

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into Access by Donor-Conceived People to Information about Donors

Melbourne — 10 October 2011

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Witness

Prof G. Kovacs

The CHAIR — Welcome Prof Kovacs. My name is Clem Newton-Brown. I am the Chairman of the Law Reform Committee. Thank you for accepting the invitation to come and speak to us today.

This is a cross party committee. Also on the Committee is Jane Garrett, Anthony Carbines, Russell Northe and Donna Petrovich. We are preparing a recommendation to Parliament to address the issues which were covered in this inquiry.

Perhaps if you could start with your name and professional address and talk us through your submission.

Prof KOVACS — Gab Kovacs, 28 Arnold Street, Box Hill.

The CHAIR — Did you want to speak generally to the Committee?

Prof KOVACS — I have put most of the things in my submission and summary, unless you want me to expand on anything.

The CHAIR — I think probably the main reason that the Committee wanted to speak with you is to ask questions about the process by which the pre-1988 conceived children can have access to identifying information of the donor at that time. Just given that you have practised for a long time in the area, how you see it ideally working pre-1988?

Prof KOVACS — I was specifically talking about the Prince Henry's conceived children and that is a difficult story now because I was a director first in 1978 till 1998 and in 1998, for various reasons, services closed down and all the files, although it was a private clinic, it was not my private clinic. It was Prince Henry's Research Centre and Prince Henry's Institute Clinic. So all the notes were owned by the clinic.

The CHAIR — How many doctors were at the clinic?

Prof KOVACS — About eight or nine worked in the clinic under the hand of Henry Burger. So when the clinic closed, all the notes stayed with the clinic and Prince Henry's Institute had some dilemma what to do with them. Then ultimately they have gone to the Public Records Office. Although they were notes that I kept or we kept in the team, there is no longer access to those notes. I did put in a freedom of information request a few weeks ago, but that has been rejected; so it has come to a dead end.

The CHAIR — What is the basis of the rejection?

Prof KOVACS — That I cannot get information, it is not my information, it is other people's, third party's information and therefore freedom of information does not apply and I cannot get access to those notes, even though I wrote a lot of them or my team wrote a lot of them.

Now we have actually got no way of getting to the notes. That is a special problem for the Prince Henry's conceived offspring.

Ms GARRETT — That is notes including identifying information about donors?

Prof KOVACS — Everything. There is no other record anywhere else. All the records were kept in the clinic histories and are now locked up by the Public Records Office.

Ms PETROVICH — Do you have people actually working directly now as treating clinicians doing follow up work?

Prof KOVACS — I was just thinking about it on my way here. I have probably had 10 requests in the 30 years that I have been involved. I started in 1978, so just over 30 years. Maybe we have had about 10 requests and we have done the same process. Maybe if I can expand on it.

It has been a dilemma. I can see both sides of it. We started the donation service before my time by recruiting young men to donate sperm back in the 1970s and David de Kretser actually set up the clinic before my time. There were no laws then. They had various legal opinions, Austin Ash was kind of the official legal advisor to the AID clinics in those days and there was no law.

The CHAIR — Is he still alive?

Prof KOVACS — I am not sure actually. I was just thinking about it, he must be very old. He went to the Northern Territory as the equivalent of the governor for the Government of the Northern Territory and I saw him about 10 years ago, but I have not seen him since.

The CHAIR — He was a lawyer who worked for the hospital?

Prof KOVACS — No, he was the chief judge of the Family Court at that stage and his wife worked at the Queen Victoria Hospital with us and he was kind of interested in it. I do not know if you have seen the publication, we wrote a book on donor insemination in about 1979/1980, John Leeton, Carl Wood and I wrote that book and they wrote chapters on various things. He wrote the chapter on the legal side, which was absolutely anyone's guess, the best guess.

There was concern about inheritance in those days. Certainly nothing about what the legal status of the child was and there was quite some concern about it.

