SUBMISSION (2) TO THE VICTORIAN PARLIAMENT LAW REFORM COMMITTEE INQUIRY INTO
ACCESS TO INFORMATION
BY DONOR CONCEIVED INDIVIDUALS
ABOUT THEIR DONORS

Prepared by:

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To the Executive Officer of the Victorian Parliament Law Reform Committee,

I am writing in regard to the continuance of the *Inquiry into Access to Information by Donor Conceived People about Donors* currently being conducted by the Law Reform Committee of the Victorian Parliament.

As a legal academic and researcher who has for a number of years worked on these particular issues I made submissions in 2010 to both the interim Victorian Inquiry and the Senate Legal and Constitutional Affairs Committee inquiry into donor conception practices in Australia about donor conceived individuals having access to identifying and non-identifying information about their donors and siblings. My submissions focused upon the individuals who, as a result of medical technologies, have been conceived using donor sperm, oocytes or embryos and who deserve to have access to information about their genetic heritage.

You will be aware that the Senate Committee called for national uniform legislation, and for a national register (or state based registers across the nation) to be set up ‘as a matter of priority’ allowing donor-conceived individuals access to information about their donor and donor-siblings. However the Senate also left a number of matters open for further investigation and discussion by the States/Territories.

I therefore make the following further submission to your inquiry that focuses upon issues of retrospectivity and balancing the ‘rights’ and ‘interests’ of all parties involved in donor conception when considering information release. I thank you for the opportunity to once again present my views. I note that my initial submission still stands, and that this submission is in addition to that.

Dr Sonia Allan
This submission focuses upon access to information about donor conception by donor conceived individuals. It reiterates concern expressed in my first submission that many people conceived using donor insemination or ART do not have access to information about their donor and/or siblings born to other families that share the same donor. It focuses particularly on issues that were not resolved by the Senate Legal and Constitutional Affairs Committee Inquiry, or that needed more legal analysis as a result of that inquiry’s report.

Specifically, I provide you with a copy of a paper that I have written that will appear in the *Journal of Law and Medicine* Volume 19(2), December 2011. This paper examines the law regarding the government’s power to enact retrospective legislation; and the psycho-social, ethical and legal arguments concerning the release of information to donor-conceived individuals about their donors. It includes analysis and argument that:

- there is no bar to passing retrospective legislation if the government sees fit;
- the manifest injustice suffered by donor conceived individuals, donors and recipients who wish for information to be made available outweighs arguments (made predominantly by some infertility clinics/doctor, and in some instances by donors themselves) that donors wish to remain anonymous;
- the importance of access to information for donor-conceived individuals is unquestionable;
- the call for information by donor-conceived individuals, donors and recipient parents should finally be heard, and again outweighs the arguments put forth most notably by fertility clinics/doctor, and in some instances, by donors that anonymity should remain;
- the adoption analogy in terms of a model for retrospective release is most useful;\(^1\)
- arguments concerning privacy and confidentiality should include recognition that a ‘right’ to privacy is not absolute. In Australia there are many exceptions to a person’s privacy or confidentiality being protected;
- a donor’s privacy may be protected by way of enabling a ‘contact veto’ system, similar to that in place for the disclosure of information that relates to adoption in some states/territories of

\(^1\) Note: I do not assert that adoption and donor-conception are similar in all ways, but rather focus on how the retrospective release of information in the adoption context enabled a balancing of interests between all parties, whilst providing for access to information.
Australia – whilst not denying donor-conceived individuals access to information about their genetic heritage (and themselves);

- issues concerning the alleged contracts for anonymity should be considered closely. It is noted that ‘consent forms’ signed in the 1970s and 1980s by donors and recipients do not preclude or prohibit a clinic releasing information to donor-conceived individuals; – i.e. the contracts only ensured that the clinic would not release information to the donor about the recipient and vice versa; and at one clinic that the donor would not seek the child conceived using their gametes. They do not address the situation of a donor-conceived individual seeking information for themselves;

- any contract that did attempt to deny donor-conceived individuals access to information about their genetic heritage may be void for public policy reasons;

- legislation passed with retrospective effect that makes void any argued clause for anonymity would, in any case, enable information to be released, resolve fears of claims for compensation, and enable all parties who wish to share information to do so;

- the balancing of arguments framed in both terms of ‘human rights’ and ‘legal interests’ of the donor-conceived, recipients and donors, for and against release of information weighs in favour of those donors, recipients and donor-conceived individuals who call for information release;

- the need for sensitivity, counselling, education and public awareness campaigns, prior to retrospective legislation that enables information release coming into force, is unquestionable. Specifically sensitivity to donor and recipients in relation to their coming to terms with the release of donor information to donor-conceived individuals is absolutely required should retrospective legislation be enacted. This will require enough time to be given before making information available to donor-conceived individuals, to enable public awareness, education and counselling of donors, recipients and donor-conceived individuals where necessary.

Further to the arguments presented in my article, I also submit here that retrospective legislation may resolve the legal issues and complexities faced in Victoria due to having different laws passed at different times that allowed for access to information, only with consent, or not at all depending on when a gamete donation was made, and/or when a donor-conceived individual was conceived.
Retrospective legislation could provide that allowing access by donor-conceived individuals to information about their donors does not give rise to any other rights or responsibilities in relation to or on the part of the donor. It is not suggested here that a donor be obliged to be a ‘parent’ (nb. they are not considered a legal parent in law), or to form a relationship with the recipient parents or donor-conceived individual(s). Rather the emphasis is upon the need for information and information exchange. Relationships that may develop subsequent to information release should remain the choice of all parties involved, and only where all parties are agreed that they wish to move toward contact should this occur. This could be supported by allowing donors to place ‘contact vetoes’ should they wish not to be contacted. Where the parties wish for contact to occur, I suggest that this could be enhanced by having proper support systems and counselling services in place for donor-conceived, recipients, and donors. Anecdotally, where this has occurred, the relationships forged have been positive for all involved.

It is imperative to allow all donor-conceived individuals equal rights and treatment with regards to accessing information about their donors in Victoria. In addition to doing so, I suggest that Victoria should continue to support voluntary registration of information by donors and donor conceived individuals (including a possible DNA bank) to allow for situations where records might have been destroyed, are not available or were not adequately kept.

All registers must operate in a way that allows for linking of donors, donor-conceived individuals and their siblings. The registers must also be updated on a regular basis.

Counselling should be made available on an ongoing basis to parents, donors and donor conceived individuals should they need it; and facilitation of disclosure by the legal parents of their child’s donor conception should continue to take place – through counselling, education and public awareness campaigns, and information that is notified to the donor conceived individual on application for a birth certificate.

Finally, I also provide (attached following JLM article)

- three ‘contracts’/consent forms that were signed by donors from the 70s from the three hospitals that were at the time providing donor conception services (Royal Women’s Hospital; The Queen Victoria Medical Centre; Prince Henry’s Hospital);
- a consent form signed by the spouse of a donor in 1977 at the Royal Women’s Hospital;
- a consent form signed by a recipient parent in NSW at Westmead Hospital.
The contracts/consent forms are provided to highlight that there was **no agreement between the donor and clinic, the donor and recipient, or the recipient and the clinic** that donor conceived individuals could not seek information. **Nor do these forms provide that the clinics/hospitals could not provide information to a donor-conceived person seeking information about their donor.**

Personal communications with an obstetrician who was a registrar in 1974 and 1975 under the auspices of the Dept of Obstetrics & Gynaecology at The Queen Elizabeth Hospital in South Australia revealed that ‘a verbal or implied contract was not acceptable when I was working at the hospital as a Registrar in this area.’

Given that verbal/implied contracts were unacceptable, there seems in fact no contract for anonymity where it is the **donor-conceived individual** seeking information.

I urge the state of Victoria to lead the way in releasing **all** identifying and non-identifying information to donor-conceived individuals about their donors regardless of when a donation took place. It is a manifest injustice to continue to deny a sub-set of people within our population information about their genetic heritage.
Sonia Allan. Psycho-Social, Ethical and Legal Arguments For and Against the Retrospective Release of Information about Donors to Donor-Conceived Individuals in Australia (2011) 19(2) Journal of Law and Medicine (Forthcoming). (Advance copy supplied with permission from JLM).

WITH THE PERMISSION OF THE JOURNAL OF LAW AND MEDICINE, the following paper is provided in advance to its publication in the Journal of Law and Medicine volume 19(2) 2011 for the purposes of assisting the Victorian Inquiry into Access to Information by Donor Conceived Individuals about their Donors. An advanced copy has also been provided to the Attorney General of Victoria, Mr Robert Clark.

The paper is subject to copyright and should be referenced appropriately (citing the Journal of Law and Medicine).

(Please note that the copy that appears below may not appear as is after editing for final publication. A final version of the paper will be provided to the VLRC when it appears in print in December, this copy is provided now due to the dates for submission closing on 12 August 2011).
Psycho-Social, Ethical and Legal Arguments For and Against the Retrospective Release of Information about Donors to Donor-Conceived Individuals in Australia

Sonia Allan*

In the February 2011 report on its inquiry into the past and present practices of donor conception in Australia the Australian Senate Legal and Constitutional Affairs Committee called for the introduction of legislation to regulate donor conception in all jurisdictions that do not have it in place ‘as a matter of priority’. They further called for the establishment ‘as a matter of priority’ of a national register of donors to provide for donor-conceived individuals to be able to access identifying information about their donor. The Senate Committee left open the question as to whether the legislation and central register should have retrospective effect. This paper focuses upon that question. It shows that arguments concerning the privacy, confidentiality and anonymity of some donors who may wish to remain anonymous are outweighed by the manifest injustice faced by those donor-conceived individuals who are denied access to such information, as well as their families and donors who wish to exchange such information.

