**Submission No 22**

# MANAGING INFORMATION RELATED TO DONOR CONCEPTION

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# Inquiry into Managing Information Related to Donor Conception

Submission to the Legislative Assembly Committee on Law and Safety

My name is Myfanwy Cummerford. I am thirty-two and I was conceived in 1980 via the use of an anonymous sperm donor at the Royal Women's Hospital in Carlton, Victoria. I discovered the truth of my conception at age twenty.
I am one of eight children who share the same biological father. Four of whom were also conceived using sperm donated by him. One is my brother with whom I was raised. The three others are females born to three separate families, I know virtually nothing else about them apart from their approximate birth dates.
I have met and am in regular contact with my biological father as well as my half sisters, daughters born during his first marriage. I am incredibly fortunate to be able to enjoy a relationship with my biological father and half sisters, simultaneously I am acutely aware that currently most donor conceived people are unable to experience the same. The following is my submission in the hope that the New South Wales government will, as a result of this inquiry, effect changes to rectify the inequity of rights between donor conceived individuals.

## Terms of Reference

That the Committee inquire into and report on the management of information related to donor conception in NSW, with particular regard to:

1. a) whether people conceived by donor conception prior to January 2010 should have access to donor conception information, including information that identifies their donor and donor conceived siblings.

2. b) which agency should manage donor conception information and provide services related to the release of this information.

3. c) what counselling or support services and public education measures are necessary to support people who are seeking access to donor conception information.

4. d) any other relevant matter.

## Overriding Premise

Conceiving a child using donated sperm, eggs or embryos can not be equated with conceiving a child conventionally. The government has a responsibility by virtue of its facilitation of the practice of donor conception to inquire into and ensure the best interests of any person conceived.
Consequently the question arises - on what basis can the government justify the denial of identifying information and contact between the donor conceived person and their biological family particularly in light of legislation which provides these opportunities for adopted people and the recent government apologies to members of the adoption community, the Stolen Generation and state care leavers recognising that to be denied knowledge of and contact with ones family is damaging and often results in a deep sense of loss.

I draw the committees attention to the March 2012 report of the Victorian Parliamentary Law Reform Committee (VPLRC) inquiry into Access by Donor Conceived People to Information about Donors. This comprehensive inquiry spanning two years and two governments produced an excellent analysis of the complex issues pertaining to donor identity release. I submit that the committees detailed recommendations work to sensitively and satisfactorily balance the interests of both the donor and donor conceived person and would be of significant value to this inquiry. As such, in the interests of brevity, I have covered only key points below.

**1 a) whether people conceived by donor conception prior to January 2010 should have access to donor conception information, including information that identifies their donor and donor conceived siblings.**

**Inequity of Rights**

Currently the rights afforded to a donor conceived person depend on where and when they were conceived. This is supremely unjust.

Australia is a signatory to many international human rights instruments, of relevance to this inquiry is the United Nations Convention on the Rights of the Child (UNCROC). Notwithstanding the constitutional and jurisdictional issues that prevent direct legal recourse to the UNCROC domestically, its ratification by Australia requires governments to recognise all children as bearers of a broad range of rights, including a right to identity. That Australian children have rights with respect to their identity and parentage is further fortified by the various provisions in the Family Law Act 1975 (Cth) under Pt VII and in particular the objects and best interests principles espoused in s60B. Noting that whilst the term parent in case law will often be used in reference to a legal parent, the term is not preclusive of biological parents who have no parental responsibility.

I have heard some opposers to reform in this area argue that allowing donor conceived people the ability to retrospectively access the name of their biological donor father, awards us with some special right that naturally conceived people do not have and that to do so would unfairly impose on the donors right to privacy or interest in remaining anonymous.

An analogy

Imagine someone conceived as a result of a one night stand. The mother becomes pregnant and has the baby but does not inform the man who she had intercourse with—the biological father—that she became pregnant, nor that a child was born. Let's say the child is now 10 and the mother decides to apply for child support. Even though this man who had a one night stand ten years ago, did not give any further thought to whether he had fathered a child as a result, may be embarrassed, may have had a family of his own since, and doesn't want to have anything to do with this child he conceived. The Family Court can still order a paternity test and if that man refuses to undergo paternity testing, infer paternity (FLA s.69Y(2)), order that he pay child support, and the child would know his identity. This is so, even though he may argue that this would be contrary to his personal and financial interests and, to his 'right' to privacy.

In contrast, a donor conceived person can not and does not seek any financial advantage in accessing the identity of their biological father. They only seek information. The men who donated sperm knew that their sperm could and would be used for the purposes of conceiving a child. Giving access to information would not create any other obligations on the donor. For instance, not only does the law already provide that the donor has no rights or responsibilities in relation to any person conceived (and therefore does not have to pay child support), the VPLRC Inquiry into Access by Donor Conceived People to Information about Donors report also recommends that contact between parties can be precluded by way of contact preference form or contact veto. Further, any necessary correspondence can occur very privately via an intermediary and the donor's privacy is protected while the donor conceived person is still given information. These measures would work to satisfactorily balance the interests of both the donor and donor conceived person.

So in fact with this law reform donor conceived people would only be awarded the same right to information and certainty about biological parentage as naturally conceived people.

**The Right to Privacy**

Any right to privacy with regards to the donor is not absolute. ss69V - 69ZA of the Family Law Act 1975 (Cth) provide an example of where the need to establish parentage will trump privacy permitting a court to order DNA testing and where a party refuses to undergo testing, infer parentage even when such an inference might be contrary to that parties interests (G v H (1994) 181 CLR 387).