Ms PETROVICH — What is the time frame of that book?

Prof KOVACS — 1980 I think we published it. It is called *Artificial Insemination by Donor* by Wood, Leeton and Kovacs.

We had informal legal advice, so we did not know what the situation was. I actually did not deal with the donors, I am a gynaecologist, so I looked after women who wanted to get pregnant and the donors were mainly looked after by the andrologists, which are physicians in male fertility, David de Kretser, Gordon Baker and subsequently Rod McLachlan, Doug Lording for a while there. They were working with the donors, so I did not actually see them.

It was my job to do some marketing for the donors. I used to go and talk to groups of medical students saying: Look, come and be a sperm donor. We need people to donate, we have got all these infertile men; the women are waiting and I did market it.

Certainly our clinic policy was that we told them all then that it is totally anonymous, there is no law but we would keep it anonymous. Then of course in 1988 it all changed and going forwards it became quite clear it had to be open. We were all totally supportive of that and very happy with that.

We then had this dilemma with the people in the middle before 1988 like Narelle, so we did not quite know how to handle that. When we started getting a couple of inquiries, I was a paid employee of Prince Henry's Institute. I was getting paid a session a week to supervise a clinic. We asked for guidance from the clinic from Prince Henry's board and I think the board's consultation with the Ethics Committee at the time was that we had to be sensitive about it because they were sympathetic to the children, the offspring who might want to find out about their donor.

They were prepared for us to do something and what we should do or I should do was to write a letter, a non-descriptive letter making an approach to the last known address of the donor.

Lots of people who donated in those days were young people; they may have subsequently got married and not told their partners about having been a donor and what the anxiety was that if it came out, it may upset their family relationship. They were altruistic donors donating sperm as young people; so that was a negative. On the positive side, we felt they should be given the chance to have contact with the offspring.

Of course the voluntary register overcomes that, if we could have everyone on the voluntary register, it would be really good but we cannot be sure that everyone is aware of that.

So what we used to do is I would write a letter and by then I worked at Box Hill Hospital, so it went on Box Hill Hospital letterhead. So nobody would know anything about it. A non-descript letter saying: I am trying to contact you about the program you took part in at Prince Henry's Hospital back in the 1970s. Could you please contact me?

That was certainly successful on two occasions and two of those donors did contact me. I was able to arrange a contact with the recipient. I probably had maybe half a dozen where we did not get anywhere, could not find their address or came back address unknown.

We then used VANISH who are very good at chasing people and some of the offspring would contact VANISH. We would give them last known address and they would try and trace them on the electoral rolls and dates of birth and so forth.

That is where we kind of were but unfortunately I cannot exactly remember Narelle, because I have seen her a number of times over the last 20 odd years, including as part

of her university project, she came and we did some filming and things on that; so I know her reasonably well. I know she did approach me at some time, we went through the exercise but we did not get a match.

Ms GARRETT — Just on that, because obviously she gave us quite extensive evidence, with respect to Narelle's case, your recollection is you wrote to the last known address of the donor?

Prof KOVACS — I think I wrote to more than one, I cannot exactly remember because it was more than 10 years ago now.

Ms GARRETT — Would there be records of those letters?

Prof KOVACS — I think there were about three people who had a matching name and we actually wrote not only to the last known address but also to the address in the phone book.

Ms GARRETT — You received no response?

Prof KOVACS — No response.

Ms GARRETT — Would all of that be where?

Prof KOVACS — In the file I would imagine.

Ms GARRETT — Which is at Prince — —

Prof KOVACS — Well it is in the Public Records Office now I think, because we kept the records of Prince Henry's — see I stopped working there 13 years ago, so I have had no association with the records since.

Ms GARRETT — With respect to the freedom of information request and again to use Narelle as the example because she gave us evidence and she is obviously an extremely distressing situation, is your only capacity now to make an FOI request?