I INTRODUCTION

In the February 2011 report on its inquiry into the past and present practices of donor conception in Australia² the Australian Senate Legal and Constitutional Affairs References Committee (the Senate Committee) made thirty-two recommendations concerning matters relating to

(a) donor conception regulation and legislation across federal and state jurisdictions;³

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³ Ibid. (Recommendations 1, 2 & 3).
(b) the conduct of clinics and medical services with regards to payment for donors,\(^4\) managing data relating to donor conception;\(^5\) and provision of appropriate counselling and support services;\(^6\)
(c) the number of offspring born from each donor with reference to the risk of consanguine relationships;\(^7\) and
(d) the rights of donor-conceived individuals.\(^8\)

Significantly, the Senate Committee recommended that jurisdictions which do not already have legislation in place should ‘as a matter of priority’ establish legislation to regulate donor conception,\(^9\) and that the ‘Australian Government pursue all available policy and political options…to ensure that nationally consistent legislation relating to donor conception is developed.’\(^10\) In addition, seventeen recommendations related to the preservation, recording and release of records concerning identifying and non-identifying information\(^{11}\) about donors to donor-conceived individuals.\(^12\) This included a call for the establishment ‘as a matter of priority’ of a national register of donors\(^13\) and this central register should operate according to

\(^4\) Ibid, xv, (Recommendation 22).
\(^5\) Ibid, 105, (Recommendation 12).
\(^7\) Ibid (Recommendations 28 & 30).
\(^8\) Ibid (Recommendations 3.4 & 19).
\(^9\) Ibid, xii (Recommendation 1).
\(^10\) Ibid, (Recommendation 2).
\(^11\) Identifying information would include the donor/donor conceived person’s name, date of birth and address; non-identifying information might include education (level and qualifications); eye colour; hair colour; height; weight; marital status; number of children (if any); sex; year of birth; place of birth; nationality/culture with which the donor identifies; religion (if any); reason for becoming a donor; number of offspring born through other donations; identity of other offspring born through other donations; interests/hobbies/sporting activities; anything else the donor considers central to their personality. (NB. It is difficult to delineate some of the information as identifying or non-identifying as some information in combination might lead to the identification of a person, but alone would be considered non-identifying.)
\(^12\) Ibid, xii-xvii. (See recommendations 3, 5-14, 19-21, 25, 31-32).
\(^13\) Recommendation 5.
principles which provide for donor-conceived individuals to be able to access identifying information about their donor.\textsuperscript{14}

The recommendations and report left a number of issues open for further debate including whether the legislation should provide for the retrospective release of identifying and non-identifying information about donors to donor-conceived individuals.\textsuperscript{15} Given that the call for information has been made most loudly by those donor-conceived individuals who are already in existence, and who are denied access to information that already exists, the issue of retrospectivity is most important. This paper therefore focuses upon the question of retrospective release of identifying and non-identifying information about donors whose donations predate legislative intervention, and who at the time of their donation may have been told that their anonymity would be preserved.\textsuperscript{16}

Section II begins with an examination of principles of statutory law regarding whether it is possible for legislation to be enacted retrospectively. This is important as without the power to legislate retrospectively, the question of whether such legislation should be enacted is a moot point. It is shown that governments do in fact have such power. Section III raises psycho-social, ethical and legal arguments for and against the retrospective release of information about donors to donor-conceived individuals. Section IV considers the balancing exercise required by the principles of statutory interpretation and drafting introduced in Section II. Section V concludes the paper. It is argued that while not all donor-conceived individuals may want information, all donor-conceived individuals should be given the

\textsuperscript{14} Recommendation 9. Arguably such a register would also enable donors to receive information about their offspring, and donor-conceived siblings to receive information about each other.

\textsuperscript{15} Senate Legal and Constitutional Affairs Reference Committee, \textit{Donor Conception Practices in Australia} (2011) p 114, at [7.26]. The committee stated at [7.26] ‘In the absence of authoritative evidence about the legal and ethical implications of retrospectively removing donor anonymity, the committee chooses not to make any specific recommendation about retrospectivity’.

\textsuperscript{16} Ibid.
choice. The ‘rights’ and ‘interest’ of donor-conceived individuals to access identifying and non-identifying information about their donors, along with those of families and donors that wish to be able to share information with them should prevail. Nonetheless, the issues raised in relation to parents who fear disclosing their child’s donor conceived status, or by donors in relation to privacy, confidentiality and contracts for anonymity require, sensitivity and thought in how a program that provides for the release of information would occur. The paper leaves open the opportunity for more detailed discussion of each of the issues presented.

II DOES THE LEGISLATURE HAVE THE POWER TO PASS RETROSPECTIVE LEGISLATION?

Legislation is retrospective if it has effect in relation to a matter arising before it was enacted or made. Another, slightly more complex definition, is that a statute is retrospective, when it ‘takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past’.  

In the absence of a clear statement to the contrary, the Courts have frequently declared that an Act will be assumed not to have retrospective operation. That is, there is a ‘presumption against retrospectivity’. The presumption is based upon the idea that one should not imply retrospectivity as doing so may have negative impacts upon people who in the past acted according to the law as it was at that time. However the presumption is rebuttable, it

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18 L’Office Chiffre des Phosphates et al v Yamashita-Shinbun Steamship Co Ltd The Boucraa [1993] 3 All ER 686, 682 per Sir Thomas Bingham MR.
can be excluded by a clear statement to the contrary within an Act of Parliament, or where a court can spell out a necessary intendment that the Act is to operate retrospectively.\textsuperscript{20} ‘Well-reasoned arguments against too ready an acceptance of the presumption against retrospectivity’ have also been recognised.\textsuperscript{21} For example, Pearce and Geddes cite Adam J in *Doro v Victorian Railways Comrs* [160] VR 84 who said

> The strength of the presumption against retrospectively in any particular case, and accordingly the ease or difficulty with which it may be overcome, must...depend on the nature and degree of the injustice which would result from giving a statute a retrospective operation. Where palpable injustice would result, the presumption should be given its fullest weight. In such a case it is but common sense to require the clearest indication of legislative intention that such an unjust result was intended. On the other hand, where to give retrospective operation to a statute might be considered to work some injustice to one party, but is clearly required to rectify a manifest injustice to others, there would, on principle, seem little reason for giving much weight to the presumption. In such a case, where the legislature used language which is apt to give to its statute retrospective operation, it would be a matter of conjecture to presume that it preferred the interests of the one to the others.\textsuperscript{22}

The presumption against retrospectivity also does not imply that the parliament cannot or should not make laws that have retrospective operation.\textsuperscript{23} As noted, a clear statement that a statute is to Act retrospectively is enough to make the provisions contained in the Act retrospective.

In *Kidman* Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ (Griffith CJ dissenting) held that the Commonwealth had power to pass retrospective legislation. Higgins J stated

>[t]he...Parliament, admittedly, has power to make its laws retroactive; and I know of no instance in which a Legislature created by the...Parliament has been held to have overstepped its powers by making legislation retroactive. [Whilst] there are plenty of passages that can be cited showing the inexpediency, and the injustice...of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done...

\textsuperscript{21} Ibid, 315.
\textsuperscript{22} [160] VR 84 at 86.
these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it see fit.24

The constitutional validity of retrospective legislation has also been affirmed in Millner v Raith,25 Polyukhovich v Commonwealth,26 and Tuitupou v Minister for Immigration and Multicultural Affairs.27 The only qualification upon such power has been that where retrospective legislation deprives someone of a property right it must do so upon just terms.28

There is therefore no impediment to the legislature passing retrospective legislation allowing the release of identifying and non-identifying information about donors to donor-conceived individuals if it sees fit. The passing of retrospective legislation is however not commonly done, and further examination must be had of the possible injustices to one party (some donors) that are required to rectify a manifest injustice to others (donor-conceived individuals, donors who wish to release their information, and parents who wish to tell their children).

III ARGUMENTS FOR AND AGAINST THE RELEASE OF IDENTIFYING AND NON-IDENTIFYING INFORMATION TO DONOR-CONCEIVED INDIVIDUALS

This section examines arguments for and against the retrospective release of information about donors to donor-conceived individuals. It examines arguments posited in relation to donor-conceived individuals, their parents, and donors. In relation to each of these parties, it considers the psycho-social, ethical and legal arguments as they arise.

25 Millner v Raith (1942) 66 CLR 1.
28 Georgiadis v Australian and Overseas Telecommunications Corp (1994) 179 CLR 297; Australian Constitution Act 1901 (Cth), s51(xxi).
A  Donor-conceived individuals

i  Number of Individuals Affected and Demand for Information Increasing

It has been estimated that there are between 20,000\textsuperscript{29} to 60,000\textsuperscript{30} donor-conceived individuals in Australia. The number of people that may be affected due to lack of information about their genetic heritage, including donor-conceived individuals, their families, and generations to come, using either estimate, is therefore significant.\textsuperscript{31}

As donor-conceived individuals enter adulthood, and some have families of their own, the call for information has increased. Similarly, there are potentially tens of thousands of individuals who are yet to reach adulthood, or are yet to be conceived in those jurisdictions that do not have legislation that requires information recording and release, who may in the future call for information about their donors. As access to assisted reproduction is opened up, and our country celebrates and recognises the many different family formations, so too should it facilitate those families in having access to information. This is vital, as such information is threatened by being lost or destroyed for example as clinics or doctors’ surgeries close. Mr Richard Egan of FamilyVoice Australia in his submission to the Senate Committee said:

...you need to collect the data before clinics go out of business. Some of it will be very patchy going back to the 1970s and so on, but we need to get that information into a central registry before it is too late. Some people may not


\textsuperscript{31} However, the actual number of donor-conceived individuals is unknown, as most jurisdictions have not kept central registers or have not required specific information to be entered on birth records about the method of conception. In Victoria, there are 4821 donor-conceived individuals and 1663 donors on that state’s register (See VARTA, Annual Report 2010 (2010). This would not account for private arrangements, or individuals conceived before the central register began in 1988.
start looking for their donor father until they are 30 or 40, so these things come up at different times in people’s lives. [There is] an absolute right to know.32

ii. Genealogical Bewilderment – A Sense of Identity

Academic literature has increasingly emphasised that relations based on blood are less important in shaping a child’s development than previously thought. However, it is also the case that societies such as Australia’s place great weight on ‘blood relations [as] … the basis of kinship’.33 Despite a child’s development being shaped by social as much as biological factors, knowledge of one’s immediate genetic heritage is thus considered integral to the self-identity of most people. Once donor-conceived individuals discover they are not biologically related to their parent(s) some feel a sense of ‘lost identity’ and a corresponding desire to know more about their donor.34 This has been referred to as ‘genealogical bewilderment’.35

Similar to adopted children wanting to meet their biological parents,36 some donor-conceived individuals may feel a strong need to connect with, or have detailed information about their donor in order to obtain a more complete sense of self-identity.37 The desire often exists independently of the love and affection individuals feel from their non-biological parent(s) and the fact their relationship is strong. There may in some instances be a deeper

32 Commonwealth, Senate Committee Hansard, 29 October 2010, 19-20, Mr Richard Egan of Family Voice Australia.
35 Turner and Coyle, above n33; E. Wellisch, ‘Children without Genealogy: A Problem with Adoption’ (1952) 13(1) Mental Health at 41-42; H. Sants, ‘Genealogical Bewilderment in Children with Substitute Parents’ (1964) 37(2) British Journal of Medical Psychology at 133-141. Such bewilderment may be particularly acute for people who discover later in life that they were donor-conceived.
36 Noting that whilst it has been suggested that the issues faced by adopted children are distinct from donor-conceived individuals because the latter do not undergo the trauma of knowing they were ‘abandoned’ at birth, the sense of ‘lost identity’ is reportedly the same.
37 Turner and Coyle, above n33; Wellisch, above n34; Sants, above n34.
appreciation of the relationship with the parents who have reared them based on an acute awareness of how much they were wanted by parents who endured fertility treatment in order to give birth to them.\textsuperscript{38} The curiosity about their donor and the propensity for donor-conceived individuals to search for information is not related to the desire to escape negative family issues rather most donor-conceived individuals report positive relationships with their parents.\textsuperscript{39} On the other hand, such feelings coexist with a strong desire to know about one’s donor and frustration at being denied information.\textsuperscript{40}

In studies conducted to evaluate the consequences of non-disclosure for an individual’s sense of identity, some respondents described feeling as though they were ‘freaks’ or ‘products of experiments’ or that they were in some way ‘incomplete’. McNair writes, ‘[t]hese sentiments suggest that identity is related to genetic inheritance in some way, and a fuller sense of identity for a donor-conceived person may only be achieved through access to details about their donor.’\textsuperscript{41} There is evidence to suggest that donor-conceived individuals undergo a ‘fracturing’ in their identity due to knowledge of their status. However such difficulties are typically related to feelings of frustration at being denied information about their donor and not about being donor-conceived per se.\textsuperscript{42} Of major concern then is that


\textsuperscript{39} P.P. Malhstredt, K. LaBounty, and W.T. Kennedy, above n37.

