

To the Law Reform Committee  
Parliament of Victoria

6 August 2010

**Victorian State Government Inquiry into access by donor-conceived people to information about donors.**

**Personal background**

We are a lesbian couple, with a child conceived via private donor sperm.

We investigated the law about our legal recognition as parents, the status of sperm donors, and children born via donor conception. When the Federal Parliament amended the Family Law Act to include same sex parented families, it meant that our family could expect to be recognised and afforded equal treatment before the law as parents (federally at least).

Around this time, laws enabling registration of non-birth mothers on birth certificates was before the Victorian Parliament: I refer to the *Assisted Reproductive Treatment Act (2008)* ("ART Act"). The ART Act had passed into law, but not commenced prior to our child's expected birth.

I contacted Births Deaths Marriages (BDM) to ask when the ART Act was commencing, so that both mothers would be recorded as our child's parent. I was concerned that we may be compelled to disclose the donor's identity to obtain birth registration, contrary to our donor's express wishes, because the BDM has power to refuse to register a birth (without a Court order) unless a "father" was disclosed.

I asked the BDM to confirm whether under the current legislative scheme, or under the new ART Act (when commenced), the Registrar would refuse to register our child's birth if we declined to identify the private known donor on the birth registration form. The Registrar gave an undertaking to address my questions after getting legal advice, within 2-3 weeks. I received no reply.

I make this submission to outline previously unregulated practices of collecting of donor identifying information from lesbian mothers by the Registry of Births, Deaths and Marriages in Victoria, and highlight issues arising from my experience that may be of relevance to the present Inquiry.

**Births Deaths & Marriages (Vic)**

When I spoke to the Registrar of BDM, I confirmed that Births Deaths & Marriages have kept an unregulated internal "register" or "list" of known donors for same-sex couples (and possibly also single women) who registered the birth of their private donor conceived children.

While the concept of "donor" is legally distinct to "father", the Registrar's practice was to require further information identifying the "donor" as if this information equated to "father" before the birth would be registered. This requirement was not imposed consistently, but enforced where the birth mother was single or in a lesbian relationship. The question simply did not arise for birth registrations for children born to heterosexual couples using IVF, or using private sperm donor arrangements, due to a statutory presumption that a de facto or married spouse of the opposite sex is the father of the child. The unregulated "donor list" was the result of a historic compromise negotiated with a small group of lesbian parents in response to the practice by the Registrar/ senior policy officers to refuse to register births to lesbian mothers without a known donor being named as "father". The compromise served a

limited purpose in avoiding disputation and ensuring that donors were not erroneously identified as “father”. However, it does not reflect the wishes of all lesbian parents, and was reached through a necessarily unrepresentative process. As far as I understand, this informal “donor /father list” is still maintained.

### **Collection and disclosure of donor information obtained informally from lesbian parents**

The BDM practice of maintaining this informal “list” indirectly discriminates against lesbians and single women who do not obtain the benefit of statutory presumptions of parentage open to heterosexual couples in Victoria (noting that parentage is defined to include same sex couples who conceive a child by assisted conception in the amended Family Law Act).

Prior to the ART Act giving this informal “list” some legal status, it was managed without lawful authority, and without statutory guidelines.

Further, it is likely that donor-identifying information was collected by BDM in some instances in contravention of statutory Information Privacy Principles. The information may have been collected using coercion, since the Registrar had the power to refuse to register a child’s birth unless information was provided. While some may have freely consented, it is also likely that many lesbian mothers simply did not have the legal resources to analyse their options to refuse to provide such information.

Many lesbian mothers would have considered it untenable to engage in a dispute with a Birth Registration authority immediately after the birth of their child. Like our family, I expect many lesbian mothers felt unreasonable pressure to disclose sensitive personal information, and considered the “comfort” of the “list” as an alternative to inaccurately naming the donor as “father” on the birth certificate to be an unsatisfactory compromise.

The “list” was not subject to proper parliamentary procedures and disclosure of sensitive personal information about donor identities was in the discretion of the Registrar, and was (in all likelihood) legally unreviewable. I say this because the Registrar made it clear during our conversation that sperm donors were (contrary to the ART Act policies) regarded by BDM as “fathers”, and the Registry felt it their duty to inform the child of their ‘father’s’ identity as and when it saw fit. The Registrar expressed in strong terms that she considered it “contrary to international conventions on the rights of the child” for a child to be “deprived of information about their father”.

The Registrar was adamant that private donor identifying information would be collected so that the donor (or “genetic father”) could be disclosed to the child by the Registry at a time (and in a manner) considered appropriate to the Registrar/ BDM policy officers. The consent or otherwise of the child’s parents or the donor was not factored into the decision foreshadowed by the Registrar.

The conclusion I took from my discussion with the Registrar was that the BDM Registry could (and was inclined to) disclose confidential donor information from this informal “list”, in a manner that may not have regard to the consent of the parents or the donor, and may undermine the integrity and stability of the family unit.

### **Legislative amendments / reform**

The ART Act (on commencement) goes some way toward regularizing the informal “list” arrangement.

However, for the birth of our child, we did not wish to submit to a regime that was unregulated, nor feel coerced into describing the 'donor' as a 'father' when that simply was not the case as a matter of fact or law. Given the conversation I had with the Registrar, I held concern that donor data could be disclosed at the discretion of a faceless organisation without regard to our wishes, or that of the donor.