Prof KOVACS — That has been rejected, so that has come to a dead end.

Ms GARRETT — But that is your only avenue to get access to Narelle's father?

Prof KOVACS — They have got the notes and they are locked records as I have had it explained to me and therefore you have to have very special permission to get to them. So I cannot get to them, even though they were my notes or our notes that we kept, they are no longer our notes, so we cannot get access to them.

Ms GARRETT — Is it your understanding that the only person who could get access to them, would it be Narelle's mother?

Prof KOVACS — We do not know, we are not sure.

Ms GARRETT — Or the donor.

Prof KOVACS — The first thing I have to do, because it is so many years ago, Narelle said it was T5 but the first thing I want to know is to make sure it was in fact T5, so I asked to get access to Narelle's mother's notes and in those notes codes of donors is clearly written.

Ms GARRETT — It is T5?

Prof KOVACS — I am not sure it is, Narelle said to me when we talked, it is T5 but I cannot remember that and I said before I wrote to the donor I had to double check that from Narelle's mother's notes, so I could confirm that he is T5 and then the details of T5 and that has basically been rejected.

The CHAIR — Is Narelle's mother alive?

Prof KOVACS — I presume so, I do not know.

The CHAIR — That is probably an avenue that could be explored.

Prof KOVACS — She could apply, she could ask. But that is only half the puzzle. I just wanted to do that because I did not trust my memory or Narelle's memory 15 years on.

The CHAIR — When you say it is half the puzzle in terms of once you have got the notes — —

Prof KOVACS — They have got the donor file as well.

The CHAIR — There is a donor file separate?

Prof KOVACS — Because we were so anxious about anonymity in those days, they were kept separate. I did not see the donors; I dealt with the recipients, the mothers and the children. I did not have anything to do with the donors apart from an overall marketing. I was the person who went out and marketed because I was the only person working in the Centre on a regular basis, so I would go talk to medical students and other people, talk on the radio about getting sperm donors, but once they came to the system the andrologists would actually look at them, examine them, take their histories and so forth.

Ms GARRETT — With respect to again Narelle's particular circumstance where she has got a very, very life threatening disease now that may well be genetic, what is the process that the eight siblings or so that are out there may be informed? Is there a process?

Prof KOVACS — We cannot work out who those eight siblings are because all those records are now locked up in the Public Records Office and no one has got access to them. Having bowel cancer is a familial tendency. We would have to ask an expert in genetics but I do not think it is a very high prevalence. If you have got a first degree relative with bowel cancer you have got a somewhat increased chance of getting

bowel cancer but it is not like colour blindness or haemophilia which is passed on and you definitely get it, or Huntingtons.

Ms GARRETT — Are you saying there is absolutely no medical ethical capacity for doctors to access those records?

Prof KOVACS — I do not think anyone can get to those records. I think those records are locked up and I think there is no way that we can get to them is what I have been told. Because what happened was the ITA had temporary access — because Prince Henry's clinic closed — if they had not closed they would still be in the basement where they were until about six years ago and we could all go down there, get the key, people had access to it, go and look something up and that is what I have done.

Because there have been some inquiries after I left and I would just then get the key from the person at Prince Henry's, go down to the basement, find the history, look it up, look up the donor code and write the appropriate letter. But since those records have gone, I am told they are a locked record in the Public Records Office and I am not sure who has got access to them, if anyone.

The CHAIR — Assuming you could get access to them, you support the idea of contacting them; you say you have done it in the past? The only hurdle to trying to get a match is the access?

Prof KOVACS — I would think — the problem is you have got two sides to it. I am worried about upsetting the donors, so I think a sympathetic approach I would support, like I was trying to do, but also we were told at the time when I asked for — this is probably going back 20 years or something when the first request came in and I was told we could do it but we were not to harass the donors because they had donated in good faith on the understanding they would be anonymous if they donated before 1988 and therefore we could approach them but not harass them was the words that were used by the decision of the Prince Henry's board in those days.