\textsuperscript{40} Turner and Coyle, above n33; V. Jadva, T. Freeman, W. Kramer and S Golombok ‘Experiences of offspring searching for and contacting their donor siblings and donor’ (2010) 20 Reproductive Biomedicine Online 523, p 524; Michelle Dennison ‘Revealing Your Sources: The Case For Non-Anonymous Gamete Donation’ (2008) 21(1) Journal of Law and Health 1, at 13.

\textsuperscript{41} Dr Ruth McNair, Outcomes for Children Born of A.R.T. in a Diverse Range of Families (2004), p 43.

there are a significant number of Australian donor-conceived individuals who continue to be denied access to information.

iii  Access to Medical Information

The importance of having access to information concerning a biological parent's medical history (for example whether or not there is a familial history of heart disease, diabetes, cancer, mental health issues, and/or other heritable diseases) is undeniable. Donor-conceived individuals who are denied access to familial medical histories are placed at increased risk as a result of not having access to information about their genetic heritage. This becomes very significant as people age. A donor, who donated in the 70s or 80s, when donor-conception was shrouded in secrecy, may not until more recently have become aware that they are a carrier of certain diseases. Similarly, a donor-conceived individual may become aware of a heritable condition, but has no way presently to notify their donor(s) or half-siblings conceived using the same donor gametes. As there is no linkage for either the donor to the donor-conceived person, or vice versa, or to donor-conceived siblings in most jurisdictions of Australia, alerting relevant parties to health information is problematic. This may have ramifications not just for the person unaware of such information, but for generations to come.

On the other hand, release of medical information raises issues about health privacy and confidentiality, which is generally protected in Australia. These issues, along with the numerous exceptions to maintaining ‘health privacy’ are discussed below in relation to donors’ privacy and confidentiality.

iv  Fear and Risk of Forming Consanguineous Relationships

Some donor-conceived individuals report the fear of unknowingly forming relationships with siblings or possibly their unknown donor.\(^{44}\) Whilst the actual probability of such an occurrence is unknown (as the actual number of donor-conceived individuals is unknown) such a risk may be significant within Australia given the small population and the significant number of donor-conceived individuals in existence. While it has been claimed in international reports that one way to avoid half-siblings forming relationships was through the restriction of a donor to one donation, it is clear that this is not and has not been the approach to donor conception in Australia.\(^{45}\) In many clinics and doctors’ surgeries, donors are likely to have donated multiple times. Some donors may also have donated at multiple clinics, and across jurisdictions. The risk of siblings (and/or donors) forming relationships with related individuals may be more acute in states and territories with small populations, where donor conception has been practised with inadequate record-keeping, or where information is retained but unavailable.\(^{46}\)

Entering consanguineous relationships has legal ramifications. The Commonwealth Marriage Act makes unlawful marriages between an individual and their parent, and an

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\(^{44}\) Marilyn Crawshaw, Submission 156, 7 to the Senate Legal and Constitutional Affairs Reference Committee Inquiry into Donor Conception Practices in Australia (2010).

\(^{45}\) In Victoria, the maximum number of families is 10, Assisted Reproductive Treatment Act (2008) (Vic) s 29; in New South Wales, the number is 5, Assisted Reproductive Technology Act (2007) (NSW) s 27(1); in Western Australia, the number is 5 Human Reproductive Technology Act 1991 (WA) (see ‘Paragraph 8.1, Human Reproductive Technology Directions (WA), Western Australian Government Gazette, 30 November 2004, p 5434’). In Queensland, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory, the NHMRC Guidelines cover the issue and provide that ‘clinics must take all reasonable steps to reduce the numbers of genetic relatives created through donor gamete programs’ to protect donor conceived people, and donors, from having too many genetic siblings or too many offspring, respectively’: NHMRC Guideline 6.3. A number of submissions to the Senate Committee noted concern that despite limiting numbers, inconsistent registration of donors between states prevents one accurately knowing the amount of families a donor has assisted: Senate Legal and Constitutional Affairs Reference Committee, Donor Conception Practices in Australia (2011) p 73, [5.16].

individual and their half-sibling. The effect of this provision is to invalidate the marriage because such relationships fall under a prohibited category within the Act. How can donor-conceived individuals avoid breaking the law by forming unions with their siblings or donors if they cannot identify them? State criminal law also makes incest between individuals and their parents and half-siblings a punishable offence. While such an offence requires knowledge of blood relations, if half-siblings were unwilling to separate upon discovering their biological connection, this places them in an uncertain position with regards to the legality of their relationship. The chances of such situations occurring would be greatly lessened if donor-conceived individuals and donors were able to obtain information about each other with the possibility of being connected.

Beyond the legal difficulties, there is also the chance that such relationships would bear children, leading to genetic or chromosomal difficulties in those children due to having genetically related parents. The fear of this occurring causes great distress for some donor-conceived individuals.

Psycho-social and ethical dilemmas also exist. Most importantly, it has been argued that the threat arising from consanguinity risks that poses the greater risk to the emotional

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47 Marriages Act 1961 (Cth) s 23(1)(b) makes marriages involving ‘prohibited relationships’ void. Section 23(2)(a)-(b) states that marriages between an individual and their parent and an individual and their sibling, including half siblings, are ‘prohibited relationships’.

48 Ibid.

49 See for example, Crimes Act 1958 (Vic) ss 44 (2) & (4).

50 Robin L. Bennett, Arno G. Motulsky, Alan Bittles, Louise Heudtins, Stefanie Ulrich, Debra Loehner Doyle, Kerry Silvey, C. Ronald Scott, Edith Cheng and Barbara McGillivray, et al. ‘Genetic Counseling and Screening of Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors’ (2002) 11(2) Journal of Genetic Counseling at 97-119. (Note this article in recognising the risk associated with forming consanguineous relationships makes recommendations for genetic counselling and screening for consanguineous couples and their offspring. Donor-conceived individuals unaware of their relatedness to others would not have the opportunity to undergo such counselling/screening.)

51 Commonwealth, Senate Committee Hansard, 03 November 2010, oral evidence of donor-conceived individuals.
and social well-being of some donor-conceived individuals. Crashaw describes how some
 donor-conceived individuals question ‘whether their attraction to someone may be ‘genetic
 sexual attraction’, and that an otherwise innocent statement such as ‘you look just like so-
 and-so’ carries a very different significance to those personally affected by donor
 conception’. She makes the point that ‘the living experience with regard to consanguinity
does not necessarily reflect the statistical risk’.

v Inconsistency in Providing for Access to Information to Some but not all
Donor-Conceived Individuals

The law in four Australian jurisdictions does in fact require the recording and release
of identifying and non-identifying information to donor-conceived individuals. However it
depends on where and when a donor-conceived individual was conceived as to whether they
can access information about their genetic heritage.

Those conceived in Western Australia post 2004; Victoria post 1998 (or post 1984
with donor’s consent); New South Wales post 1 January 2010; and South Australia since
2010 (or post 1988 with donor’s consent) may have access to identifying and non-
identifying information about their donors. Non-identifying information is available in

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52 Retired Senior Lecturer in Social Work, University of York; Former Infertility Counselling Service; Co Chair
of PROGAR (Project Group on Assisted Reproduction).
53 Marilyn Crashaw, Submission 156, 7 to the Senate Legal and Constitutional Affairs Reference Committee
54 Ibid.
55 See (regarding storage of information) for example, Human Reproductive Technology Act 1991 (WA) s 45;
Assisted Reproductive Technology Act 2008 (Vic) ss 19, 49 &50; Assisted Reproductive Technology Act 2007
(NSW) s 33; Assisted Reproductive Treatment Act 1988 (SA).
56 Human Reproductive Technology Act 1991 (WA) ss 49, 49(2)(c).
57 Assisted Reproductive Treatment Act 2008 (Vic) s 59(a)-(b).
58 Assisted Reproductive Treatment Act 2008(Vic) s 59 (b)(i).
59 Assisted Reproductive Technology Act 2007 (NSW) s 37.
60 Assisted Reproductive Treatment Act 1988 (SA) s 16; Assisted Reproductive Treatment Regulations 2010
(SA) regulation 4(c).
Western Australia to donor-conceived individuals conceived pre-2004, noting that such information has been on the central register only since 1993.\textsuperscript{62} In South Australia, donor-conceived individuals may access non-identifying information at the age of 16.\textsuperscript{63} However, in South Australia there is no central registry and access has been reliant on information being held by clinics. Donors may also voluntarily place information on the register in Victoria, Western Australia and New South Wales but all have been maintained from different dates\textsuperscript{64} and the availability of such registers is not widely known.

The remaining states and territories refer to the National Health and Medical Research Council (NHMRC) guidelines for ethical practice, which from 2004:

- recognise that persons conceived using assisted reproductive treatment (ART) procedures are entitled to know their genetic parents;
- require the donor to consent to the release of identifying information about himself or herself;
- emphasise the significance of the biological connection that donors have with the persons conceived using their gametes;
- require donors to be advised that the persons conceived are entitled to knowledge of their genetic parents and siblings.\textsuperscript{65}

\textsuperscript{62} Human Reproductive Technology Act 1991 (WA). (Note the Act came into operation, on 8 April 1993, and central records have only been stored since April 1993).
\textsuperscript{63} Reproductive Technologies (Clinical Practices) Act 1988 (SA).
\textsuperscript{64} For example the WA voluntary register includes details of people involved in donation since ART started in Western Australia (circa the early 1970s) its operations are influenced by whether the donation was made before or after the Human Reproductive Technology Act 1991. The only records available before the commencement date of that Act are those held by the fertility clinics and medical practitioners that provided such services. Because detailed records were not always kept in the early days of ART the registry notes that it is very difficult to match records for donors and donor offspring where donations were made before the early 1980s.
\textsuperscript{65} National Health and Medical Research Council. Ethical Guidelines on the use of Assisted Reproductive Technology in Clinical Practice and Research (2004).
However, the NHMRC guidelines are not law, and do not link in to any central registry to ensure information is maintained and made available to donor-conceived individuals. Submissions to the Senate Inquiry also indicated that clinics vary in the assistance given to donor-conceived individuals in accessing information.

