifically excluded from the control of the Murray-Darling Basin authority — the Murrumbidgee and the Goulburn. What do you see as the impact of these two being excluded from the basin plan, and do you think that it will improve the operation of the basin plan to exclude these tributaries?

Dr CRAIK — They will be included in the basin plan to the extent that new sustainable diversion limits will be set for both the Goulburn and the Murrumbidgee — all the valleys in the basin will have new sustainable diversion limits — so they will be included in that part of the basin plan, and clearly they will be picked up in some way in relation to critical human need, probably in much the same way they are now.

Ms LOVELL — I am told that last week on ABC Radio Mildura — I did not hear it myself — you said Victoria has an obligation to fulfil its commitments to the Living Murray by 2009?

Dr CRAIK — June 2009.

Ms LOVELL — Do you think Victoria will meet those obligations, and if Victoria does not meet those obligations by then, what are the implications?

Dr CRAIK — There are no sanctions on jurisdictions that do not meet their obligations, but every state has undertaken to use its best endeavours. As we understand it, the water from the Shepparton modernisation, that entitlement, will come to the program in June 2009, as will that from the Lake Mokoan one. That will come in June 2009. The Goulburn-Murray Water one I think comes to the program in 2009, then there is a small new program that has been listed on the eligible measures, sustainable dairy farms. I am not sure of the timing on that, but certainly Victoria has every reason to imagine it will meet its obligations. There may be some payments that go into the following year for finalising projects, but as we understand it, the vast majority of the water entitlements will be delivered to the program in June 2009 from Victoria.

Mr BARBER — There would be a verification regime for those savings that have been created and allocated?

Dr CRAIK — Yes, there is; that is correct. What happens is that if there is an entitlement actually just handed up and provided, then that is very easily verified. If it is looking at savings and you are paying on savings that have been achieved, say, from putting in infrastructure, and if those savings determine the size of the entitlement rather than just saying, 'Yes, we are going to give you X gigalitres of entitlement', then we send out an independent auditor to look at the actual savings. The project is independently audited to determine the savings.

Mr BARBER — Obviously we have got some very large and very leaky systems. We all know that that water is leaking back into the environment, and so we know we are taking with one hand in terms of stopping those leaks, but then we are giving back by saying, 'Here is your Living Murray or other environmental program'. When that is happening in the same system, how do we ensure it is not just a mere bookkeeping exercise?

Dr CRAIK — My understanding from the work that has been done is that they are genuine savings from the work that has been done, and it certainly provides a great deal more control about when you can actually use the water into the system. Certainly, as I understand it, it is regarded as genuine savings. All the jurisdictions have

looked over these projects that have been put up, and they are genuine savings — the same with infrastructure projects from other jurisdictions.

Mr DRUM — Whilst you use the term 'genuine savings', the actual water is not there yet, is it? The water has not been saved yet, because the system is only running at a fraction of its capacity?

Dr CRAIK — That is correct.

Mr DRUM — The entitlements are in place, and the savings are there to be taken?

Dr CRAIK — That is correct.

Mr DRUM — Once the water starts to run?

Dr CRAIK — That is right. We will not have the entitlements to some of those until June 2009 — or the program will not have the entitlements until June 2009. But you are right; even then with the entitlements we do not actually get water until there is an allocation against those entitlements. That is right.

Mr DRUM — One of the big issues we have here in relation to taking water to Melbourne in the north–south pipeline is that if the water is just not there, and yet Melbourne is granted a bulk entitlement or a 75 gigalitre entitlement, where will that water come from?

Dr CRAIK — That is not for me to answer that question.

Mr DRUM — But you can confidently say it is not going to be delivered out of these savings projects unless things change dramatically?

Dr CRAIK — All I am talking about is the Living Murray. The notion of the water for Melbourne through the pipeline is not really a matter for the commission. We have been guaranteed the entitlement in June 2009 from the Shepparton modernisation project for the Living Murray — the 30 gigalitres of long-term cap equivalent — and we have no reason to suggest that that will not be provided in June 2009. Then, as with all the other entitlements, it is a matter of what the allocations are against those entitlements.

Mr DRUM — But the sheer fact is that most of the projects are similar in nature, are they not? The water infrastructure improvements that are taking place throughout the Goulburn Valley are quite similar in relation to the projects that have had their savings deemed to go to the Living Murray — the waters, the rivers or whatever — or deemed to go to the environment or deemed to go to Melbourne? The projects are similar.

Dr CRAIK — Yes, they are quite similar.

Mr DRUM — Your water is not available at the minute; as I said, of the hundreds of gigalitres that have actually been saved on paper, you have only received 2 gigalitres of actual water savings?

Dr CRAIK — That is correct.

Mr DRUM — So it would be a fair assessment to suggest that the other projects are going to have similar bookkeeping problems — or not problems, but there is going to be a similar situation?

Dr CRAIK — There may well be — and so will every irrigator who has an equivalent entitlement. That is right.

Ms LOVELL — Dr Craik, I understand you said you expect Victoria to meet its commitments, but if Victoria's promises for the Living Murray are not met, will the passage of this legislation empower the commonwealth to demand these prior commitments to be fulfilled prior to any savings that might arise from food bowl modernisation being allocated to the environment or to irrigators?

Dr CRAIK — Victoria has undertaken to provide the entitlement in June 2009 to the Living Murray. It has undertaken to do it. It has met the other commitments it has made, so there is no reason to doubt that it would not meet that. And then the allocations are a matter — —

Ms LOVELL — If it does not, will this legislation empower the commonwealth to demand that prior to the food bowl modernisation savings being shared?

Dr CRAIK — I cannot answer that question.