The CHAIR — Is there a time frame that you would think that would be appropriate if an approach is made, over a period of time, that it would not be harassing them to make another approach?

The CHAIR — Certainly and particularly with Narelle's very special case, I think one should actually — if I had access to the records I would have another go and maybe be a little bit more, not quite harassing but be a little bit more forceful and maybe we could — I am not sure what else we could do, but we could certainly try and have a second approach and say there is a medical reason now which there is, so that would give us some justification to push a bit harder; so it would not be looked on as harassment.

Ms PETROVICH — Thank you very much for your submission, we very much appreciate it. I am very interested in your publication too because I think that might give us a bit of a snapshot of the feeling at the time perhaps as to what people were thinking or where they were going.

In your submission you said in the past there was some recruiting done and you participated in that.

Prof KOVACS — Yes.

Ms PETROVICH — I think you are in a really good position to help me understand, what sort of undertakings were given to those people who were recruited to make those donations?

Prof KOVACS — Really, it would be anonymous. There were worries about inheritance; well from 1984 onwards there was no problem with that because the safety net came in, so there was not any legal responsibility for the child, no responsibility; no right to the child and that it would be anonymous. It would be just an anonymous donation and whilst I say non-identifying information, which is giving height, build, colouring, hair colour, racial background, aptitudes, likes and dislikes — I think that is the list of things we used to give them and that would be given out but that would be anonymous. That was kind of our clinic policy.

Ms PETROVICH — Was there a consistency in that after 1988?

Prof KOVACS — 1988 it was open. Once we got to 1988, you donate, you have to be prepared to meet the offspring should they desire. That was fine. All changes were very clear after that. So a gap is only up to 1988.

I do not think we are talking about a very large number of people. I probably looked after about 3000 couples with donor insemination in my 30 years. Some would have had more than one child.

I guess the other information you do not have yet because the paper writing has been slowed down by my co-writer, I actually followed 120 couples whose children would have been between five and 13 about four or five years ago as part of a study done by the Institute of Family Studies. The Institute of Family Studies did a wellness study on Australian families and they had about 2500 families they studied, which gave us a control group to compare to.

We then identified 120 DI families and also contacted them. I rang every one of them up and spoke to them. One of the things I asked them on the phone, when again I thought it had to be a tactical phone call because I did not know whether the children knew or whether they did not know, but I managed to talk to 120 people and of those 120, only 40 of the children had been told about their donor conception; two thirds were not told.

Despite the fact that all these couples were counselled, mainly by Helen Kane, Helen was our social worker most of the time, counselled the couples, told them how important honesty was and they should tell them and two thirds have not told them, which means there are not that many children out there who know and the percentage of those who even know who really want to chase up the donor seems to be fairly small.

There is not going to be many left to cater for, so I think we could be fairly generous in the efforts we might go to for those few people who really want to know. It is not going to be thousands of people coming forwards. I think it is important for the Committee to know that there are only going to be special cases and I doubt whether it is going to be more than 10 or 20 people in the next year or two who are going to do it. So we are not looking at an avalanche and I think that should be taken into consideration in whatever recommendation you make.

Mr CARBINES — Chair, picking up on that issue and going back to you were saying you had about 10 requests that you have been dealing with over the past 30 years. Based on what you were just saying in the last answer that that might grow related to the age of donor-conceived people and the inquiries they might make. Do you see there is much correlation in that changing?

Prof KOVACS — Not really because 1988 was 23 years ago so if the parents are going to tell the children, those children before 1988 would now be told. There would not be many children that were conceived before 1988 whose parents are going to now tell them they are donor offspring children; so that is why there will not be many of them coming forward and that is why it is not a big problem that we are facing.