That the law varies across states and territories in a Federal system is not unusual. However, given there is recognition of the need for and entitlement to information nationwide (via legislation or the NHMRC guidelines), the argument for legally mandated retrospective release of information in relation to the national inconsistencies gains force. The Senate Committee called for the entitlement to information by donor-conceived individuals to be mandated across all Australian jurisdictions. They asked the states and territories to consider further the retrospective release of such information.66 In doing so the states and territories must recognise that allowing the law to continue to deny a subset of donor-conceived individuals access to the very information that is recognised as essential to all donor-conceived individuals would be inconsistent and therefore unacceptable.

**vii Analogy with Adoption**

Psychologists have drawn many parallels between the experiences of donor-conceived individuals and adoptees, particularly in relation to the problems described above that some individuals experience in relation to genealogical bewilderment as a result of being denied access to information,67 and the secrecy that in the past shrouded both practices. Similarly the

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66 Senate Legal and Constitutional Affairs Reference Committee, *Donor Conception Practices in Australia* (2011) p 96. At [7.25] ‘The committee urges the states and territories to further consider the issue of retrospectivity in the creation of any national register (including seeking and obtaining legal advice, as considered appropriate).’

Canadian Supreme Court of British Columbia has held that the circumstances of adoptees and those of donor offspring, with regard to the need to know and have connection with one’s roots, are closely comparable. The Senate Committee Report recognised numerous submissions that drew this analogy. They said

all states and territories have legislation which sets out the rights that adopted people have to information about their birth parents. . . . All state and territory legislation provides adopted people with the right to identifying information about their biological parents, including their original birth certificate. However, legislation is not consistent between states and territories and, additionally, not all adoption legislation in Australia is retrospective. For example, in South Australia and Queensland, birth parents and adopted people may veto the release of identifying information, and any contact, if the adoption was finalised prior to the commencement of the relevant legislation in those states.

With respect, this is not quite correct. All laws in Australia were passed with retrospective effect. The possibility of contact and/or identifying information vetoes does not negate the retrospectivity of the law. Rather, it gives the relinquishing parent the option to ‘opt out’ of the retrospective system. Some jurisdictions only provided the option to ‘opt out’ in relation to contact. Victoria does not allow any vetoes at all. All jurisdictions except South Australia provided for the retrospective release of identifying information.

In Queensland, the identifying information and contact vetoes applied only to adoptions that occurred prior to 1991. However, in 2010 Queensland enacted the Adoption Act 2009 (Qld), which retrospectively removed the option of placing a veto on identifying information. Acting Child Safety Minister, Karen Struthers said at the time

No longer will we have the most restrictive adoption laws in the country... Under the new Act, which will come into force on February 1, 2010,

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68 Pratten v British Columbia (Attorney General) 2011 BCSC 656, [3]. This case is discussed further below at Section IV.

adopted people and birth parents will have the right to identifying information regardless of when the adoption took place. The new laws balance people's right to information about their birth parents or son or daughter who was adopted, with the right of others to maintain their privacy. Currently more than 3000 Queenslanders affected by an adoption that occurred before 1991 are prevented from obtaining identifying information about their birth parents or son or daughter who was adopted. The new Act will give these people the right to access information about their own identity or that of a son or daughter for the first time. The new laws will make it possible for people to access identifying information about themselves and their birth parents but still requires them to respect another person's privacy if they do not wish to be contacted.\(^70\)

The explanatory memorandum of the Queensland Act details that peoples' privacy would be protected via enabling contact vetos, and placing fines for breach of such vetos. It states 'this retrospective removal of their rights must be balanced with the benefits that arise by allowing other parties to those adoptions access to information about their identity, family and heritage. The change in the law also ensures that parties to adoptions are treated equally, regardless of when the adoption occurred, as there is no longer any entitlement to object to the release of identifying information.'\(^71\)

Similarly, Western Australia previously allowed for both contact and information vetoes, however information vetoes were removed. In this jurisdiction, a person who wishes to gain access to information that was previously restricted by an information veto, and where a contact veto is in place, is required to be interviewed by an approved counsellor and to sign an undertaking not to contact the vetoer. Breach of the undertaking imposes penalties of $10,000 and 12 months in prison. The purpose of counselling in these instances is to ensure


that the rights of all involved parties are fully understood and that people are made aware of some of the issues which may arise in the search and reunion process.\textsuperscript{72}

In 1992 the NSW Law Reform Commission detailed the reasoning for retrospective release of information about adoptees in NSW. In relation to the retrospective enactment of legislation, they reiterated that there is no legal principle preventing legislation from having retrospective operation.\textsuperscript{73} They recognised that the law relating to information about adoption needed to deal fairly with many different people and situations and that a further complication existed, in that the law has to deal with the consequences of adoptions that took place over a long period of time - from the 1920s to the mid-1970s - and over that period there were major changes in adoption law and practice. The degree of secrecy that prevailed at the time of the adoption, the amount of information supplied to the parties, and the information available from existing records, all vary considerably according to the period in which the adoption took place, the agency which arranged the adoption, and other factors. It is a difficult task to design a law that will deal appropriately with all the people and situations involved in this complex picture.\textsuperscript{74}

The NSW Law Reform Commission concluded that in passing retrospective laws in NSW that allowed identifying information release to adoptees, there had in fact been a weighing up the competing interests of different groups of people affected by adoption, namely adopted people, birth parents, adoptive parents, and other relatives. \textquoteleft\textquoteleft[T]he view that prevailed was that the law should enable adopted persons and birth parents to have the right to information, even though this did mean a change from the position as it was when the adoption order was

\textsuperscript{74} Ibid, Chapter 3.
made. The interests of those who felt threatened by the new law were acknowledged by a number of measures, notably the contact veto system.\textsuperscript{75}

The Victorian Adoption Network for Information and Self Help Inc (VANISH) note that despite the initial anxiety surrounding the retrospective release of information regarding adoption it is now well accepted that it is normal for adopted people to want information about their birth parents.\textsuperscript{76} That some jurisdictions provide the option for vetoes pertaining to contact to be placed does not take away the force of arguments that advocate information release.

The Australian Institute of Health and Welfare reported in 2008 that in 2006-2007 there were 2,851 applications made in relation to adoptions, 83\% of which were for identifying information. In that year, there were 80 contact vetoes lodged. The vast majority of information applications (both identifying and non-identifying) were made by the adopted person, being 73\%. Fifteen percent were lodged by birth parents, and 7\% by other relatives. Nine in ten adopted persons seeking identifying information were aged 25 years and over, and over two thirds were aged 35 years and over.\textsuperscript{77} The AIHW also note that over the years, the number of applications for information far exceeded the number of vetoes lodged against contact or the release of identifying information.\textsuperscript{78}

Clearly the analogy can be drawn with donor-conceived individuals. Australia is seeing an increased call for identifying and non-identifying information as donor-conceived individuals reach their late twenties and onwards. These are the donor-conceived individuals

\textsuperscript{75} Ibid.
\textsuperscript{76} Commonwealth, Senate Committee Hansard, 3 November 2010, 65-70, Mr Cole (from VANISH).
\textsuperscript{78} Ibid, p 30.
conceived in the 70s and 80s. They call for a similar system as implemented for adoption. As Mr Egan of FamilyVoice Australia commented during the Senate Inquiry,

if legislation establishing a national register was retrospective, contact vetoes could be put in place the way they are in adoption cases [n]o-one wants to force themselves on someone else, but they do have a right to know where they come from, who they are, who their relatives are and so on. That should include the ability to track donor siblings so you know who your brothers and sisters are. That seems to me a fundamental human right. That is the ‘right to know’ stuff.39

It must also be recognised that of those donor-conceived individuals, donors, and recipients, that seek information, some might not wish to forge relationships. Many simply desire information. It is here emphasised that the law in Queensland was changed retrospectively to address the issues faced by more than 3000 Queenslanders affected by the previous legislation, and yet the numbers of donor-conceived individuals denied information in Australia runs into the tens of thousands.

viii Human Rights Arguments

It is also relevant to recognise arguments that place the issue of access to information by donor-conceived individuals about their donors within a human rights framework. Such arguments have existed for some time. In 1998, Ramsey stated

[p]rinciples from the domain of human rights can provide an important framework for responding to one of the most pressing challenges confronting reproductive technology...access by donor offspring to information about their origins...[P]ut at its most succinct, from a human rights perspective, one might ask the question — how can one argue against the basic human right to know one’s genetic identity?40

39 Commonwealth, Senate Committee Hansard, 29 October 2010, pp 19-20, Mr Egan (Family Voice Australia).
Australia’s obligations under a number of international treaties support this. Particularly relevant ‘rights’ are raised as follows:


Arguably the most applicable Articles of CROC to the issue of donor conception are Articles 7 and 8.

Article 7 specifies that every child has a right to know and be cared for by their parents as far as possible. 81 With respect to this article, the Implementation Handbook for the Convention on the Rights of the Child (IHCRC) states 82

a reasonable assumption is that, as far as the child’s right to know his or her parents is concerned, the definition of “parents” includes genetic parents (for medical reasons alone this knowledge is of increasing importance to the child) and birth parents, that is the mother who gave birth and the father who claimed paternity through partnership with the mother at the time of birth (or whatever the social definition of father is within the culture: the point being that such social definitions are important to children in terms of their identity). In addition, a third category, the child’s psychological parents – those who cared for the child for significant periods during infancy and childhood – should also logically be included since these persons too are intimately bound up in children’s identity and thus their rights under article 8.

Whilst a non-biological parent(s) is considered the legal parent(s) of a donor-conceived child in Australia, this should not preclude that child having information about their genetic parent(s). The UN Committee has noted the possible contradiction between Article 7 of the Convention with the policy of the State Party in relation to artificial insemination, ‘namely in keeping the identity of sperm donors secret.’ 83

Article 8 states that every child has a right to preserve his or her identity, including

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83 Norway CRC/C/1/S/Add.23, para. 10.
nationality, name and family relations as recognized by law without unlawful interference.\textsuperscript{84}

Denying a donor conceived individual access to information about their genetic heritage may contravene this right by denying them access to important information that can help in development of identity and preserve family relations. With respect to this Article, the IHCRC notes

{\textbf{[t]he concept of “children’s identity” has tended to focus on the child’s immediate family, but it is increasingly recognized that children have a remarkable capacity to embrace multiple relationships. From the secure foundation of an established family environment, children can enjoy complex and subtle relationships with other adults and with a range of cultures, to a much larger degree than may be recognized. Thus children’s best interests and senses of identity may be sustained without having to deny them knowledge of their origins, for example after reception into state care, through “secret” adoptions or anonymous egg/sperm donations and so forth.}}

The message is clear that pursuant to the above articles, secrecy and anonymity are not in the best interests of the child. Other articles are also relevant.

