

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

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## Acknowledgments

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# 1. Executive summary

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PILCH welcomes the opportunity to make a submission to the Law Reform Committee (**Committee**) in relation to its Inquiry into Access by Donor Conceived People to Information about Donors.

We make the following submissions based on our experience of facilitating legal referrals to private practitioners for pro bono assistance. We use two case studies of referred clients who are donor conceived people, both of whom were conceived using gametes donated before 1 July 1988. In particular, our submissions address our clients' ability to obtain access to information about their biological fathers. Our submissions are made with the approval of our clients, Ms Lauren Burns and Ms Kimberley Springfield.

We note our submissions to the Committee Inquiry into Access by Donor Conceived People to Information about Donors in the 56th Parliament. We continue to support the recommendations made in those submissions. We make these further submissions in order to respond to various issues canvassed by the Committee in its Interim Report and to clarify our recommendations.

Our submissions are relevant to (b), (d), (e) and (g) of the Committee's terms of reference.

## 1.1 Recommendations

In summary, PILCH makes the following recommendations:

### Recommendation 1

**The *Assisted Reproductive Treatment Act 2008* (Cth) (ART Act) should be amended so that power is expressly conferred on medical practitioners and medical clinics with access to records containing identifying information about a particular donor to facilitate requests by donor conceived people for access to identifying information, including by acting as intermediaries and communicating such requests by contacting donors directly;**

### Recommendation 2

**The ART Act should be amended so that the Registrar is under an express obligation to facilitate requests by donor conceived people for access to identifying information about their biological fathers, including by acting as intermediaries and communicating such requests by contacting donors directly; and**

### Recommendation 3

**At the very least (i.e. failing 1 and 2), the ART Act should be amended so that power is expressly conferred on the Registrar to write to donors to inform them about the existence and purpose of the Voluntary Register.**

## 2. About PILCH

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PILCH is a leading Victorian, not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- ▶ address disadvantage and marginalisation in the community;
- ▶ effect structural change to address injustice; and
- ▶ foster a strong pro bono culture in Victoria; and, increase the pro bono capacity of the legal profession.

## 3. Our Clients

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### 3.1 Ms Lauren Burns

PILCH referred Ms Burns to Corrs Chambers Westgarth (**Corrs**) in order to advise her on her legal rights with respect to obtaining access to identifying information about her biological father.

Medical records containing information about Ms Burns' biological father (including identifying information) were held at the Public Records Office and access to those records was controlled by the Infertility Treatment Authority (**ITA**).

Ms Burns wrote to the ITA requesting that it assist her to obtain information about her biological father. The ITA refused to provide Ms Burns with identifying information relating to her biological father and, further, refused to contact him seeking his consent to the release of that information.

As a result of the ITA's refusal to act as an intermediary, Ms Burns wrote to the doctor who performed the treatment procedure resulting in her conception, requesting that the doctor write to her biological father to see if he would agree to release identifying information to Ms Burns. The doctor agreed to do so.

As a result, Ms Burns' biological father gave his consent to the release of identifying information and Ms Burns has, fortunately, established a relationship with him.

### 3.2 Ms Kimberley Springfield

In 2010 PILCH referred Ms Springfield to Corrs in order to assist her, to the extent possible, to obtain access to information about her biological father.

Ms Springfield was conceived following a donor treatment procedure at Monash IVF. After discovering that Monash IVF held medical records identifying her biological father, Ms Springfield wrote to the doctor who facilitated her conception requesting that he write to her biological father, "to initiate exchange of information and potentially ask for consent to release identifying information." The doctor refused Ms Springfield's request for him to act as an intermediary on the basis that her biological father had "elected" to remain anonymous.

Ms Springfield subsequently wrote to Monash IVF requesting that it assist her by acting as an intermediary to facilitate contact between her and her biological father. Monash IVF refused Ms Springfield's request for the same reason given by the doctor.