Mr DRUM — Dr Craik, in relation to the $2 billion that has been put aside in the food modernisation project, the first billion effectively comes out of a combination of Melbourne Water money, state government money and local irrigators money?

Dr CRAIK — Yes.

Mr DRUM — My understanding is that they are going to get first dibs at the various projects, so that money is going to be spent on what you might call the lowest hanging fruit so they can go in and fix up the leakiest system?

Dr CRAIK — I am not sure.

Mr DRUM — You are not sure?

Dr CRAIK — No.

Mr DRUM — Are you aware of the strings attached to the second billion coming from the federal government, which is only going to be used for the irrigators and for the environment?

Dr CRAIK — No, I am not. I know the federal government is going to examine it, but beyond that, I do not know.

Mr DRUM — It has to actually pass each of the projects.

Dr CRAIK — I am not involved in any of that. The commission is not involved in that.

Mr DRUM — So you are not concerned that when the time comes for those works to be done, those projects may not be available?

Dr CRAIK — It is not really a matter for me. It is not a matter for the commission at all to get involved in. We have not been involved in that issue at all.

Mr DRUM — Was the commission consulted about this legislation at all?

Dr CRAIK — The commission had representatives on some of the early IGA drafting meetings at officer level but not the final meetings or the final negotiations. In terms of the legislation, the commission has had officers involved in some aspects of the legislation, but at the end of the day it is the Australian government jurisdiction and the states who decide. They decide the final agreements. We as officers provide advice based on our experience at the commission, but it is up to others whether they accept it or not.

Mr DRUM — So how in depth was that process of your members' involvement in the forming of this legislation?

Dr CRAIK — Many of them attended meetings, particularly in relation to assets and some of the elements of the legislation. Again, we offered to provide advice, but whether it was accepted or not was a matter for the states and the commonwealth government to make a decision.

Mr DRUM — Can you help me out with the change in the name of the governing body from a commission to an authority?

Dr CRAIK — I have no idea why. I assume it was to distinguish it from the commission.

Ms LOVELL — Dr Craik, recently you released the Murray–Darling Basin river health audit?

Dr CRAIK — Yes.

Ms LOVELL — That identified the Goulburn River as the river in the poorest health in the basin, and in particular the breakdown of the Goulburn River, that at the slope zone it was the most degraded area of the Goulburn, yet that is the very area from which the Victorian government plans to remove 75 gigalitres to pipe to Melbourne. Does it concern you that that area is going to be the area where they are taking that water from? That is, from the river that has the poorest ecosystem health in the basin?

The CHAIR — Can I intervene? You are not obliged to answer that question, frankly, Dr Craik. If you wish to give us an opinion, that is fine, but it is outside the province of the legislation.

Dr CRAIK — It is outside the commission's involvement.

The CHAIR — Whilst I accept that some work has been done and an opinion has been formed on the health of the Goulburn, the government's position on extracting water for Melbourne is quite separate to this legislation. You are not obliged to answer, but if you are able to help the committee, I would obviously welcome that.

Dr CRAIK — The issue of the water going to Melbourne is not an issue for the Murray-Darling Basin Commission, so we do not have an opinion on that.

Ms LOVELL — Will the passage of the legislation make it harder for Victoria to maintain the current 4 per cent annual cap on water trade from the irrigation district and the 10 per cent cap on water that can be held by lone land-holders in Victoria?

Dr CRAIK — I honestly cannot be certain about that answer. I do not believe it is referred to directly in the legislation, but I could not be absolutely sure, and I am not sure of the role of the Australian Competition and Consumer Commission in relation to that.

The CHAIR — Are there any further questions?

Dr Craik, I express our gratitude to you. As Chair, I have allowed a fair range of questions, partly because you were quite competent in fielding them. I had no concern about intervening on some of those questions but you have certainly provided a range of information that is helpful. We appreciate that you have come some distance and made yourself available at some inconvenience personally to assist us in this inquiry. I indicate to you that it is very much appreciated. This is landmark legislation, hence the interest of committee members and our colleagues in the chamber in ensuring particularly that Victoria's rights are maintained within a context where we play our part in a multi-jurisdictional approach to water management.

Hansard staff have taken a record of proceedings which will be made available for you to peruse and highlight any areas of concern. As is always the case with *Hansard*, we cannot alter the substance, but if there are any matters that have not been clear as part of the record, we would certainly invite your comment on them. Thank you.

Dr CRAIK — Thank you very much.

The CHAIR — Thank you very much for being with us today.

Dr CRAIK — Sorry I could not be more helpful.

The CHAIR — We also wish you well with finding some new gainful employment. With somebody of your stature, I am sure we will be reading about you again in the future fairly soon, probably in relation to public policy issues. Thank you very much.

Dr CRAIK — Thanks a lot.

The CHAIR — I ask members if there are any clauses to which there are proposed amendments or any further discussion in relation to specific matters on clauses?

Mr DRUM — I suppose it is no great shock that I expected to be able to quiz Dr Craik some more on the practical workings of how the new legislation will work. Through no fault of hers she was unable to garner that information this afternoon. As to whether or not I will be moving amendments, I would not be foreshadowing

that — I do not think that would be the case — but we certainly will need to be talking to the minister in the committee stage.

The CHAIR — That is fine. What happens in the chamber, happens in the chamber. I am more concerned about here and now. Are there any specific matters that anybody wants to address in any of the clauses of this legislation now? If not, I propose to put that clauses 1 to 26 be agreed to for the purposes of a referral back to the Legislative Council, obviously with a report and the attached transcripts.

Clause agreed to; clauses 2 to 26 agreed to.

Committee adjourned.