Article 2 requires States Parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.\textsuperscript{85} The status of a child's parent as 'recipient' or 'donor' should not therefore preclude the child from having information about their genetic heritage. It could be deemed discriminatory to deny donor-conceived individuals information about their genetic heritage when other children in Australia have access to such information.

Article 3 (1) provides that ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or


\textsuperscript{85} Ibid.
legislative bodies, the best interests of the child shall be a primary consideration. The best interests of the child includes access to information about their biological heritage for reasons such as having information about familial medical history, psychological health and well-being, development of identity, avoidance of consanguineous relationships, knowledge of genetic siblings and parent(s).

Article 13 provides that the child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds... Denying donor-conceived individuals the right to seek and receive information about their genetic heritage may therefore contravene this right. (Note: the exercise of this right may be subject to certain restrictions as provided by law and are necessary a) for respect of the rights or reputations of others; or b) for the protection of national security or of public order, or of public health or morals. The 'right to privacy' of donor's may be raised in relation to (a) and is discussed further below).

b. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights, also gives rise to argument that may support information release. For example, Article 7 states that all are equal before the law and are entitled without any discrimination to equal protection of the law. Denying donor-conceived individuals access to information about their genetic heritage treats them differently, and therefore it is submitted unequally, to other Australian children. Most children are granted access to information about their genetic heritage via their birth certificates, or other means within the law. The Family Court of Australia has the power to

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86 Ibid.
87 Ibid.
order DNA testing when trying to determine genetic parentage pursuant to issues governed by the *Family Law Act 1975* (Cth). Some states actually provide information release to donor-conceived individuals. On the other hand, as seen in Section III(A)(vii) some adoptees in South Australia are denied access to identifying information about their birth parent(s) as a consequence of the veto system.

c. **Local Human Rights Charters**

Reference to human rights arguments is not confined to international law or treaties. For example, in their submission to the Senate Committee inquiry into donor conception the Public Interest Law Clearing House (PILCH) argued that the issue of access by donor-conceived individuals to donor information in Victoria raised a number of complex human rights issues given that state’s *Charter of Human Rights and Responsibilities Act 2006* (Vic). They said

> [o]n the one hand, the denial of access to donor identifying information may be inconsistent with...[provisions of the Charter of Human Rights and Responsibilities Act 2006 (Vic)] including the freedom of expression (including freedom to seek and receive information of all kinds), the right to recognition and equality before the law, the protection of families and children, and cultural rights. On the other hand, the right of donors to privacy and reputation may be impinged upon if access to donor identifying information is too freely available. A balance must be struck between the rights of donors and donor-conceived individuals.

The balancing process is considered further in Section IV.

**B Parents of Donor-conceived individuals**

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83 *Family Law Act 1975* (Cth) s 69W.
80 *Adoption Act 1988* (SA) ss 27, 82(3).
99 Submission 125, 8 to the Senate Legal and Constitutional Affairs Reference Committee Inquiry into Donor Conception Practices in Australia (2010).
Parents being unable to Provide Information to their Children

The current state of law also affects parents of donor-conceived individuals. Such parents are prevented from being able to provide their children with information that many actually desire to impart. For example, during the Senate Committee Inquiry, the Victorian Infertility Counsellors Group submitted

[...up until the [Assisted Reproductive Treatment Act 2008 (Vic)], fertile women had to travel interstate to seek treatment and did therefore not come under Victorian legislation [which provides for information recording and release]. These women and their children therefore do not have the same access to information about their donor origins as do donor conceived offspring in the rest of the Victorian community. These women find it particularly difficult not to be able to provide their children with up to date and accurate information about their donor, often only having a few lines of information to share with their child. A retrospective national register would assist in rectifying this inequality.92

Issues of equity are again apparent. Parental interests and desire to be open and able to provide their child with information about that child’s genetic heritage are clearly denied. Parents are also affected in other ways. They may ‘wish to thank the donor for helping them become a family and/or may wonder what they are like and what their child has inherited.93 They may also wish to be able to refer to the donor by a name when telling their children about the method of conception, rather than referring to him/her as ‘donor’. Without laws mandating the retrospective release of information parents are unable to do so, or to share information within their families.

Parental Curiosity about Donor-Conceived Siblings and Donors

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In 2009, researchers from the United Kingdom’s Cambridge University Centre for Family Research recruited 791 parents via the Donor Sibling Registry\(^4\) in order to study why parents seek information about their donor-conceived children’s donor-conceived siblings and donors.\(^5\) The study found that parents’ principal motivation for searching for their child’s donor siblings was curiosity. In relation to their search for their donor, their primary reason was to enhance their child’s sense of identity.\(^6\) Eleven per cent of parents who had found their child’s donor siblings had found ten (10) or more, with one parent finding fifty five (55).

An overwhelming majority of parents reported positive experiences of contacting and meeting their child’s donor siblings and donor. Very few negative experiences were reported: 2% (8) reported negative experiences of contacting their child’s donor siblings for themselves and 1% (2) parents reported negative experiences for their child.\(^7\) Parents frequently described feeling excited and happy on their child’s behalf when they found donor siblings, and viewed the addition of such relationships to their children’s lives as ‘enriching’, ‘wonderful’ and ‘fun’.\(^8\) Most parents reported that the impact of searching for both their child’s donor siblings and their child’s donor had a ‘neutral’ or ‘positive’ impact on their relationship with their child.\(^9\) The study concluded that having access to information about a

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\(^4\) The Donor Sibling Registry is US-based international registry that facilitates contact between donor conception families who share the same donor.

\(^5\) T. Freeman, V. Jadva, W. Kramer, and S. Golombok, ‘Gamete Donation: Parents’ Experiences of Searching for their Child’s Donor Siblings and Donor’ (2009) 24(3) Human Reproduction 505–516. The parents consisted of 39% lone mothers, 35% lesbian couples and 21% heterosexual couples. 91% (717) of parents lived in the United States, 5% (37) in Canada and 1% (8) in the UK; other countries of residence included Austria, Germany, Ireland, Spain, Sweden, Australia, New Zealand and Israel.

\(^6\) Ibid.

\(^7\) Ibid, 511.

\(^8\) Ibid, 511.

\(^9\) Ibid, 509.
child's donor origins is important for some parents and has potentially positive consequences.\textsuperscript{100}

Such results support the release of information. In particular, they show that 'kinship relationships are based on both direct and indirect genetic connections and shared understandings and experiences, out of which new concepts of the family are being defined and negotiated.'\textsuperscript{101}

As a nation Australia recognises and embraces diversity, and supports varying family types. We should do so for the extended family connections that are being newly defined in relation to donor-conception.

\textit{iii Parental Fear of Telling}

Some parents however, may have fears associated with disclosing that their child was donor-conceived. Some may have kept a secret for a long time, and feel they are now unable to tell, they may fear rejection, or that they will lose the child (or adult) they love.\textsuperscript{102} Many parents received treatment when the culture of secrecy was strong, and may genuinely feel that they are protecting their children and their families, or are shamed by their battle with infertility.\textsuperscript{103} Daniels states 'confidence is required in order to resist potential stigma and view donor conception as a way to build families in a positive manner'.\textsuperscript{104}

Whilst the Cambridge University study described above illustrates that many of these fears may not become reality, some parents who conceived in the time where secrecy was

\begin{itemize}
\item \textsuperscript{100} Ibid, 509.
\item \textsuperscript{101} Dr Tabitha Freeman, research associate at the Centre for Family Research, University of Cambridge quoted at \url{http://www.disabled-world.com/news/research/donor-conceived-children.php}, viewed 9 May 2011.
\item \textsuperscript{102} Ken Daniels, 'Donor Gametes: Anonymous or Identified' (2007), 21(1) Best Practice and Research Clinical Obstetrics and Gynaecology at 113-128.
\item \textsuperscript{103} Ibid.
\item \textsuperscript{104} Ibid.
\end{itemize}
emphasised, may need significant support in telling their children, and in accepting their offspring’s desire for information. Nonetheless, when parents find the courage to tell, many describe feeling a sense of relief in telling their children, and in that they have been able to ‘pass the baton’ to the donor-conceived individual, recognising that the information rightly belongs to them.¹⁰⁵

C Donors

i Donors do not Necessarily Wish to Remain Anonymous

It is not necessarily the case that past donors wish to remain anonymous.¹⁰⁶ The Donor Conception Support Group quoted in their submission to the Senate Committee a former sperm donor who stated

I was a sperm donor during 1997-1998. [M]y donations were during the period when [d]onors had to sign away any future contact. This was a condition of participation and I only wanted to help people – but at the back of my mind was the hope that the rules would change to allow the resultant children to trace their donor fathers, if they wished to do so.¹⁰⁷

Similarly, the Victorian Assisted Reproductive Treatment Authority (VARTA) state that the belief that secrecy was paramount to protect all parties to the arrangement was based on myths ‘that donors would not want to be contacted, that parents would not want to know more about their donor, and that donor-conceived individuals would not want information about their donor if they really loved their parents’.¹⁰⁸ VARTA state that ‘donors do not

¹⁰⁶ Rainbow Families Council, Submission 73, 2; DCSG, Submission 122, 139 to the Senate Legal and Constitutional Affairs Reference Committee Inquiry into Donor Conception Practices in Australia (2010).
Sonia Allan. Psycho-Social, Ethical and Legal Arguments For and Against the Retrospective Release of Information about Donors to Donor-Conceived Individuals in Australia (2011) 19(2) Journal of Law and Medicine (Forthcoming). (Advance copy supplied with permission from JLM).

forget they have donated and often wonder about the people they helped to create. Who are they? Are they healthy? Are they happy? Are they loved?100

At a seminar held in Victoria, Australia, aimed at educating parents about how to tell their children they were donor conceived, one donor said

At the time of my donations, made in the early 80s, I don’t think I understood what I was doing. I don’t think I gave truly informed consent, as I was simply asked to sign a form, and had a brief discussion with the people who worked at the clinic about what had to be done from there. I don’t believe I had a contract with anyone. I think I was told that it was anonymous, but this wasn’t explained, and having seen an ad in the paper, and having known an infertile couple, I just wanted to help people. It was not until I had my own children that it began to dawn on me. I then one day received a letter from the ITA [infertility treatment authority], stating I had helped to conceive seven (7) other children. They are out there somewhere, they might not know, I have so many questions, and fear I will never know, they will never know.101

Studies have also shown that donors who may once have wished for anonymity may at a later date wish to meet the donor-conceived individuals and that their thoughts on the matter may change over time.111 Some studies have also indicated that the majority of donors agree to the release of medical records,112 however there is yet to be a system put into place that ensures these records are updated and that vital information is disseminated to offspring and recipient parents. There does not as such seem to be a blanket refusal to share information.

