



JOHN PAUL II INSTITUTE  
FOR MARRIAGE AND FAMILY

PO Box 146 East Melbourne Vic 3002  
Ph 03 94123381 Fax 94172107 Email ntoni-filippini@jp2institute.org

Tuesday, 09 August 2011

Dr Vaughn Koops  
The Executive Officer  
Law Reform Committee  
Parliament of Victoria  
Spring Street  
EAST MELBOURNE VIC 3002  
vplrc@parliament.vic.gov.au

Dear Dr Koops,

**Re: Inquiry into Donor Conceived People**

**1. Introduction**

Thank you for the opportunity to make a submission to the enquiry. I have had a long term involvement in this issue, including having been deputy chair of the Australian Health Ethics Committee that in 2007 revised the National Health and Medical Research Council *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice* and a member of an expert panel advising the Victorian Assisted Reproductive Technology Authority. I have also had a long term association with the Victorian Parliament on this issue including having been an adviser to several Ministers of Health in relation to both the 1984 Bill and the 1995 Bill.

The views in this submission are my own and not necessarily those of the Institute nor of any of the government agencies with which I am involved.

**2. Overview of the Needs of Donor Conceived People and their Families**

**2.1 Donor Gametes and Embryos**

The choice to use donor sperm, eggs or embryos is a difficult choice for couples and many choose to remain infertile rather than to bring someone else into their relationships in this way with all the difficulties created for the child and the family of creating a matrix of parental relationships. That other person also becomes a parent to the child as a genetic parent. Parenthood then becomes separable into genetic, gestational and social or nurturing. For the child, that

involves a fragmentation of parenthood, raising questions about who really are the child's natural parents, whatever the law may say in terms of recognizing the birth mother or the genetic mother, depending on the jurisdiction and whatever has been contracted between the parties. Using donor sperm or donor eggs is problematic for both the couple and the child because it involves including another person as a genetic parent of the child.

In practice this fragmentation of the parental roles into genetic, gestational and social or nurturing parents has implications for the child. Psychologists often refer to the issue of genealogical bewilderment as children, perhaps later in life, seek to discover their origins and to identify their own identity in circumstances in which the genetic parents may be completely unknown to them or become known to them at a later stage. The relationship between a child and his or her parents is complex. So much of our sense of identity is based upon that relationship. When it is fragmented, that can be hurtful and confusing.

Prior to 1988, it had been the practice of the clinics to undertake not to voluntarily release information about gamete or embryo donors. The Infertility (Medical Treatment) Act 1984 which was passed in 1988 required identifying information to be kept and guarantees of anonymity could no longer be given by the clinics even though the law at that time required donor consent for the release of identifying information. It is that group that is the major issue at this time.

What is significant about the pre 1988 arrangements was that they were an arrangement that involved the person conceived, the donor or donors, the infertile couple and the IVF clinic, but the person conceived was excluded from those arrangements. An agreement that principally involved the interests of the child was made seemingly without regard to the interests of the child and certainly without anyone to represent the interests of the child. Undertakings for secrecy and anonymity that breached the children's rights to know and to have access to their parents ought not be regarded as morally binding.

An important element of the arrangements that were set in legislation since 1988 is that if a woman gave birth to a child using reproductive technology and she was single or had a partner who did not consent to being considered the parent of the child, then that person has no father according to the law, even though there was always a genetic father in existence. That seems particularly egregious. That there is a genetic father but a structure has been put in place to prevent the donor conceived person from being able to identify that person clearly breaches that person's right to know and have access to both their mother and father.

## **2.2 Surrogacy**

In 2008, the Victorian Parliament added surrogacy to the possible arrangements using reproductive technology. The 1988 and 1995 legislation had effectively prohibited the use of the technology for that purpose by limiting IVF to the infertile.

Surrogacy sets up, to the detriment of families, a division between the physical, psychological and moral elements that constitute those families. The woman's

capacity to bear a child is implicitly separated from her role as mother to that child and any other children she may have. She must deny any affections she has for the child she carries.

In that respect, the treatment of the surrogate is problematic because it does not recognise the motherhood that exists in becoming pregnant and nurturing the child until birth. The surrogate is implicitly treated as an object, and her body is used as a mere incubator rather than as the child's mother. As the child's mother she is linked to the child physically, emotionally, cognitively and spiritually and that reality ought not be denied. To enter into a contract to the contrary by which her connectedness is to be rejected is essentially false.

The surrogate may be genetically a stranger to the embryo because the latter has been obtained through the union of the gametes of "donors;" or she may use her own egg fertilized through insemination with the sperm of a man other than her husband or of her husband. Either way, she carries the pregnancy with a pledge to surrender the baby once it is born to the party who commissioned or made the agreement for the pregnancy, who may or may not be the donors.