In May 2010, Corrs wrote to the Registrar of Births, Deaths and Marriages (**Registrar**), Ms Helen Tritias, requesting that she write to Ms Springfield's biological father to inform him of the existence and purpose of the Voluntary Register. In the event that the Registrar did not have access to Ms Springfield's biological father's identifying information we requested that the Registrar ask Monash IVF to forward such a letter to Ms Springfield's biological father. In making this request Corrs referred to the intended purpose of the Voluntary Register and the Registrar's power pursuant to section 71(2) of the ART Act which provides that, "The Registrar may from time to time publicise the establishment and purpose of the Voluntary Register."

In June 2010, Corrs received a letter from the Registrar declining Ms Springfield's request because the Registrar's view was that she lacked power under the ART Act to write to donors directly.

In September 2010, Ms Springfield applied to the Victorian Civil and Administrative Tribunal (**VCAT**) for a review of the Registrar's decision. Although Ms Springfield's application was dismissed by VCAT on the basis that it lacked jurisdiction to review the Registrar's decision, Senior Member Billings found that:

There appears to me to be some force in Mr Hanks' [Ms Springfield's Counsel's] submission that at least this [sending a letter through an intermediary] would be within the Registrar's power but I do not need to decide the scope of the Registrar's powers to decide whether VCAT has jurisdiction.<sup>1</sup>

As a result of the refusals from the doctor responsible for Ms Springfield's conception, Monash IVF and the Registrar in relation to Ms Springfield's request for each to act as an intermediary by contacting her biological father to ask him whether he would consent to the release of identifying information (and, in the case of the Registrar, simply to inform him of the presence of the Voluntary Register), Ms Springfield has not been able to advance any potential contact with her biological father.

### 3.3 Conclusions from our clients' experiences

The experience of our clients, as described above, reveals that:

- medical practitioners and medical clinics with access to medical records containing identifying information about donors have different views about their ethical obligation and legal ability to act as intermediaries between donors and their biological children and this results in inconsistency and unfairness for donor conceived people, some of whom have been given assistance by cooperative medical practitioners and medical clinics while others are refused;
- each body responsible for maintaining the Voluntary Register in Victoria (originally the ITA and, since 2010, the Registrar) was (and the Registrar is) unwilling to act as an intermediary by contacting donors or doctors who have facilitated conceptions, upon request by their biological children, in order to request their consent to the release of their identifying information; and
- although the Registrar has an express power to publish the Voluntary Register pursuant to section 71(2) of the ART Act, the Registrar is unwilling to write to donors directly (as she does not believe that she has the power to do so), upon request by their biological child, simply to inform the donor about the existence and purpose of the Voluntary Register.

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<sup>1</sup> Para 10, *Springfield v Registrar of Births Deaths and Marriages* (General) [2011] VCAT 130 (10 February 2011).

## 4. Right to Know vs. Right to Anonymity

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We submit that the interests of donor conceived people in knowing their genetic origins, including by obtaining identifying information about their biological fathers, is consistent with various human rights recognised in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), including:

- the right to equality before the law (s8);
- rights for protection of families and children (s17); and
- cultural rights (s19).

We understand that men who donated sperm in Victoria prior to 1 July 1988 were in many cases given assurances by medical clinics and medical practitioners that they would have a “right to anonymity”. Moreover, as the Committee observed in its Interim Report, in many instances the contracts between medical clinics and donors provided donors with such a right.

However, as far as we are aware, no consideration has been given by medical clinics in possession of relevant medical records or the Committee to the nature of the actual terms of confidentiality clauses used in the agreements between medical clinics and Donors, other than to say in a general sense that “anonymity was guaranteed”. Subject to a review of the terms actually used in these contracts (whether they be oral or written), we submit that if medical clinics and medical practitioners were to act as intermediaries by simply contacting donors to ask them for consent to disclose identifying information (as is the current practice of some medical practitioners and clinics) there is no reason to suspect that they have breached any contractual duty to maintain confidentiality or anonymity.