Mind you, it is a big problem ethically and psychologically but it is not volumally. There is not going to be hundreds of people coming forwards wanting to find their donors. So whatever recommendation you make is not going to cause a whole lot of work. It is a small number of people and I guess having spoken to Narelle a few times it is really important to her and one would like to help her, but at the same time we also have to be sensitive about the donors. So it is a difficult balance.

Ms GARRETT — Just to go back to Narelle, the process would have been at the time, you went to the board to say — —

Prof KOVACS — It was even before Narelle I went, when the first request came in, which would have been 20 years ago.

Ms GARRETT — Was there a set process, you sent registered mail, you followed it through with the electoral roll.

Prof KOVACS — It probably was not registered mail because we wanted to go below the radar. There was a letter on Box Hill Hospital paper just from me saying: I would like to talk to you. You were involved in a program at Prince Henry's Hospital back in the 70s, because most of them donated in the 70s.

Ms GARRETT — So you would look at the date of birth and the address, et cetera, send that?

Prof KOVACS — Send that and wait for a response.

Ms GARRETT — And if there was no response, that was the end of it?

Prof KOVACS — That is the guidance I was given.

Ms GARRETT — So in Narelle's situation, there was no response. So you are not sure whether the letter got to the right person?

Prof KOVACS — Again, from my memory, I think we could not work out who it was. It was a fairly unusual name I think and there were three in the phone book, so I think I wrote to all three or four. There was a handful of people but it was a long time ago.

Ms GARRETT — It would be on the file.

Prof KOVACS — I have done a lot of things since then. I cannot be absolutely definite about it. If I get to the file, it is in the file, it would be in the file, I would imagine we would have filed it and it would be in the file somewhere, but we have got this silly situation now where they are supposed to be our files but we cannot get them anymore because they are being locked away in public records — bureaucracy.

Ms GARRETT — I note in your submission and we have had submissions coming in two different ways really, I suppose the rights of the donor to remain anonymous is paramount given the agreements that were entered into and then others who say that no, given what has happened and we are a lot wiser perhaps in terms of those broader complications and the changes that have been made since, but the profound impact on the children should outweigh those of the donor and given the adoption experience where children have been allowed to get access to identifying information, because the nature of identity is so profound to the individual, what is your view with the adoption experience?

Prof KOVACS — I think it is a poor comparison.

Ms GARRETT — Why?

Prof KOVACS — In adoption, Dr Glysiotis, he did a lot of work in adoption, you might have come across him; he did a lot of work in adoption in the early days. If I remember correctly, about four per cent of the adoptees of that survey wanted to find their fathers. Most of them wanted to find their mothers. In fact in this situation it is quite clear who their mother is. They have got their mother and it is only their father that is missing.

In fact there is some interesting data which I think David de Kretser is going to talk to you about next week, that there are some studies that show certainly that often the father is not who you believe your father is anyway. Mother's husbands are often not their fathers; there is some evidence to show that.

Therefore, you have got your mother. Yes, you do not know who your genetic father is but a lot of people are in that situation in the community, either they do not know or they have a misunderstanding of who their father is. So it is a very complicated thing. I think adoption is not a perfect comparison, it is a very different situation.

Ms GARRETT — Purely because of the gender of the parent?

Prof KOVACS — On the adoption work there seemed to be more bonding with the mother. Very few of the adoptees came along and said: I want to find out who my father is. They all wanted to find out who their mother was and in a donor sperm situation your mother is very clear there. Your social birth genetic mother is with you. It is only half of the things that are missing now. For some people that half is very important, as we know from Narelle's case.

Ms GARRETT — Certainly the testimony that we have had here is that it is of absolute importance, who the father is.

Prof KOVACS — But it is a fairly small minority of the offspring who feel that way. There are a couple of others I know who are really keen who I have had communication with. A lot of the mothers I treated two or three times, they have got two or three babies. There are a few who really want to find out but out of the large number it is a fairly small percentage.

And of course, anyone who was conceived after 1988 can do so now and has done; so it is a pre-1988 problem.