To the extent the BDM is proposing law reforms that will merge donor identification lists, and enable disclosure of previously confidential material, this is likely to be directed (in part) to confirming the power of BDM to manage and disclose the donor identities provided by lesbian mothers on the informal "List". The reforms are also probably designed to enable BDM to direct disclosure of material previously provided on a confidential basis.

I consider these aims are expressly contrary to the wishes of anonymous and private sperm donors and the parents of many privately donor conceived children. Retrospective amendments to mandate disclosure fundamentally undermines the right to privacy contained in the Charter of Human Rights and Responsibilities Act, and the applicable privacy laws of Victoria, and the Commonwealth of Australia.

Given the circumstances in which the informal/ unregulated lesbian donor list was created, and the coercive manner in which information was obtained, the informal "list" should be excluded from compulsory disclosure as a matter of public policy in any event.

#### **Other Jurisdictions**

We were so concerned about the unregulated BDM "list" and data collection arrangement (and lack of response to our request for information from the Victorian Registrar of BDM) that we looked into the law in other jurisdictions. The NSW Registry of Births Deaths & Marriages does not require disclosure of a known donor's identity, and regards this information as unnecessarily intrusive and irrelevant to the child's legal and social parentage. I understand that the recent Victorian Law Reform Commission report that led to the ART Act held this view as well.

It is desirable that the law of Victoria be consonant with the law of NSW, in that privacy and family structure decisions of individuals is respected. The present state of the law is, in this regard, less discriminatory in NSW than in Victoria.

#### **Respecting families and donor wishes**

It is the fundamental right and privilege of a family decide how and when they share intimate family information (such as the identity of a donor and the story of a child's conception and birth) with their children. The State should not intrude upon the family's integrity with legislative schemes that override rights to privacy, or the right of competent adults to parent children in a manner that reflects and honors the family structure, the values and beliefs of the family, the parent-child relationship and the uniqueness of every child. The international convention on the rights of the child also includes a right to freedom of belief, and an obligation to protect and preserve the child's right to belong to a family.

It is equally important that the State treat all families and children - whether headed by same-sex, heterosexual, single, married, or de facto parents, and whether traditionally conceived or conceived with assistance - equally under the law. The fundamental right of heterosexual parents to disclose to a child whether that child was adopted, for instance, or conceived using private donor assistance is 'invisible' to the proposed law reforms. This means that the disclosure of donor identifying information will inevitably not be uniform, and will tend to discriminate unfairly against more "modern" forms of family.

Many sperm donors in our experience do not want their identity disclosed in an official capacity, but

want their identity (as sperm donor, NOT as “father”) identified when the child’s legal parents determine the child is ready to learn this information. Some sperm donors explicitly want privacy of their identity; amendments to this deny a donor the right to privacy at a point when they cannot revoke their donation.

It seems the BDM is now promoting reforms to enable it to lawfully disclose donor identities only AFTER it has (reluctantly) been compelled by law to register two mothers as parents on a birth certificate. This seems discriminatory, given IVF /and privately donor conceived babies have been born for a long time without such expectation.

The real policy underlying disclosure of donor identities needs close examination. Any direct or indirect discriminatory effect (eg: created by the informal/unregulated private donor list of lesbian birth mothers which was not applied to birth mothers using a formal IVF program in Victoria) must not be perpetuated.

The existence (or non existence) of a donor's consent to the release of identifying information should be determinative. Retrospective law reforms amount to little more than compulsion or coercive release of information, which was obtained under representations to the opposite state of affairs. The operation of privacy principles should not be overridden by statutory amendment because consent cannot be revoked after a child is conceived.

There could, however be a regime where donors who previously assisted in the conception of a child anonymously can personally amend their consent status, to give consent to disclosure of their identifying information. The views of each of the donor, the conceived children, siblings and ‘beneficiary’ parents (whether recipients of donor gametes or a co-parent) must be taken into account as relevant.

Any law reform should give priority to:

- a. Preserving the viability of donor programs;
- b. respecting the individual wishes of the donor, any conceived child, the recipient of donor gametes (the parent), the non birth/non recipient parent, and the siblings or children of such families.
- c. preserving the existing status quo vis a vis consent / non consent to disclosure
- d. creating a scheme by which donors and beneficiaries (recipients of donor gametes , birth parents, non recipient parents, donor conceived children and /or siblings) to register a new consent status.
- e. Both donor and beneficiaries of donation would need to provide consent to disclosure of identifying information before it can be disclosed.
- f. Consensus consent is required for disclosure: if partial disclosure only is agreed, the minimum level of common disclosure agreed limits the scope of disclosure notwithstanding full disclosure is sought by some parties. For instance, a party’s views cannot be ascertained, the past status quo should be preserved until after the death of that party, whereupon a disclosure can proceed in accordance with consensus consents only.
- g. The role of state authorities should be limited to disclosure of information only, and in situations prescribed strictly by statute.
- h. State Authorities should not be given power to regulate their own practices in this regard, and should be prohibited from any act that would override or exercise discretion to disclose in the absence unequivocal consent by all parties.

I respectfully ask the Inquiry to give full weight to the matters raised in this submission.