As seen below, arguments made against release of information about donors often centre on a ‘donor’s right to privacy and confidentiality’ and/or the contract for anonymity

109 Ibid.
that was made. However, as such privacy, confidentiality and anonymity were mandated by the medical profession at the time of donation, one may question the perpetuation of secrecy and denial of information in an age where the entitlement for information has been established. In reviewing the retrospective release of information we must not assume that donors wish to remain anonymous. For many donors particularly in jurisdictions where there were no registers and no legislation they were not given any choice. Legislation providing for the retrospective release of information could provide an ‘opt out’ for donors who do not wish to be contacted by allowing contact vetoes.

ii Privacy and Confidentiality

Arguments against the retrospective release of identifying information often raise issues of the donor’s right to privacy and confidentiality.\textsuperscript{113} For example, in their submission to the Senate Committee inquiry the Fertility Society of Australia (the body that represents fertility doctors and clinics Australia wide) suggest that retrospectivity would be a ‘grievous violation’ of the privacy of donors who previously entered into confidential agreements in good faith.\textsuperscript{114} Privacy is a contentious and complicated subject. Like the ‘rights’ discussed above in relation to arguments for information to be released to donor-conceived individuals, Australia’s international obligations under the \textit{International Covenant on Civil and Political Rights}\textsuperscript{115} give rise to obligations to recognise a basic human right to privacy premised on the

\textsuperscript{113} Note the terms ‘privacy’ and ‘confidentiality’ are commonly used interchangeably however, whilst related they are not identical concepts in law. Privacy may include physical privacy, and also privacy that relates to information about a person. Information privacy laws regulate the handling of personal information through enforceable privacy principles. Confidentiality relates to information only.

\textsuperscript{114} Submission 106, 11 to the Senate Legal and Constitutional Affairs Reference Committee inquiry into Donor Conception Practices in Australia (2010).

autonomy and dignity of the individual. Such arguments support cautiousness in any consideration of releasing personal (and identifying) information.

Nonetheless, whilst a ‘right to privacy’ is recognised to some degree in Australian law the ‘right to privacy’ is not absolute. This is illustrated by statement made by the Australian Law Reform Commission in its 2008 report on privacy that

as a recognised human right, privacy protection generally should take precedence over a range of other countervailing interests, such as cost and convenience. It is often the case, however, that privacy rights will clash with a range of other individual rights and collective interests, such as freedom of expression and national security. Although the ALRC often heard emphatic arguments couched in the language of rights, international instruments on human rights, and the growing international and domestic jurisprudence in this field, all recognise that privacy protection is not an absolute. Where circumstances require, the vindication of individual rights must be balanced carefully against other competing rights...\(^{116}\)

In fact, there are clear exceptions to the protection of private and/or confidential information in Australia.\(^{117}\) Examples of the ability to release information exist in many areas of the law: there exists statutory provision for the release of identifying information in relation to reporting of communicable diseases;\(^{118}\) suspected child abuse;\(^{119}\) supply of certain

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*\(^{118}\)* Public Health and Wellbeing Act 2008 (Vic) s 127; Public and Environmental Health Act 1987 (SA) ss 30 s30(1)(b); Health Act 1911 (WA) ss 276, 300, 300(4)(b); Public Health Act 1997 (Tas) ss 48, 49, 61 and 50(1)(c); Public Health Act 2010 (NSW) ss 54, 55, s 56 (4); Notifiable Diseases Act 1981 (NT) s8(1)(b); Public Health Act 2005 (Qld) ss 70-73; Public Health Act 1997 (ACT) ss 102(1)(d), 102, 102A.

*\(^{119}\)* Public Health Act 2005 (Qld) ss 158, 191-193, Child Protection Act 1999 (Qld) s 148, Commission for Children and Young People and Child Guardian Act 2006 (Qld) s 20; Children, Youth and Families Act 2005 (Vic) ss 182, 184; Children, Young Persons and their Families Act 1997 (Tas) ss 13, 14; Children’s Protection Act 1993 (SA) s 11, Family and Community Services Act 1972 (SA) s 73; Children and Young Persons (Care and Protection) Act 1998 (NSW) ss 23, 27; Community Welfare Act 1983 (NT) s 14(1), Care and Protection
drugs, or supply of drugs of addiction to registered addicts;\textsuperscript{120} reportable deaths (to the Coroner);\textsuperscript{121} illness affecting driving ability;\textsuperscript{122} and impairment affecting a registered health professional’s ability to practice.\textsuperscript{123} By analogy, the health issues relating to non-disclosure of donor information arguably counter-weigh the need to keep such information private. As discussed above, the retrospective release of identifying information to adoptees regarding their biological parent(s) is also provided for in all states and territories,\textsuperscript{124} except for South Australia which continues to allow for information vetoes to be placed.\textsuperscript{125}

There also exists common law authority in a number of other contexts where private information may be disclosed. In the context of breach of confidence the law provides that private information may be released in circumstances where the withholding of information would lead to iniquity.\textsuperscript{126} That is ‘if the subject matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed’.\textsuperscript{127} In the law of negligence there is also precedent that recognises a ‘public interest’ exception to the general duty of

\textit{for Children Act 2007 (NT) ss 23, 26; Children and Young People Act 2008 (ACT) ss 356, 362; Children and Community Services Act 2004 (WA) ss 101, s124B.}

\textsuperscript{120} See for example, \textit{Poisons Regulations Act 1965 (WA) Reg 51FE.}
\textsuperscript{121} See for example \textit{Coroners Act 2003 (Qld) ss 8, 17; Coroners Act 2008 (Vic) ss 4, 10-13.}
\textsuperscript{122} See for example \textit{Motor Vehicle Act 1959 (SA) s 148.}
\textsuperscript{123} See for example \textit{Health Professions Registration Act 2005 (Vic) s 36.}
\textsuperscript{124} \textit{Adoption Act 1993 (ACT); Adoption Act 2000 (NSW); Adoption of Children Act 1994 (NT); Adoption Act 2009 (Qld); Adoption Act 1988 (SA); Adoption Act 1988 (Tas); Adoption Act 1984 (Vic); Adoption Act 1994 (WA).}
\textsuperscript{125} \textit{Adoption Act 1988 (SA) s 27(H).}
\textsuperscript{126} \textit{Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 282 (Lord Goff); Gartside v Outram (1857) 26 Ch (NS) 113, 114 (Wood VC) (“there is no confidence as to the disclosure of iniquity”); Beloff v Pressdram [1973] 1 All ER 241, 260; Castrol Australia Pty Ltd v EmTech Associates Pty Ltd [1980] 51 FLR 184, 213-214; A v Heydon (1984) 156 CLR 532.}
\textsuperscript{127} \textit{Corrs Pavey Whiting and Byrne v Collector of Customs (Vic) (1987) 14 FCR 434, 455-456 per Gummow J; Smith Kline & French Laboratories (Australia) Limited v Secretary Department of Community Services and Health (1990) 22 FCR 73, 110-111 per Gummow J; British American Tobacco Australia Limited v Gordon & Ors (No 3) [2009] VSC 619.}
confidentiality which may enable a doctor to release information to avoid a serious risk to a third party, for example where a person’s sexual partner has HIV and the person risks infection.\(^\text{128}\)

In relation to genetic information, the Australian Law Reform Commission’s Report on privacy recommended that

\[
\text{[p]rivacy laws should be harmonised and tailored to address the particular challenges of human genetic information. Among other things, this will require extending privacy protection to genetic samples as well as genetic information. However, the familial dimension of genetic information also requires acknowledgment – for example, doctors should be authorised to disclose personal genetic information to a genetic relative where disclosure is necessary to lessen or prevent a serious threat to an individual’s life, health, or safety.}^{129}
\]

The *Privacy Act 1988* (Cth) was amended in 2006 to permit health professionals to use or disclose genetic information whether or not a patient gives consent in circumstances where there is a reasonable belief

\[
\text{that the use or disclosure is necessary to lesson or prevent a serious threat to the life, health or safety (whether or not the threat is imminent) of an individual who is a genetic relative of the individual to whom the information relates.}^{130}
\]

Guidelines developed by the National Health and Medical Research Council on the use and disclosure of genetic information by private health care professionals were released in 2009,\(^\text{131}\) and include that where such information needs to be released:

- reasonable steps should be taken to obtain consent;\(^\text{132}\)
specific ethical considerations must be taken into account when making a decision about whether or not to use or disclose genetic information without consent;\textsuperscript{133}

where practicable the identity of the patient should not be apparent…;\textsuperscript{134}

disclosure to genetic relatives should be limited to genetic information necessary to convey the increased risk, and should avoid disclosing the identity of the patient;\textsuperscript{135}

disclosure without the consent of the patient should generally be limited to people no further removed than third-degree relatives;\textsuperscript{136}

It is clear that release of information is possible. Further, the national privacy protection legislation and the National Privacy Principles recognise that information may be released where the use or disclosure of such information is required or authorised by or under law.\textsuperscript{137}

Given the call for information is not just one based on a desire to know medical history or information about heritable diseases, it is possible therefore that the legislature choose to pass laws that simply allow for the release of information without having to meet any of the above ‘exceptions’. Such laws would not lead to contravention of the privacy legislation, and in fact would enable doctors to confidently and legally release information about donors to donor-conceived individuals without fearing they were breaching privacy or confidentiality obligations.

\textit{iii Contracts for Anonymity}

The Senate Committee reported having received a limited number of submissions that did not support the retrospective release of identifying information about donors because, in

\textsuperscript{133} Ibid, Guideline 2.
\textsuperscript{134} Ibid, Guideline 6.
\textsuperscript{135} Ibid, Guideline 7.
\textsuperscript{136} Ibid, Guideline 8.
\textsuperscript{137} Privacy Act 1988 (Cth) s 14.
the past, sperm donors often signed or had a verbal contract which assured the donor of anonymity.\textsuperscript{138} For example, the Canberra Fertility Centre were ‘emphatically opposed to any retrospective legislation…as it would seem unfair to donors who donated under the impression they would remain anonymous’.\textsuperscript{139} The Senate Committee noted potential legal difficulties in relation to contracts for anonymity that

\begin{quote}
unlike the abolition of anonymity in adoptions, in which the states or territories were generally involved through public hospitals or state-run institutions, the committee understands that donating gametes often involved a contract between the donor and a private clinic or medical practitioner. While little evidence was presented to the committee on this issue specifically, the committee is concerned about any contractual or other legal obligations that exist between donors and clinics which, if breached, may potentially leave the states and territories or ART clinics open to claims for compensation.\textsuperscript{140}
\end{quote}

However, if law was passed retrospectively to make void any anonymity clause in a contract for donor conception, it is unclear how clinics would be open to claims for compensation. The alleged ‘anonymity’ clause in the contract could not be enforced. As stated in Section II retrospective legislation may ‘take away or impair any vested right acquired under existing laws, or create a new obligation, or impose a new duty, or attache a new disability in respect to transactions or considerations already past’.\textsuperscript{141}

