

**Submission
No 17**

**INQUIRY INTO INCLUSION OF DONOR DETAILS ON
THE REGISTER OF BIRTHS**

Name: Professor Jenni Millbank

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Law and Safety Committee.

Professor Jenni Millbank

Faculty of Law
PO Box 123 Broadway
NSW 2007 Australia
T: +61 2 9514 3410
F: +61 2 9514 1551
jenni.millbank@uts.edu.au
www.uts.edu.au

UTS CRICOS PROVIDER CODE 00099F

Submission to Inquiry into Inclusion of donor details on the register of births

Thank you for the opportunity to provide this submission.

My expertise

I am a Professor of Law at the University of Technology Sydney, and prior to that was Associate Professor of Law at the University of Sydney. I am an expert in family and relationship law, with a particular focus on non-traditional/non-genetic families. My research has made a distinctive and internationally recognised contribution to the development of critical scholarship on “functional family” and flexible interdependency principles for the recognition of non-traditional family forms. This work has had a significant impact on legal scholarship, broadening legal understandings of family laws and developing new approaches to relationship recognition in law. My research on family and relationship law has been relied upon extensively in judgments of the Family Court of Australia and elsewhere.

Internationally, my work on family and relationship law has been relied upon by bodies such as the *Law Commission of Canada*, the *New Zealand Law Commission*, the *Belgian Federal Parliament*, the *Law Commission of England and Wales*, and the *South African Law Reform Commission*. In the past decade, every state and federal law reform inquiry in Australia examining issues relating to the legal rights of same-sex couples and families has referred to and relied upon my work in developing their proposals. My “presumed parent” model to recognise the relationships of children with the second female parent in families formed through assisted reproduction was expressly endorsed by the NSW Law Reform Commission in its 2006 Report, *Relationships*, and my work was acknowledged in legislative debates implementing the report through the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW). This model is now in place throughout all Australian states and territories as well as federally.

In 2006 I was commissioned by the Human Rights and Equal Opportunity Commission as an independent expert to assist with the development of relationship recognition models in federal law. I authored a Research Report which formed the basis of the *Same-Sex Same Entitlements Report* (2007) and provided the framework for the raft of federal legislative reforms which passed in late 2008. I was significantly involved, through the Senate inquiry process, with the re-definition of provisions concerning parent-child relationships, leading to the abandonment of the government’s original category and incorporation into all federal law of the presumed parent model through the new s60H of the *Family Law Act 1975* (Cth). My submissions and oral testimony were relied upon in parliamentary debate surrounding

this change of definition. I was also responsible for developing the approach to the federal recognition of families formed through surrogacy implemented through the new s60HB of the *Family Law Act 1975* (Cth).

My publications of most relevance to this inquiry are:

- 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' (2008) 22 *International Journal of Law, Policy and the Family* 149-177, in particular pp158-170.
- 'Unlikely Fissures and Uneasy Resonances: Lesbian Co-mothers, Surrogate Parenthood and Fathers' Rights' (2008) 16 *Feminist Legal Studies* 141-167, in particular pp157-167.
- 'The Role of Functional Family in Same-Sex Family Recognition Trends' (2008) 20 *Child and Family Law Quarterly* 155-182.
- 'The Recognition of Lesbian and Gay Families in Australian Law: Part 2 Children' (2006) 34 *Federal Law Review* 205-260.

As part of this work, through 2002-2003 I worked closely with the Gay and Lesbian Rights Lobby to develop a consultative law reform model for the recognition of parent-child relationships in diverse lesbian and gay family forms. This led to the publication of a succinct and highly influential report:

- And then...the Brides Changed Nappies (2003).

Finally, I must disclose that I acted as counsel for the applicant in my role as an academic barrister in the case of AA v BB, the case which is referred to on the Inquiry website as a trigger for this inquiry. I will not make any reference to the case in the course of this submission.