Surrogate motherhood represents a failure to meet the obligations of maternal love, marital fidelity and responsible motherhood. That is to say, carrying a pregnancy involves a unique relationship to the child in which the woman becomes the child's mother. As the mother of the child she has obligations to nurture the child.

The issue now is whether the child will be able to obtain identifying information about not only those who provided gametes, but also the birth mother. The practice of surrogacy is problematic in that it severs the child's relationship to the woman who carried pregnancy and gave birth. That relationship is of great significance even if the woman is not genetically related to a donor conceived person. Similar issues apply in those circumstances for a donor conceived person to know and have access to that person who figured so significantly in their lives.

In itself surrogacy contracts offend the dignity and the rights of the child to be conceived, carried in the womb, brought into the world and brought up by his own parents. These rights are recognized by the United Nations in the Convention on the Rights of the Child, which upholds the child's right:

- to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference (art. 8);
- not to be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child (art. 9);
- not to be separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (art. 9);
- to rely on the common responsibilities of both parent for the upbringing and development of the child, and their primary responsibility for the upbringing and development of the child on the basis of the best interests of the child (art. 18);

- that in adoption decisions the authorities shall ensure that the best interests of the child shall be the paramount consideration (art. 21).

Unfortunately the Victorian Charter of Rights and responsibilities Act 2006 was highly selective in the rights that it included and in general the rights of children were not included. If it is revised to include the rights of children, then the issue of surrogacy would need to be revisited by the Parliament. In the meantime it is important that donor conceived people are able to identify their origins including the gestational or birth mother and any donors.

The current legislation makes provision for *substitute parents* as a way of dealing with the surrogacy arrangements. That leaves some flexibility about the parenting possibilities so that people may come and go as social parents in the life of the child. The same issues of being able to identify and access those people who have had a parenting role in their life as child would seem to apply for donor conceived people.

## 2. Responding to the Terms of Reference

- the legal, practical and other issues that would arise if all donor-conceived people were given access to identifying information about their donors and their donor-conceived siblings, regardless of the date that the donation was made*

The main issue to be raised is access to identifying information about those involved in a parental role in the origins of donor conceived persons conceived using gametes donated before 1988. Parental roles include the donors of gametes, birth mothers in surrogacy arrangements, and anyone who fulfilled a social parental role and relinquished, whether or not they were genetically related to the child or related to the child as a birth mother.

There are practical issues about the storage of data before 1988 when the law required the information to be stored. It is a question of how accurate the data was especially as there had been a practice of mixing donor sperm with the husband's sperm and whether it has been kept in a way that can be readily accessed.

Second, there is the issue of the clinics having given an undertaking not to voluntarily relinquish identifying information. As discussed earlier it was an undertaking that they had no right to make given that it was an undertaking that breached the rights of the donor conceived person to know and to have access to his or her parents. *Prima facie*, in those circumstances the rights of the donor conceived person would seem to override a claim to anonymity. However there could be extraordinary circumstances in which a person who is a genetic parent, a birth mother or relinquishing social parent to a donor conceived person but is now in vulnerable circumstances such as mental illness.

In those circumstances it might be appropriate for a legislative process to be established which allows for application to be made and an objection lodged by the person about whom identifying information is sought. The existing Patient Review Panel could have the task of determining whether extraordinary

circumstances of vulnerability applied. The legislation would need to clearly define the way in which the criteria of vulnerability were to be applied.

Legislating to require the information to be kept by a government agency and that agency having responsibility for releasing the information and providing counselling to those receiving information and those about whom the information is to be released would seem to be important as it would then remove the liability from those clinics who undertook not to voluntarily release identifying information.

- b. the relevance of a donor's consent or otherwise to the release of identifying information and the National Health and Medical Research Council's ethical guidelines on the use of assisted reproductive technology in clinical practice and research;*

The National Health and Medical Research Council's ethical guidelines on the use of assisted reproductive technology in clinical practice and research strongly support the rights of persons conceived using ART procedures to know their genetic parents<sup>1</sup>. The guidelines also insist that that for gametes that were donated prior to the guidelines, both gametes not be used unless consent to identifying information being given to the child has been obtained. The guidelines have not addressed the issue of identifying information about persons in other parenting roles, such as a relinquishing birth mother, relinquishing substitute parent, or relinquishing social parent.

However the principles of a child having a right to know and have access to his or her parents, expressed in the UN Convention on the Rights of the Child, would seem to apply to all of the parenting roles in the origin of a donor conceived person. There would not seem to be a need to obtain consent from those who held parenting roles in the origins of a donor conceived person. They have parental obligations because they were in parenting role. The law should not ever have countenanced circumstances in which they could be allowed to be anonymous parents. To maintain the anonymity now for those who were given undertakings would continue the injustice to those who were donor conceived. As discussed earlier commitments have that kind cannot be morally enforceable because they affected someone who was not a party to the commitment to that person's detriment.

