

**Submission
No 30**

MANAGING INFORMATION RELATED TO DONOR CONCEPTION

Organisation: Australian Christian Lobby
Name: Mr David Hutt
Position: NSW Director
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New South Wales Office
PO Box H331
Australia Square NSW 1215

T 02 8005 3834

E nswoffice@acl.org.au

W acl.org.au

ABN 40 075 120 517

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The Committee Manager
Committee on Law and Safety
Parliament House
Macquarie St
Sydney NSW 2000

RE: Inquiry into managing information about donor conception

The Australian Christian Lobby (ACL) welcomes the opportunity to make a submission to the Legislative Assembly Committee on Law and Safety on its Issues Paper *Managing Information Related to Donor Conception*.

ACL mostly supports the recommendations of the committee's October 2012 Report on the *Inclusion of Donor Details on the Register of Births*. If implemented, these recommendations would require accurate information about donors be kept in a central national register. ACL submits that registering donor details with the Registry of Births, Deaths and Marriages is preferable to maintaining a separate central register.

In its submission to that inquiry, ACL recommended that donor details be included on the register of births and that donor-conceived persons have an absolute right to access this information from the age of 18, or non-identifying information prior to this age if required for medical purposes. In its submission to the Victorian Law Reform Committee's *Inquiry into Access by Donor-Conceived People to Information About Donors*, ACL recommended that in cases where a gamete donor donated on the understanding that he remain anonymous and still wishes to remain anonymous, the case be referred to a tribunal. The tribunal would then decide whether the donor should be allowed to remain anonymous. The tribunal should weigh the rights of the donor against the rights of the donor-conceived person. In doing so, greater weight should be placed on the rights of the donor-conceived person.

In this submission, ACL repeats these recommendations, as well as addressing the other questions raised in the Committee's Issues Paper.

Introduction: A person's right to know his or her parents

The right of a person to know their biological heritage is a fundamental right. It is recognised in Article 7 of the UN *Convention on the Rights of the Child*, which states that a child shall have “as far as possible, the right to know and be cared for by his or her parents”.¹ Legal and medical ethicist Margaret Somerville has argued that “the most fundamental human right of all is a child’s right to be born from natural biological origins”.²

Somerville argues further that the first step in dealing ethically with issues of donor conception “is to place the future child, and the child’s human rights and our obligations as a society to him or her, at the centre of the decision-making as to what should be required, allowed or prohibited”.³

Furthermore, children, who are unable to consent, should not be subject to an agreement of anonymity between biological parents and “social” parents, especially because it denies them this right to know their biological parent. Somerville argues for the “ethical doctrine of anticipated consent”, which requires that “when a person seriously affected by a decision cannot give consent, we must ask whether we can reasonably anticipate they would consent if able to do so. If not, it’s unethical to proceed”.⁴

For these reasons, ACL opposes donor anonymity. The Australian Senate Legal and Constitutional Affairs Committee recommended in 2011 that

*donor conceived individuals should be able to access identifying information about their donor, once the donor conceived person reaches 18 years of age, or such younger age as agreed by all states and territories*⁵

The Committee recognised donor conceived persons who were “deeply traumatised” or “dehumanised and powerless” at not having access to the knowledge of their genetic origins.⁶

A number of countries have banned donor anonymity in recent years, including Britain, Sweden, Norway, the Netherlands, Switzerland, and New Zealand. In 2011, the Supreme Court of British Columbia also overturned donor anonymity.⁷

It is against this background that ACL provides the following answers to the questions in the Issues Paper.

¹ Article 7.1, *Convention on the Rights of the Child*.

² Margaret Somerville (2008), ‘Brave New Babies: Children’s human rights with respect to their biological origins and family structure’, *Centre for Medicine, Ethics and Law, McGill University, Montreal*, pp 1-2. Article available here:

http://www.mercatornet.com/articles/view/brave_new_babies/

³ Margaret Somerville (10 July, 2010), ‘Life’s essence, bought and sold’, *The Globe and Mail*,

<http://www.theglobeandmail.com/news/opinions/lifes-essence-bought-and-sold/article1635165/>

⁴ Somerville, ‘Life’s essence, bought and sold’

⁵ Legal and Constitutional Affairs References Committee (February, 2011), *Donor conception practices in Australia*,

http://www.aph.gov.au/Senate/committee/legcon_ctte/donor_conception/report/report.pdf, Recommendation 9, p xii

⁶ *Donor conception practices in Australia*, pp 70-71, 77.