Even without such legislation, it may be argued that any such contracts may be void for public policy reasons. For example, there is overseas precedent where a contract for anonymity between a private clinic and a donor was held to be so.\textsuperscript{142} In Johnson v Superior

\begin{footnotesize}
\textsuperscript{138} For example see Canberra Fertility Centre, Submission 48, 7; Fertility Society, Submission 106, 11 to Senate Legal and Constitutional Affairs Reference Committee inquiry into Donor Conception Practices in Australia (2010).
\textsuperscript{139} Ibid.
\textsuperscript{140} Senate Legal and Constitutional Affairs Reference Committee, Donor Conception Practices in Australia (2011), p 96 at [7.25].
\textsuperscript{141} L'Office Chrifien des Phosphates and another v Yamashita-Shiinohan Stewship Co Ltd The Bournan [1993] 3 All ER 686, 682 per Sir Thomas Bingham MR.
\textsuperscript{142} Johnson v Superior Court, 95 Cal. Rptr.2d, 864 (Cal. App. 2d Dist, 2000).
\end{footnotesize}
Court, an 11 year old donor-conceived girl, Brittany Johnson, won the right to information from a California Cryobank about her donor father. Although the parents had been guaranteed that sperm was screened for heritable disease, at age six Brittany Johnson developed a genetic kidney disease inherited from her biological father. The contract between the sperm bank and the donor prohibited disclosure under any circumstances. The Court held that obtaining important genetic and medical information for donor offspring would, in some circumstances, require the disclosure of the sperm father’s identity, and that ‘a contract that completely forecloses the opportunity of a child conceived by artificial insemination to discover the relevant and needed medical history of his or her genetic father is inconsistent with the best interests of the child.’ On the issue of privacy, the Court held that the father’s right to privacy was limited and was outweighed by compelling state interests in disclosure. They noted, (as discussed above in relation to Australian law), that privacy rights are not absolute and must be balanced against other interests.

Significantly, the only written ‘contracts’ that appear to exist are (1) ‘donor statement and consent’ forms which the donors were required to sign; and (2) recipient consent forms. The ‘anonymity clause’ in the form used by the Royal Women’s Hospital in 1977 states: I understand that the identity of any recipient shall not be disclosed to me nor shall you reveal my identity to any recipient.

This clause does not preclude or prohibit release of information to donor-conceived children (or anyone other than the recipient). The form further required the donor to agree never to seek the identity of any child or children born or any recipient of my semen, nor shall I seek to make any claim with respect to such child or children in any circumstances whatsoever.

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143 Ibid.
144 Ibid at 875.
Again however, this *does not* prohibit a donor-conceived individual from seeking information about their donor. It would have been impossible to bind a non-existent party (a potential, but not as yet existing child) to the contract for anonymity. Forms from the Queen Victoria Medical Centre, required the donor to agree that the woman to whom their semen was provided to make pregnant ‘would remain unknown’ to them, and that the donors ‘identity shall never be revealed to her’. Again, there is no restriction, or agreement, that the donor would remain unknown to the child conceived as a result of using his sperm. The argued contract therefore does not protect the identity of a donor insofar as the donor-conceived individual is concerned. Nor would it leave the medical clinics open to liability if they released such information to the donor-conceived individual or to for example, a donor register, as the donor did not sign anything stating that this was prohibited, or even a condition of their agreement/consent to provide sperm.

Recipient contracts appear to have been the same. For example, a form used in New South Wales at the Westmead Hospital states

> We understand that the identity of the donor will not be disclosed to us, nor shall we directly or indirectly seek his identity.

Again, this *does not* prohibit the donor-conceived individual from doing so.

Nonetheless, arguments that raise the spectre of ‘injustice’ or ‘fairness’ are valid, and the above mentioned privacy and confidentiality issues still need be resolved. For those who donated and who wish to remain anonymous, it may appear an injustice to retrospectively release their information. The Senate Committee urged the states and territories to further consider the matter and, where necessary, to seek expert legal advice. Within the present paper’s scope a call for further analysis is also made. However, whilst it is beyond the scope
of this paper to delve further into the issues of contract law, it is certain that arguments based purely upon alleged contracts for anonymity do not in themselves close the matter of retrospectivity. Nor do they seem to reflect what in fact those ‘contracts’ contained. In any case, if there were anonymity clauses in other contracts, the legislature has the power to make such anonymity clauses void.  

iv Risk of Donors Refusing Contact

The final argument against retrospective release of information raised in one submission to the Senate Committee Inquiry was that ‘[i]t may also be devastating to a child or the recipient parents if their attempt at contact with the donor was rebuffed.’ 147 This again, does not in itself have force of the arguments raised in favour of information release, and with respect seems a rather weak argument in itself. It must be emphasised that not all donor-conceived individuals want contact with the donor. Some however do want information. Some donors wish they could provide information, or know about the offspring they helped to conceive. The frustration and/or devastation faced by some donor-conceived individuals who desire information but are currently denied it may outweigh the risk of having an attempt at contact rebuffed. This of course is an unknown, but to draw on the adoption analogy again, devastation has not been the experience when information was made accessible.

IV BALANCING THE INTERESTS, RIGHTS, AND INJUSTICES

146 L’Office Chrifien des Phosphates and another v Yamashita-Shinnihon Stemship Co Ltd The Boncrau [1993] 3 All ER 686, 682 per Sir Thomas Bingham MR.
147 Canberra Fertility Centre Submission 48, 7 to the Senate Legal and Constitutional Affairs Reference Committee Inquiry into Donor Conception Practices in Australia (2010).
The above discussion illustrates that in deciding about the retrospective release of identifying and non-identifying information about donors to donor-conceived individuals balancing of ‘rights’, ‘interests’ and/or the potential injustices that may be suffered by the respective parties are called for. This is different to finding that the ‘rights’ or ‘interests’ accorded to any of the parties involved in donor conception are erroneous. Rather as illustrated in Section II, the legislature may pass retrospective legislation when it sees fit, the only exception being that where this relates to the acquisition of property it must be done so upon just terms. Retrospective legislation may be enacted even where such legislation may result in injustice to one party—in this instance, some (but arguably not all) donors. This is so because retrospectivity may serve to rectify a manifest injustice to others—donor-conceived individuals, their families and donors who wish to release information.

Human rights discourse similarly requires the weighing of benefits and detriments in relation to the competing rights being served. PILCH submitted that a human rights-based approach to access to donor information provides a helpful framework for addressing and balancing these concerns in a nuanced way. Other jurisdictions have in fact taken a ‘rights’ based approach.

In July 2002, the English High Court held that donor anonymity contravenes donor-conceived individuals’ right to ‘respect for private and family life’ guaranteed by Article 8 of

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148 Cf. the Office of the Information Commissioner Queensland (OICQ) in their submission to the Senate Inquiry who stated ‘...if donors provided sperm or eggs on the understanding that their identities would remain confidential, that should not be overridden by any new laws without evidence that the presumptions of benefit are shown to be erroneous or that any detriment that is shown to arise overrides the benefits of the policy to an extent where it becomes desirable to change the rules.’ Office of the Information Commissioner Queensland, Submission 20, 3 to the Senate Legal and Constitutional Affairs Reference Committee Inquiry into Donor Conception Practices in Australia (2010). It is argued here that that the view that the laws must be shown to be erroneous is incorrect.

149 See for example the European Court of Human Rights approach to determining whether any State interference with a right is valid. Generally they take the approach that 1) the interference must be proscribed by law and must be unambiguous (The Sunday Times v UK No2 (1991) 14 EHRR 229); 2) the aim of the interference must be legitimate (Campbell v UK ECHR, 25 March 1992, 57); 3) the interference in all the circumstances “must be necessary in a democratic society” (Smith & Greedy v UK (1999) 29 EHRR 493).
the 1950 European Convention.\textsuperscript{150} Whilst the Court did not rule upon whether there had been a breach of Article 8 in the case before it, Mr Justice Scott Baker, was clear that the applicants’ request to obtain information about their genetic fathers ‘goes to the very heart of their identity’ and was an essential element of ‘private life’ protected by the European Convention. He stated

It is to my mind entirely understandable that [ART] children should wish to know about their origins and in particular to learn what they can about their biological father or, in the case, of egg donation, their biological mother. The extent to which this matters will vary from individual to individual. In some instances... the information will be of massive importance. I do not find this at all surprising bearing in mind the lessons that have been learned from adoption. A human being is a human being whatever the circumstances of his conception and an [ART] child is entitled to establish a picture of his identity as much as anyone else.

In the 2011 case of Pratten v British Columbia (Attorney General)\textsuperscript{151} the Supreme Court of British Columbia balanced the rights of parties involved in donor conception, pursuant to the Canadian Charter of Rights and Freedoms (the Charter). In Pratten, it was asserted that the law preventing access to information was contrary to the Charter through the failure to enact any legislation to provide donor offspring with rights and opportunities to know the origins that most Canadians take for granted.\textsuperscript{152} It was argued that it was unfair and discriminatory to recognise the needs of adoptees to learn about their biological parents and roots, but to ignore the very same needs of individuals who are donor offspring and experience the same sense of loss and incompleteness as adoptees.\textsuperscript{153} The Court held that pursuant to s15(1) that ‘anonymity is not in the child’s best interests’\textsuperscript{154} and that ‘[m]ore significantly... donor offspring are the victims of stereotypical thinking about their

\textsuperscript{150} Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority [2002] Fam 962.
\textsuperscript{151} Pratten v British Columbia (Attorney General) 2011 BCSC 656.
\textsuperscript{152} Ibid. [4]-[6].
\textsuperscript{153} Ibid. [3].
\textsuperscript{154} Ibid. [247].
circumstances and needs.\textsuperscript{155} They said, ‘[s]trong and positive relationships with social parents do not satisfy or eliminate the desire and need of donor offspring to know where they came from, and their need to know their origins is just as powerful and real as those of adoptees’.\textsuperscript{156} They held that there was a violation of the rights of ...donor offspring\textsuperscript{157} and ordered that the province of British Columbia draft and enact legislation to comply with the Charter.

In some European countries donor anonymity is also prohibited on human rights grounds. Sweden became the first nation to eliminate sperm donor anonymity in 1984, Austria passed anti-anonymity legislation in 1992 partly based upon an interpretation of Article 7 of CROC, and that same year, Switzerland incorporated a new constitutional article ensuring a child’s ‘access to data concerning his lineage.’\textsuperscript{158} In all instances the right of the child to know their genetic heritage was seen to outweigh any argument for donor anonymity.

Nonetheless, in its report the Senate Committee stated that ‘while many submissions and witnesses framed the issues surrounding donor conception in terms of the rights of donor-conceived individuals or the rights of donors, some research in related areas of public policy suggests that an approach that focuses on 'rights' may not be of great assistance in this context.’\textsuperscript{159} The Senate Committee cited the Australian Law Reform Commission (ALRC) and the Australian Health Ethics Committee’s (AHEC) 2003 report into the protection of human genetic information in Australia which ‘considered analogous issues relevant to genetic parentage testing and cautioned that

\textsuperscript{155} Ibid, [248].
\textsuperscript{156} Ibid, [254].
\textsuperscript{157} Ibid, [259].
...this is not an area in which it is especially useful to draw on the language of 'rights'—whether that be a child's 'right' to know his or her biological parentage, or a man's 'right' to know who are his biological offspring. This is an area that requires a careful balancing of interests of mothers, fathers and children in different biological and social relationships with each other. To privilege the interest of one party by accepting a claim to an absolute right fails to give adequate regard to the interests of others involved in the equation.  