We refer to the Victorian Law Reform Commission’s (VLRC’s) *Assisted reproductive technology & adoption: Final Report (2007)* (VLRC Report) in which the VLRC recommended that, “the Infertility Treatment Authority (ITA) assist clinics to contact their pre-1 July 1988 donors to explain their options for providing information about themselves to people using their sperm.” Moreover, the VLRC recommended that a process should be instituted to enable donor conceived people, whose biological fathers donated gametes before 1 January 1998 (including those whose biological fathers donated gametes prior to 1 July 1988), to seek their consent to the disclosure of identifying information. Recommendation 99 in the VLRC Report provides:

### **Retrospective Access to Information**

If a person conceived with gametes donated prior to 1 January 1998 wishes to obtain identifying information about the donor and the donor has not registered his or her wishes on a voluntary register:

- The donor-conceived person should contact the ITA to request that it facilitate an approach to the donor.
- The ITA should contact the clinic where the person’s mother received treatment (if it can be identified) and ask the clinic to forward a letter from the ITA to the donor.
- The letter from the ITA to the donor should explain the donor’s options in respect of providing identifying information to the person conceived with his or her gametes, and should draw attention to the availability of counselling to explore those options further.

We submit that the approach outlined in this recommendation reflects an appropriate balance between the rights of donor conceived people to know their genetic origins and any contractual rights given to men who donated sperm in Victoria prior to 1 July 1988.

## 5. Recommendations

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PILCH makes the following recommendations:

### Recommendation 1

**The ART Act should be amended so that power is expressly conferred on medical practitioners and medical clinics with access to records containing identifying information about a particular donor to facilitate requests by donor conceived people for access to identifying information, including by acting as intermediaries and communicating such requests by contacting donors directly;**

### Recommendation 2

**The ART Act should be amended so that the Registrar is under an express obligation to facilitate requests by donor conceived people for access to identifying information about their biological fathers, including by acting as intermediaries and communicating such requests by contacting donors directly; and**

### Recommendation 3

**At the very least (i.e. failing 1 and 2), the ART Act should be amended so that power is expressly conferred on the Registrar to write to donors to inform them about the existence and purpose of the Voluntary Register.**

Further, in relation to recommendation 1, a provision should be included in the ART Act to make clear that doctors and medical practitioners will not be taken to have breached any contractual duty of confidentiality owed to a donor simply by seeking the donor's consent to release his identifying information to a biological child, provided this power would not override contractual agreements expressly preventing such contact by the medical practitioner or clinic with the donor. Moreover, we submit that Guidelines should be published by the Registrar to advise medical practitioners and medical clinics of appropriate ways in which contact should be made with donors when requesting their consent to the disclosure of identifying information on behalf of donor conceiving persons.

In relation to 2, as indicated by recommendation 99 in the VLRC Report, this may entail the Registrar writing to a medical clinic (or doctor) requesting they forward a letter to the donor in question and this method should be expressly prescribed in the ART Act or in regulations under that Act.

In relation to 3, the experience of Kimberley Springfield shows that the Registrar has taken a very narrow approach to her power to publicise the Voluntary Register under section 71(2) of the ART Act.

Accordingly, the ART Act must be amended in the manner proposed in recommendation 3 so that section 71(2) is given the full effect that, we submit, Parliament had always intended.

## 6. Conclusion

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We support the third Guiding Principle articulated in the VLRC Report which states that, “All children born as a result of the use of donated gametes have a right to information about their genetic parents.” We accept that many men who donated sperm in Victoria prior to 1 July 1988 were given assurances (whether oral or contractual) that their identifying information would not be disclosed. Nevertheless, we have not identified any material which suggests that the duty of confidence owed by medical clinics to donors would be breached by adopting an approach based on recommendation 99 in the VLRC Report. Accordingly, we submit that the Committee should recommend such an approach, as set out in our recommendations, to the Government.

We would be pleased to assist the Committee further in relation to this inquiry.