⁷ CBCNews (19 May, 2011), ‘Sperm donor anonymity overturned by B.C. court’, <http://www.cbc.ca/news/canada/british-columbia/story/2011/05/19/bc-sperm-donor-ruling.html>

The rights of anonymous donors

The lack of consent highlighted by Somerville is at the heart of the issue of donor anonymity. Agreements of anonymity are made without the conceived person's consent and thus cannot be binding on those conceived persons.

The rights of donors need to be weighed against the rights of donor offspring to know their parents. Even in cases where the donor entered an agreement of anonymity, this agreement was made without considering the party most affected by it – the conceived person. It should carry limited weight when being balanced with the rights of persons conceived prior to 2010.

ACL recommends that in cases where donors wish to remain anonymous, their case be presented to an appropriate tribunal which can consider their reasons for wishing to remain anonymous, with due weight given to the rights of the donor conceived person.

Question 1: Should donor conceived adults have retrospective access to donors' identifying details?

Yes, subject to the answer to Question 2 below. When donor-conceptions commenced in Australia, it was an experiment which did not sufficiently consider the ethical issues around denying a person the right to knowledge of their biological identity. The pain and trauma caused by donor-conception practices, particularly donor anonymity, is now well-documented. Retrospective access to donors' identifying details is a necessary rectification of past error.

Question 2: If retrospective access were granted what conditions should apply?

Donor conceived adults should have an absolute right to non-identifying information. In cases where donors wish to remain anonymous, ACL recommends that the case be determined by a tribunal. The tribunal should consider the rights of the donor conceived person as well as the rights of the donor, including his current situation and his reasons for wishing to remain anonymous. However, greater weight must be given to the rights of the donor-conceived person and any decision should err in favour of the donor-conceived.

Question 3: What other issues would be raised by granting retrospective access? For example, how would the process of applying for information be managed? Would counselling and support services be required?

Issues raised by granting retrospective access may include privacy of donors who wish to remain anonymous. As discussed, these cases should be referred to a tribunal who would weigh the anonymous donor's rights against those of the donor-conceived person.

Question 4: Which agency is best placed to manage the register of donor conception information (donor register)? Is the current management of the register adequate?

Question 5: Should a standalone body be established to manage the register? What other areas could it have responsibility for?

ACL argued at the Committee's *Inclusion of Donor Details on the Register of Births* inquiry that information should be recorded on the Births, Deaths and Marriages Registry.

Firstly, the Registry of Births, Deaths and Marriages is an already established central information service. It has a high public profile and would be the first place people would look to obtain family and genetic information. It also has expertise in managing records.

Secondly, the Registry should accurately and truthfully record a person's biological heritage. It should be a requirement for information about a person's donor conception to be kept by the Registry and for this to be linked to the birth certificate.

An additional stand-alone register is unnecessary and should not be created.

Question 6: Should counselling and support services be offered to those seeking donor conception information from the donor register?

Question 7: Are there other types of support that could be offered?

Question 8: How would support services be funded? By the government, the individual seeking the service, or by ART clinics?

Question 9: How would such support be provided? By referral to the Department of Family and Community Services (as with adoption) or by a standalone body (as has been recommended in Victoria)?

The process of finding and contacting a donor is a very emotional one for a donor conceived person, as it would be for a donor on meeting the children to whom he has given life.

Given that donor conception practices means the deliberate severing of a person from their biological, those availing themselves of this service should contribute to the counselling costs of the donor conceived person.

Given the error created by government in allowing donor anonymity in the past, there is a case for government support to cover the costs of accessing counselling and support services and this should be considered. In the future, ACL recommends that ART clinics fund counselling services.

However, it is important that counselling services be privately provided. ART clinics with a financial interest should not be providing counselling services themselves. People should be pointed to the range of non-government community counselling services available, and funding should be provided for individuals to use on counselling services wherever they choose. A similar principle has been adopted in the *Surrogacy Act 2010* where surrogate mothers, before making a surrogacy agreement, are required to receive counselling independent of ART clinics.

Question 10: How long should ART clinics be required to retain records?

As well as being maintained by the Registry of Births, Deaths, and Marriages, ART clinics should be required to retain records for the reasonable life-span of a human being.

Question 11: What should happen to records if a clinic closes?

Question 12: How can we ensure the integrity of records? For example, ensuring that they are not destroyed or tampered with.

All records should be immediately placed on file at the Registry of Births, Deaths and Marriages so that there is a back-up held by the state available to donor conceived persons.

Yours sincerely,



David Hutt
NSW Director