Most recently I have undertaken ARC funded empirical research on decision-making in regard to frozen embryos with my colleagues Isabel Karpin and Anita Stuhmcke at UTS. This has involved survey and interviews to explore the experiences of people who have undertaken IVF around Australia. Part of the research focused on decisions regarding gamete and embryo donation, and around one third of our respondents to date (a cohort of 350 surveys and 50 interviews) were recipients of donor gametes. This research revealed significant information about the use and impact of donor identity disclosure regimes which we are still in the process of writing up for publication.

My submission

In any discussion regarding the legal rights and responsibilities attached to gamete donation it is important to recall three key points:

1. Gamete donors are not legal parents and have not been so under NSW law since the passage of the Artificial Conception Act 1984 (NSW), which was repealed and replaced by similar provisions in the Status of Children Act 1996 (NSW). The lack of legal status does not prevent a significant adult from applying for and being granted orders to maintain a relationship with a child: this has always been protected under the Family Law Act 1975 (Cth) s65C(c).

In every reported and unreported Australian Family Law case to my knowledge known sperm donors who have applied to the Court for orders to maintain, or create, a relationship with a child have been successful. Genetic fathers have been regarded as significant to the child in every reported Australian case involving a lesbian-led family.¹

2. Gamete donation occurs in a diverse range of family forms and formal and informal circumstances in Australia.
3. The experiences of offspring from heterosexual families formed with the use of donor sperm reflect past practice where children were denied access to information about their genetic heritage. This has caused genuine and ongoing distress for many. Offspring were often deceived about their genetic parentage and many have been left with no means to identify their donor or other genetic relatives (such as half siblings) once the truth came out. Such situation will not reoccur because genetic information is now regarded as significant and the right to access it is protected through state law, under the Assisted Reproductive Technology Act 2007 (NSW)(in effect since 1 January 2010) and under federal ethics rules as a result of the NHMRC Ethical Guidelines on the Use of Assisted Reproduction in Clinical Practice and Research since 2004 (revised 2007).

Gamete Donation and Diverse Family Forms

There are a wide range of situations in which sperm, eggs and embryos are donated for the reproductive use of others. While donation of eggs and embryos requires the use of clinical assistance, sperm donation can take place in informal circumstances. The intentions of the adults, resulting family forms and role of the parties involved may vary considerably – and many also change over time. These situations include but are not limited to:

- sperm, egg and embryo donation taking place through the clinic system by donors who are unknown to the recipients (note that offspring can access identifying information through compulsory disclosure regimes upon attaining the age of 18 but some clinics *also* facilitate voluntary contact at an earlier age, and moreover, some parent groups have set up their own informal matching sites to meet half siblings, such as the Solo Mothers By Choice online forum and the US based Donor Sibling Registry);
- sperm, egg and embryo donation taking place through the clinic system between parties who are already known to each other – egg donation is often between known parties, such as sisters;
- surrogacy involving the use of both intended parents gametes undertaken through IVF, or with the use of intended father's sperm and donor eggs through IVF, or intended father's sperm and gestational mother's egg which may take place under informal circumstances;
- known donors to lesbian-led families (occupying roles which may range from completely uninvolved to a warm regular or semi-regular contact relationship with the child/ren, to a close extended family kind of relationship seen as akin to an uncle figure, to the less commonly occurring involved parental or quasi parental role). Conception may take place under informal circumstances of

¹ See eg *Re Patrick* (2002) 28 Fam LR 579; *H & J & D* (2006) 205 FLR 464; *B & B & Anor* [2007] FMCAfam 246; *R & J and Anor* [2006] FamCA 1398; *Wilson & Roberts* (No 2) [2010] FamCA 734.

home insemination or through the clinic system. Such donors are often gay men, who may be known to the mothers through a friendly relationship or may in fact be strangers prior to engaging in the reproductive endeavour together, ie they have met through mutual acquaintance or through public advertising or websites. In all of these situations the child/ren are made aware of the identity of their genetic father, regardless of the role he plays in their lives.

In this context any general rule about gamete donors is very difficult.

