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## COMMENTARY

# Reforming birth registration law in England and Wales?

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**Abstract** The Law Commission of England and Wales is considering what its 13<sup>th</sup> Programme of Law Reform should address. During the consultation process, a project on birth registration law has been mooted. This is a very welcome proposal given that civil birth registration in England and Wales is a compulsory procedure that not only finds its roots in the early Victorian era, but also remains very similar, at least in terms of form and the information that is recorded. I first use two recent legal challenges to illustrate why the current system is coming under increasing pressure. I further use these examples to caution against a law reform agenda that is narrowly focused on the precise information recorded, without a preliminary and wider examination of what the role and purpose of birth registration is, and should be, in society. I argue that this needs to be addressed before the state can justify the parameters of the information recorded. I then use an outline of historical reforms relating to the registration of births outside of marriage to highlight the normative two-parent family model that underpins the birth registration system. I argue that legal reform must be cognizant of the tenacity of this normative family model, particularly in relation to reform proposals surrounding donor conception and the annotation of birth certificates. Finally, I draw attention to wider developments in family law that cast birth registration as a social policy tool for the facilitation of parent–child relationships, particularly unmarried fathers.



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## Introduction

The Law Commission of England and Wales is currently considering what its 13<sup>th</sup> Programme of Law Reform should address. During the consultation process, a project on birth registration law and certificates has been mooted. This is a very welcome proposal. Civil birth registration in England and Wales is a compulsory procedure that not only finds its roots in the early Victorian era, but also remains very similar, at least in terms of form and the information that is recorded. In this short commentary, I first use two recent legal challenges to illustrate why the current system is coming under increasing pressure. I further use these examples to caution against a law reform agenda that is narrowly focused on the precise information recorded on a birth certificate, particularly in relation to parenthood. This is not to suggest that the information recorded should not be reconsidered, but rather that the scope of a law reform project on birth registration needs to be wider given the normative family model which underpins the system.

I then draw particular attention to the wider family law and policy context within which birth registration operates, and ask what this means in relation to the information recorded. I outline reforms relating to the registration of births outside of marriage to demonstrate that, while historical changes could be interpreted as being a bit haphazard, they have, in fact, always been informed by the normative two-parent family model. I argue that legal reform cannot ignore this tenacious normative dimension, given the extent to which it shapes how the familial information on a birth certificate is understood. I also point to changes in the Adoption and Children Act 2002 and the Welfare Reform Act 2009 – relating to the joint birth registration of births outside of marriage – to show how birth registration has been conceptualized in recent times by the state as a social policy tool that facilitates a parent–child relationship. I argue that this imbues birth registration with even further significance in terms of ‘textually mediated’ statecraft (Breckenridge and Szepter, 2012), for it means that registration is significant for purposes beyond ‘recognition’. Legal reform must be cognizant of this growing role of bureaucracy and ‘paperwork’ in the state’s efforts to organize and determine family practices and behaviour. I conclude that a law reform process underpinned by these wider considerations should be very much welcomed as a way of progressively considering what role this compulsory civil registration procedure can and should play in contemporary and future society.

## Challenging times for birth registration

It has been almost a decade since the Joint Committee scrutinizing the Human Tissues and Embryos (Draft) Bill (2007) recommended that, ‘as a matter of urgency’, the Government give consideration to rights that may be implicated in state authorities holding personal information – namely details of gamete donors – and the information that appears on birth certificates [House of Lords and House of Commons Committee on the Human Tissue and Embryos (Draft) Bill, 2007: 276]. No government has responded to this recommendation. This is perhaps not surprising as, while donor conception is not

uncommon, it affects only a relatively small proportion of the population.<sup>1</sup> However, the existence of a similar minority demographic represented by mother-only registered births (around 7% of births registered each year; Wallbank, 2009: 1) did not prevent the enactment of quite considerable reforms in relation to the compulsory joint registration of births outside of marriage in the Welfare Reform Act 2009 (Schedule 6; on the detail of the reforms, see below). However, the fact that these reforms have never been implemented points to a further – arguably more likely – reason why the Joint Committee’s recommendation has been gathering dust; that to reform the law relating to birth registration and certificates is a complex task. The interplay between public and private information is politically sensitive, and the myriad uses for a birth certificate – including passport application, genealogical research, application for school entrance and local authority services<sup>2</sup> – makes it difficult to determine the most obvious government department for such an undertaking. The Law Commission, as a non-political entity, is therefore well placed to start considering how this complex area of law might be reformed.<sup>3</sup>

In relation to the scope of a possible law reform project, I was very pleased to see the Law Commission cast this in wider terms than the Joint Committee recommendation. Any attempt to reform this one area of birth registration law is likely to prove unsatisfactory, given that the issue of whether birth certificates should indicate that a person is donor-conceived and/or include the name(s) of the gamete provider(s) continues to prove highly controversial and often polarized. In my view, this stems not only from different values being placed on genetic relationships, but also from different understandings of the purpose of birth registration.

To say this is not to suggest that the issue should not be included in a law reform programme, particularly in light of the depth of feeling that it evokes. However, two recent legal challenges signal that a much wider review is warranted. The first of these cases appears, on the surface, to fit closely with the Joint Committee’s concerns. In 2014, Emma Cresswell had her birth certificate re-issued without the name of the man originally recorded as her father, who she had assumed was her biological father. Her legal action followed an argument

<sup>1</sup> According to the Human Fertilisation and Embryology Authority’s most recent statistics, live birth rates in fertility clinics in 2013 were as follows: 589 following in-vitro fertilization (IVF) with donated sperm; 597 following IVF using donated eggs; and 590 following donor insemination (HFEA, 2014). The statistics do not detail the number of live births following donated embryo transfer, nor do they detail donor insemination births that take place in a non-clinical setting.

<sup>2</sup> For example, in Torfaen County Council in Wales, residents applying for the nappy collection service as part of their fortnightly waste collection must provide a copy of their child(ren)’s birth certificate [<http://www.torfaen.gov.uk/en/RubbishAndRecycling/Householdwaste-domesticbins/YellowBag/Yellow-Bag.aspx> (last accessed 8 May 2017)].

<sup>3</sup> Note that the Law Commission requires confirmation from a government department that it has a ‘serious intention’ to take law reform forward before it can include a project in its programme. At this stage, we can only speculate on whether the Law Commission have mooted a project on birth registration law in their 13<sup>th</sup> Programme at the suggestion of a government department and which department it might be.

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