Arguably, the ALRC/ AHEC report was not suggesting that ‘rights’ based arguments should be rejected altogether, but rather that such language is not particularly useful when used in absolutes without considering other arguments or interests involved. As such, rather than reject rights based arguments it may be preferable to engage in the balancing of both the rights and interests of the parties involved.

Using the language of ‘interests’ still leads to an exercise where one must determine whose interests prevail or how any or all of the interests may be accommodated. Much of the debate surrounding the retrospective release of information assumes there can be conflicts of interest between the parties involved. If a donor-conceived person wishes to identify their donor, and the donor wants to keep their identity a secret, the law cannot satisfy both. The interests are competing, and the law must choose between them, or in addressing the interests it must seek a compromise. There is clear precedent that shows that the law can and does balance such interests, and at times makes a compromise. For example, it was shown above in relation to the NSW legislation on adoption that there was a weighing up the competing interests of different groups of people affected by adoption and ‘the view that prevailed was that the law should enable adopted persons and birth parents to have the right to information, even though this did mean a change from the position as it was when the adoption order was made. The interests of those who felt threatened by the new law were acknowledged by a

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number of measures, notably the contact veto system. The contact veto system was therefore the compromise.

What seems most significant is that consideration is given to all arguments for and against retrospectivity, be they ‘rights’ based or ‘interests’ based, and engage in a balancing process. In passing retrospective legislation we need to consider what injustice (if any) will arise, and whether it is outweighed by the manifest injustice that the legislation serves to correct. Given the strength of arguments above in favour of those donor-conceived individuals who are denied access to information about their genetic heritage, and their families and donors who wish to impart/exchange such information, it is argued here that on balance donor-conceived individuals’ rights and interests outweigh any possible injustice that may arise in relation to those donors who may wish to remain anonymous. Contact vetos may however provide a compromise in that those donors may protect their privacy by preventing contact by their genetic offspring.

V CONCLUSION

In making their recommendations the Senate Committee recognised the need for disclosure of information relating to donor conception to donor-conceived individuals, their donors, and their extended families. Whilst not all donor-conceived individuals may wish to access such information, the growing view is that the information must be available should they choose to do so. Access to such information is important to a significant number of individuals for reasons including but not limited to identity formation, a need to know about biological heritage and medical history, a fear of forming consanguineous relationships, and a

desire by some to connect with biologically related siblings and/or donor(s). There are human rights arguments that support the release of information, and the number of donor-conceived individuals already in existence who are affected by the secrecy that surrounded donor conception in the past is significant. There are also arguments made by both donors, and recipient parents, for such information to be released. On the other hand, privacy, confidentiality and contracts for anonymity issues are used by others to claim that information should remain closed to those donor-conceived individuals who were not protected by any laws at the time of their conception.

The Senate Committee recommended that the states and territories consider further the issue of retrospectivity. This paper may serve to highlight the complexities and legal arguments that need weighing when trying to establish whether retrospective legislation, whilst potentially serving an ‘injustice’ to some donors, may in fact be required to rectify the manifest injustice faced by donor-conceived individuals, their families, and donors who do wish for information to be released. It is apparent that as those conceived in the 70s and 80s reach adulthood the call for such information is increasing. Tens of thousands of Australians are affected. Australia has in recent decades moved to right many injustices, and in doing so as a nation celebrates different family types and recognises them at law—with the best interests of the child at the forefront. This is an opportunity to lift the veil of secrecy that has surrounded donor conception for donor-conceived individuals, their families, donors, and generations to come. There is no shame in making, or helping people to make, families. The call for information from those brought into being by such ‘family making practices’ should not be ignored.

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That said, should retrospective legislation be passed, it does not have to, nor should it occur in a way that is insensitive to the needs of all people affected by this issue. Long notice periods, counselling, and sensitivity to peoples’ personal and familial situations would of course be warranted. The contact veto system is a way of further protecting people’s privacy, whilst recognising the need and entitlement to information for donor-conceived individuals, their families, and generations to come.

In conclusion, whilst highlighting the psycho-social, ethical and legal issues relevant when considering retrospective release of identifying and non-identifying information to donors, this paper cannot in itself resolve them. It does however indicate that both ‘rights’ and ‘interest’ based arguments support that the manifest injustice suffered by donor-conceived individuals who wish to know their genetic heritage but are denied such information, outweighs the arguments put forth by some about donor anonymity, privacy and confidentiality. The law allows for retrospective legislation to be passed. The Australian legislatures need to act to preserve information held and to enact legislation that enables access to information by donor-conceived individuals nationwide.
ATTACHMENT 2

The following pages include:

- three ‘contracts’/consent forms that were signed by donors from the 70s from the three hospitals that were at the time providing donor conception services (Royal Women’s Hospital; The Queen Victoria Medical Centre; Prince Henry’s Hospital);
- a consent form signed by the spouse of a donor in 1977 at the Royal Women’s Hospital;
- a consent form signed by a recipient parent in NSW at Westmead Hospital.
DONOR STATEMENT & CONSENT

TO: Doctor: 
AND TO: The Royal Women's Hospital.

1. I offer my services as a donor of semen with the understanding that it is your intention to use my semen for purposes of artificial insemination.

2. I understand that the identity of any recipient shall not be disclosed to me, nor shall you voluntarily reveal my identity to any recipient.

3. I am of the CAUCASIAN race.

4. To the best of my knowledge, information and belief:
   (a) I am in good health and have no communicable disease and I do not know that I have ever suffered from any physical, sexual or psychological impairment, disability or abnormality, whether inherited or as a result of any disease, illness or accident except as follows:
   (b) None of my relatives have ever suffered from any inheritable diseases except as follows:

5. For the purpose of determining whether I am acceptable as a donor of semen, I consent to a physical examination, including the taking of blood and other body fluids, by you or any other doctor or medical worker whom you may designate.

6. I agree never to seek the identity of any child or children born following artificial insemination of any recipient of my semen nor to make any claim in respect of any such child or children in any circumstances whatsoever.

Dated this twelfth day of October 1971.

SIGNED by

in the presence of:

witness.

nothing prohibits child(ren) from seeking/receiving donor's identity.
SEmen DONOR APPLICATION FORM.

Name: 
Address: 
Telephone: 
Age: Married/Single 
Wife's Consent (Signature): 
Wife's Characteristics: 
Number of Children: 

Physical Characteristics of children.

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Blood Group: 
Past History of V.D.: 
Past History of Surgery e.g. inguinal hernia, testicular operations, 

Have the immediate family and or relatives (mother, father, brothers, sisters, aunts, uncles or cousins) suffered from any of the conditions listed below,

Cystic fibrosis (chronic respiratory disease): 
Renal Condition: Bronchial Asthma: 
Diabetes: Hypertension: 


I hereby agree to donate specimens of semen for research purposes, including its usage for artificial insemination of a woman in order to obtain a pregnancy.

I agree that this woman shall remain unknown to me, and that my identity shall never be revealed to her. I undertake this completely at my own volition.

I also declare that all information given by me to complete the Donor General & Medical Interview is true and correct in every detail, as far as I can ascertain.
PRINCE HENRY'S HOSPITAL

DONOR STATEMENT AND CONSENT

TO: Doctor ........................................

AND TO: Prince Henry's Hospital, Melbourne.

I offer my services as a donor of semen with the understanding that it is your intention to use my semen for purposes of artificial insemination.

I understand that the identity of any recipient shall not be disclosed to me, nor shall you voluntarily reveal my identity to any recipient.

I am of the ................................ race.

To the best of my knowledge, information and belief:

(a) I am in good health and I have no communicable disease and I do not know, nor have I ever suffered from any physical, mental or psychological impediment, disability or abnormality whether inherited or as a result of any disease, ailment or accident except as follows:

The recipient's identity will not be released to donor.

(b) None of my relatives have ever suffered from any inheritable disease except as follows:

The donor will not seek identity of children.

For the purposes of determining whether I am acceptable as a donor of semen, I consent to a physical examination including the taking of blood and other body fluids, by you or any other doctor or medical worker whom you may designate.

I agree never to seek the identity of any child or children born following upon the artificial insemination of any recipient of my semen nor seek to make any claim in respect of any such child or children in any circumstances whatsoever.

Nothing prohibits donor-conceived seeking/receiving information re donor.
AND TO: The Royal Women's Hospital.

1. I have read my husband's offer to serve as a donor of semen and to the best of my knowledge information and belief the statements he has made are true.

2. If my husband is accepted as a donor I understand that it is your intention to use his semen for purposes of artificial insemination, but not with respect to myself.

3. I know that artificial insemination is a medical procedure intended to cause pregnancy through the use of semen introduced by means other than sexual intercourse.

4. I agree that I shall not attempt to discover the identity of any recipient of my husband's semen.

5. In serving as a donor of semen, I know that my husband may father a child or children of whom I am not the mother but I nevertheless consent to the performance of such services by him and agree never to seek the identity of any child or children so produced not seek to make any claim in respect of them.

6. I consent absolutely to my husband serving as a donor of semen and agree that in the event of any matrimonial dispute between us I shall not seek to rely on the fact of my husband serving as a donor of semen as a ground for dissolution of our marriage.

Dated this 20th day of October, 1977.

SIGNED by _________________________

in the presence of: _________________________

M. Elliman witness.
STATEMENT AND CONSENT FOR DONOR INSEMINATION

From: ___________________________ and ___________________________
(name of husband) (name of wife)

To: The Westmead Hospital and persons engaged in the donor insemination programme.

1. The nature of donor insemination and its consequences have been explained to us and we have been provided with and have read a document entitled "Donor Insemination: Information for Patients".

2. We give our consent for you to inseminate artificially ___________________________(name of wife) with semen from a donor selected by you at your discretion.

3. We understand that even though the artificial insemination may be repeated as often as recommended, to which we also consent, there is no certainty that pregnancy will ever occur.

4. We shall not either jointly or severally pursue any cause of action in respect of the physical or mental nature of character of any child produced as a result of the artificial insemination nor in respect of injury, complication in giving birth or damage to the wife as a result of the artificial insemination programme.

5. We recognise that any child born as a result of the artificial insemination will be treated in all respects as a child naturally conceived by us.

6. We understand that the identity of the donor of the semen will not be disclosed to us nor will we directly or indirectly seek his identity.

Dated this ___________________________ day of ___________________________ 19

Signed by the husband ___________________________ (signature of husband)

and the wife ___________________________ (signature of wife)

in the presence of ___________________________ (signature of Witness)

Name of Witness ___________________________

Address of Witness ___________________________