Moreover, our recent ARC research found a plurality of views among parents who had conceived through the clinic system with the assistance of unknown donor gametes and embryos. Many expressed the wish for a more flexible and responsive donor identity disclosure regime, but the view that contact between recipients and donors was important was not universal. Of people we interviewed, several had made voluntary contact while their offspring were still children with other genetic relatives (mostly with other families formed with the same donor but two families had made contact with sperm donors and one embryo donor had formed a close and long standing relationship with the family formed through her donation). All of our interviewees had disclosed to their child/ren that they were donor conceived if the child was old enough, and were planning to do so in the cases where the child was still a baby. This finding reflects current research on increasing openness about donor conception, as well as the practice of Australian clinics in counselling about the importance of openness and early disclosure.

The terms of reference of this inquiry

“The Committee is conducting an inquiry into whether there should be provision for the inclusion of donor details on the register of births maintained by the Registrar of Births, Deaths and Marriages. ...The Committee will consider matters including whether the current system for recording donor information is adequate, and whether these details should be kept by the Registrar of Births, Deaths and Marriages.”

It is unclear from these terms of reference whether inclusion of details if recommended would also be intended to have legal consequences, ie to create a rebuttable or irrebuttable presumption of legal parentage.

For reasons that I explain below, I submit that the best approach is to **create a flexible, consent based system to allow for the voluntary recording of donor identity on the birth register.**

This would operate:

- 1. in addition to but not instead of the Central Register;**
- 2. only with the consent of both legal parents and the donor, not as a mandatory or general system;**
- 3. to allow for a symbolic recognition of the donor as a genetic parent with no consequences for the state or federal rules on legal parentage.**

In addition, when the time comes for a fulsome and considered review of the operation and scope of Central Register, after it has been in place for 5 years, consideration could be given to a more flexible range of options for the operation of the voluntary register and/or greater consistency and transparency in clinic policy in their approach to facilitating voluntary contact.

The Current System of Recording Donor Information (The Central Register)

The current system set up by the Assisted Reproductive Technology Act 2007 (NSW) and Assisted Reproductive Technology Regulations 2009 (NSW) is very recent – having only come into effect on 1 January 2010. Moreover the Act and Regulations were amended in 2010 to include additional registration of details of birth mothers in surrogacy arrangements and to include provisions for the operation of a voluntary register.

While I regard the central register as imperfect in many respects, it is premature to consider amending it as yet. A considered process exploring the range of perspectives of recipient parents, adult and mature donor offspring, donors and clinics is necessary and should be undertaken as part of the 5 year review required under s 74 of the Act.

The Central Register is managed by the Department of Health and is intended as a record of genetic information, including years of birth and sex of genetic half siblings. At present it lacks any facilitative or counselling functions to assist parties when they seek information under the register. This is a major omission, but will not become a pressing issue until the register has been in place for 18 years, although problems are likely to arise under the voluntary register sooner.

The Register of Births is managed by Births, Deaths and Marriages (BDM) and records legal parentage of children. BDM does not match parties or provide a range of information about broader genetic relatives beyond the family of birth. In my view it would be a dramatic shift in role for BDM to record genetic information and/or to manage dual registers of legal and genetic parentage on a general basis. There is no evidence to suggest that this is desirable or necessary.

Inclusion of donor details on the register of births

The register held by BDM records the legal parents of children, being the birth mother of a child and in cases of assisted conception her married or de facto partner whether male or female and whether or not a genetic parent as long as they have consented to the conception. This position is the correct one because it centres the birth mother and the family unit in which the child will be raised. In effect, legal parentage trumps genetic parentage in cases of assisted conception for two reasons: to provide the support and protections necessary for the social parents to raise the child, and to protect gamete donors from unintended legal obligations.

The above approach was, however, out of step for families formed through surrogacy. For surrogacy families assisted conception rules meant that intended parents (who were also often genetic parents) were not legal parents; rather the birth mother and her partner were recognised despite the intentions of all concerned. Indeed most of the reported cases on the interpretation of competing parentage presumptions under the Status of Children Act 1996 (NSW) concern surrogacy families who mistakenly believed that listing a male genetic parent through assisted conception on the birth register made him a legal parent. This has been remedied through the Surrogacy Act 2010 (NSW) which allows for a consensual transfer of legal parentage in such circumstances and the recording of details on the central register.