Mr CARBINES — What would you say are the critical aspects that the Committee should bear in mind if we want to provide information and access to donor-conceived people to donors? What do you think are the key things we need to make sure are in place?

Prof KOVACS — I think we should have worked harder on the voluntary register, I have said that right along. There is a voluntary register but really we did not put a whole lot of — well, the people who set up the register, the ITA, did not have the resources to put a whole lot of publicity into it and I think it should be widely known and people should be encouraged to use it. That would solve the problem because people like Narelle can get on the register and if the donors go on the register of their own free will; we do not have this conflict of interest of their rights against their responsibilities.

I think that is the secret of success, would be to encourage people to go on the voluntary register. I guess at Prince Henry's, off the top of my head because I do not have the file, but I think there are probably 250 donors maybe although some of these would be after 1988, so maybe there is 150 donors involved and if you could encourage a significant proportion of those to go on the voluntary register, then you could do the matches and there is no dilemma.

The CHAIR — Of the pre-1988 donors, are there records of all donors?

Prof KOVACS — While we had the records, everything is recorded, every donor, all their records, which donor was used for which person, who fell pregnant.

The CHAIR — I think there was a suggestion from one of the witnesses that some of the doctors themselves provided donations.

Prof KOVACS — Not at Prince Henry's. I ran the Prince Henry's service; we had a very tight ship. I think what they are talking about is some decades ago, there were

some private practitioners and donor insemination with fresh sperm where it was very informal and with the source of semen there is no paper trail. But on Prince Henry's, Henry Burger was the director of the clinic. David de Kretser set it up. So nothing more needs to be said. The propriety of the clinic was very clear. Everything was recorded. We had our guidelines, who could be donors. There were certain things that precluded you, for example, colour blindness excluded you on the advice of geneticists. You had to qualify all those things. You had to be seen by one of the andrologists and every single donation is recorded and every single pregnancy recorded.

There is one other problem though, we know that sometimes people came along and they actually wanted to boost their chance of falling pregnant and they had infertile husbands. They came to the insemination but there were at least a couple of occasions when there was already some sperm in the mucus; so some of the women who went through tried to improve their chances by having natural intercourse with someone.

So you cannot be absolutely sure if the donor was the genetic father of that child because I know in at least two instances where women with infertile husbands had sperm in their mucus, which we used to test in the early days. So it is really a complex issue.

We might be actually contacting donor B7 and in the meantime he was not actually the genetic donor because there is some other sperm in there. It is a really complex issue.

The CHAIR — When a match is made, do the parties actually go the extra step of having DNA testing?

Prof KOVACS — No I do not think anyone has ever done that but if you are going to do it properly, that is probably what you should do before you actually accept that the donor is the father, because human nature is really very varied and different people do different things.

The only way we know that people sometimes did that was that if the husband has got no sperm, the mucus should be crystal clear, but I know on at least two occasions where they have said: Hang on, there is some sperm. We said nothing about it of course and it possibly was not even put in the records I don't think because it was something fairly disruptive if it became public knowledge, but I know that at least on two occasions I was told that people did have that.

The other thing I have experienced is people do not tell you they got pregnant, because of Victorian legislation and everything being recorded, I have had couples who have rung up and said: We are stopping, we are not coming back and I subsequently found out they got pregnant and did not tell us about it.

The ultimate was a couple who actually got pregnant, they were so paranoid they left Victoria, sold their house, moved to Queensland, told us they were not pregnant, they were quitting, had the baby and then they came back to see me two years later and confessed because the baby died of cot death and they wanted to come back for further treatment.

So, you cannot take things at face value, that is the other thing you have to be very careful of in this business, that you cannot take things at face value.

The CHAIR — Any further questions? No. Thank you very much for coming in. We really appreciate it, it has been very helpful.

Prof KOVACS — Thanks for giving me your time.

Witness withdrew.