The alleged anonymity agreement asserted as an obstacle to allowing retrospective access to information can only exist between the donor and recipient parents. As the donor conceived person did not exist at the time of the anonymity agreement they can not be and I submit, are not, a party to it.

Opponents to reform argue that in the absence of a binding contract an 'understanding' of anonymity is enough to preclude the release of information. However this assertion fails to inquire whether this alleged understanding was truly informed, nor whether clinicians had the legal capacity to make such promises. At any rate it would be impossible to ascertain the individual circumstances of each and every case and the government is able to set aside such 'understandings' (should they exist) with legislation, just as it ordinarily does with other contracts or agreements that are found to be inequitable and/or invalid.

An article titled Keeping mum about dad: "Contracts" to protect gamete donor anonymity by Anne Rees published in the *Journal of Law and Medicine* (Volume 19 Part 4) June 2012 provides a good analysis of the legal validity of anonymity agreements.

Furthermore it should be noted that anonymity was a condition of donating imposed by clinicians. This is very different to arguing that anonymity is something past donors are positively asserting wholesale. Whilst pre-2010 donor conceived people have no ability to contact their biological donor father, donors are also unable to obtain information (or minimal information) about any children they may have fathered.

**Recent case law**

Hamm, Germany 06.02.3013
On the sixth of February 2013 the The 14th Civil Division of the Court of Appeal in Hamm, Germany granted a woman (known only as Sarah P) conceived using anonymous sperm access to identifying information concerning her donor.

The court decided (translation):
"The right to free development of personality and human dignity of the applicant belongs to an autonomous area of private life in which they can develop and maintain their personality. To understand and be able to develop their personality, the applicant has a right to know these constitutive factors – which for this purpose also include their ancestry."

Adding (translation):
"The 'fundamental right of freedom to practice on the part of the defendant and his right to privacy and the privacy rights of a donor's anonymity' must be withdrawn i.e. the personal rights of these parties are not centrally affected by providing the applicant with information crucial to her understanding of self and private life. **They are secondary to her rights.**" (Emphasis added).

Rose v The Secretary of Health and the HFEA
This case was brought by a donor conceived woman Joanna Rose and the first stage of the legal challenge resulted in the abolishment of donor anonymity in the United Kingdom.

Justice Scott Baker said in that case that if donor conceived people were denied rights to access information about their genetic heritage this engaged their human rights under article 8 (the right to respect for private and family life) of the UK Human Rights Act and that a donor conceived person is entitled to establish a picture of his or her identity as much as anyone else.

**DNA Testing**
With the advent of affordable and accurate DNA testing, donor conceived people are now able to submit their DNA to large online databases and match their genetic markers with other members of their biological family. There have already been a number of cases of donor conceived people being able to track down their donor parent in this way, the well publicised 2005 story of an American donor conceived teenager Ryan Kramer being only one example.

The reversal of donor anonymity is inevitable. I argue that it is far more appropriate for the NSW government to act and enact a framework and programs for sensitively handling the release of donor information than to have donor conceived people resorting to court cases and DNA cases in the absence of any other avenue.

- **Recommendation: That all donor conceived people be awarded the right to access identifying information regarding their unknown family members. This must be retrospective. Safeguards such as contact vetoes or contact preference forms and counselling services can be implemented to assist in alleviating any concerns about privacy.**

**2 b) which agency should manage donor conception information and provide services related to the release of this information.**

I would like to stress the importance of having an agency that is independent of Assisted Reproductive Treatment (ART) clinics and associations.

- **Recommendation: I suggest that the NSW Registry of Births, Deaths and Marriages might be the appropriate agency for handling and managing donor conception information and the provision of associated services (such as counselling).**

**3 c) what counselling or support services and public education measures are necessary to support people who are seeking access to donor conception information.**

I refer to the VPLRC report recommendations.

**• Recommendation: Counselling should be made available but not mandatory. VARTA runs public education campaigns and sessions for parents of donor conceived children, donors and donor conceived people, I submit that similar programs in NSW are appropriate and necessary.**

**4 d) any other relevant matter.**

The following is not referred to under the terms of reference but is nevertheless relevant because if a donor conceived person is not aware that they are donor conceived then they are unable to exercise any right to information regarding their biological parent(s). The current system of parentage presumptions and birth registration contributes to the inequity of rights.
The treatment of a donor conceived person as child of the mother and her intended partner under the various parentage presumption provisions in the NSW status of children legislation creates a legal fiction of parentage and severs any connection between the child and gamete donor. I believe this method of relinquishing and reassigning legal parentage is the root cause of the complex legal situation that entangles a donor conceived person currently.
It fosters deceit by producing a birth certificate that is not indicative of true parentage and permits recipient parents to refrain from disclosing the use of donor gametes to any child conceived.
The lack of any formal record documenting the familial link between the gamete donor and any children produced means that should the recipient parents not disclose then the donor conceived person has no way of ascertaining the truth. And any descendent researching their family history shall be (colloquially) led up the garden path.
It is at the point of birth and registration of the child that the practice of donor conception diverges most markedly from best interests principles. The current practice of pretense is parent-centric and must be changed.

**• Recommendation: That the recommendations of the NSW Legislative Assembly Committee on Law and Safety inquiry into birth certification be accepted and implemented.**

**Conclusion**
I thank the committee for the opportunity to participate in this inquiry. I have kept my submission deliberately brief but I make myself available to elaborate further if necessary.

Myfanwy Cummerford