After extensive consultation with the GLB community I formed the view that a greater range of options for the recognition of diverse parenting roles and practices was

necessary. The *And then...the Brides Changed Nappies*, report recommendation 4 provided:

“Amend the Births Deaths and Marriages Regulations 2001 (NSW) so that biological fathers of children born through donor insemination can be named on the birth certificate. This change would not raise any legal presumptions.”

I would now add to this, egg donors or genetic mothers of children who are born through IVF to another woman. Such provision must only operate with consent and without legal effect on parentage.

Consent

If introduced, any provision for the inclusion of a donor on the birth register should only operate with the consent of the legal parents, whether they be a heterosexual or lesbian couple, or indeed a single mother who has conceived with assisted conception.

This should be a symbolic form of recognition that reflects a particular intended family form where the donor is seen as a person of significance and/or intended to be involved in the child’s life. I stress again that while this is true of some families formed through gamete donation it is by no means a general rule. It is vitally important that any change be one that respects and expands the range of options for families, rather than mandating a particular outcome. Lesbian-led families formed with donor sperm should not be compelled to ‘name a father’ on the birth certificate any more than the birth register should be used to compel heterosexual families to reveal that there has been donor conception before they are ready to do so. Equally, donors should not be listed without their consent.

This recommendation does not replace or reproduce the Central Register or the voluntary register. It performs a different function for a much smaller population.

Legal Presumptions

For the past 30 years Australian law has drawn a bright line presumption between conception through sex and through assisted means. Parents who conceive through sex are taken to be legal parents even if on occasion this is not what they intended. The public policy reasons for this are explained in some detail in *ND & BM* [2003] FamCA 469.

There are very good reasons of law and policy why gamete and embryo donors are not legal parents and why the birth mother and her consenting partner using assisted conception are legal parents. Parents require legal status to raise children and to act in their interests through the exercise of parental responsibility. This need is irrespective of genetic link.

Gamete providers are not legal parents in order to facilitate the relationship of the family raising the child and to encourage donation through clear rules of general application. Australian law has always treated the legal status of known and unknown donors alike based on the method of conception.

If a known donor has a relationship of significance with a child this can be adequately protected through Family law provisions on adults who are involved with the care, welfare and development of a child. The *Nappies* report also raised the possibility of considering a form of adoption to allow multi-parent legal status for the small number of families where a donor (and possibly their partner) are also considered to be parent figures actively involved in raising a child (recommendation 7). This would require the consent of the legal parents as well as a child’s best interest inquiry. As part of its ART, Adoption and Surrogacy Inquiry

the Victorian Law Reform Commission considered such an option in its Position Paper 2 on Parentage. However the VLRC ultimately concluded in its Final Report that such a move was not warranted, because the need for multiple parent recognition had not been demonstrated and because the available Family Law provisions were adequate.²

I strongly urge the Committee to maintain the current approach to the legal status of gamete and embryo donors which is consistent across Australian state, territory and federal laws in place since the early 1980s. This means that any reform must make it clear that listing a genetic parent on the birth register raises no presumption of parentage and does not affect legal parentage in any way.

To recap, I submit that the best approach is to **create a flexible, consent based system to allow for the voluntary recording of donor identity on the birth register.**

This would operate:

- 1. in addition to but not instead of the Central Register;**
- 2. only with the consent of both legal parents and the donor, not as a mandatory or general system;**
- 3. to allow for a symbolic recognition of the donor as a genetic parent with no consequences for the state or federal rules on legal parentage.**

I am willing to give oral testimony to expand or explain any of the above points should you require it.

Yours sincerely,

Jenni Millbank

² VLRC, *Assisted Reproductive Technology & Adoption*, Final Report (2007), Chapter 13.