- c. any practical difficulties in releasing information about donors who provided their gametes before 1 July 1988, because in many cases records are not available either because the procedure was carried out privately or records were not stored centrally;*

Where records do not exist is obviously problematic. However what does need to happen is that whatever records do exist should be transferred to a government agency to be administered as well as they can be given whatever state they are in.

---

<sup>1</sup> National Health and Medical Research Council *Ethical Guidelines on the Use of Assisted Reproductive Technology Clinical Practice and Research* June 2007, section 6.1

*d. the options for implementing any changes to the current arrangements, including non-legislative options;*

There is a need to put in place a government administered system. One of the strange aspects of all of this is that we have a Registrar for Births Deaths and Marriages, but that agency has never been used to store information about the genetic origins of children conceived through the use of reproductive technology. Instead the information has been kept by the clinics with some information being kept by the authority. Yet the obvious agency that has responsibility for issues of this nature and has the capacity to provide these services that are needed of verification of identity and counselling is the Registrar for Births Deaths and Marriages. The obvious step to take would seem to be to legislate to require all the information about those who have parenting roles in the origin of the child, (including the genetic parents, the gestational or birth mother, and relinquishing social parents or relinquishing substitute parents), to be supplied to the Registrar. As suggested earlier, where there is not consent to identifying information being provided to a donor conceived person, then the person about whom information is sought should have a statutory right to object subject to that objection being upheld by the Patient Review Panel established under the *Assisted Reproductive Technology Act 2008*. The legislation would need to specify the criteria for upholding an objection on the grounds of extraordinary vulnerability.

*e. the impact that any such changes may have on the donor, the donor-conceived person and future donor programs;*

In future donor programs consent to the release of identifying information will already be required as it is under the current legislation and under the National Health and Medical Research Council *ART guidelines*. The issue is the impact on those prior to 1988 who were given an undertaking that the clinics would not voluntarily release the identifying information.

Many of those people would pose no objection. However there may be some who are vulnerable and the above proposal would provide some protection for them. There may be others who have been very frequent donors. In earlier enquiries into this matter there has been some indication that clinics did not restrict the number of times that a single donor could be used to parent children. It has also been suggested that medical students were often approached to be donors and even that doctors in the clinics have been donors. There is potential for embarrassment if matters are not handled sensitively. Once the information is made available to a donor conceived person then there is no practical restriction on who might have access to that information subsequently.

There does not seem to be any way around this issue. There is a natural moral obligation that a person takes on in deciding to be a genetic parent to a child or in being a birth mother or social or substitute parent. The child is vulnerable to decisions being made by others and the state has a *parens patriae* obligation to protect the best interests of the child. That obligation would seem to extend to include donor conceived people in relation to decisions made when they were

children to which they were not a party at which so severely affected their interests. The undertakings should never have been given and they ought not now be upheld.

*f. the impacts of the transfer of the donor registers currently held by the Infertility Treatment Authority to the registrar of births, deaths and marriages*

This is an important step in bringing parity to the interests of donor conceived people compared to people who were adopted. The latter have had a service provided by a covered agency that has not been available to people conceived through the use of donor gametes. The impact for donor conceived people is that it would give them some confidence in the record-keeping and the accessibility of information that is often so important to them.

*g. the possible implications under the Charter of Human Rights and Responsibilities Act 2006.*

The most relevant of the rights in the charter given that the charter has not included the rights of children generally is section 17, *Protection of Families and Children*

(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

(2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

Section 17 (2) would seem to apply in these circumstances. It is not in the interests of children that they be denied knowledge of and access to those who have parenting roles in relation to the origins of the child. Those obligations to children if they had been frustrated create difficulties for donor conceived people later in life. There is often a need to understand one's origins and the parenting contributions to one's formation. There is also often concern about whether there are siblings or half siblings. Finally, there are issues of consanguinity in relation to marriage or sexual partners.

The current law that allows for parents to make the information about genetic parents known to their donor conceived children at a time when the parents consider the child is mature enough and if not then at least by the time they are 18 would seem to meet the need. Those who in the past have been denied their right to know and have access to their parents have a need that should now be met.

This would be much clearer if the Victorian *Charter of Rights and Responsibilities* were not so selective in excluding the rights of children. However section 17 would seem to carry that implication and if it is read in conjunction with section 32 (2) then that would seem to be a reasonable interpretation, Section 32 allows

for International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision. That would allow the UN Convention on the Rights of the Child to be applied in interpreting what the best interests of the child would be.

Yours sincerely,

A/Prof Nicholas Tonti-Filippini  
BA (Hons) MA (Monash) PhD (Melb)  
FHERDSA KCSG  
Associate Dean and Head of Bioethics