

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

Submission by the Institute for Judaism and Civilization Inc<sup>1</sup>

through its Director, Rabbi Dr Shimon Cowen

### **The right of children (born, unborn, or planned through ART) to identity**

One of the most significant defects in the Victorian Charter of Rights and Responsibilities, and indeed this is reproduced in a whole series of Court judgments, is a fundamental lack of regard for the rights of children, including unborn children, and children who will be brought into being as the result of certain schemes. The right which has often been neglected is the right to identity, i.e. the right to knowledge of one's biological parentage. In addition there is a right of a child to be nurtured and raised by biological parents, in all cases except where the parents have given away a child for adoption, in which it is meritorious for suitable adoptive parents to assume care for the child. That is to say, to care for a child who has been orphaned is meritorious. But to *create* an orphan, i.e. to design a child who will in the first place not be raised by its biological parents, is wrong. At all events, taking into consideration the specific question of this commission, we must assert the right of the child to know, at some stage of its life, the identity of its biological parents. One of the most fundamental differences between a human being and an animal is that the enduring knowledge of parentage is not significant to the animal, but to the human being it is intrinsic.

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### **A contract cannot be entered upon by two parties to diminish the right of a third party**

I was told at a recent conference by a Canadian lawyer, that he had been approached by a woman who had obtained a male donor for a prospective child she wished to conceive. She asked the lawyer to draft a contract between her and the donor that the donor would renounce all future access to the prospective child. The lawyer responded to her that he could not make a contract between her and the man to eliminate the right of a third party – the unborn child – to know the identity of both of his or her parents.

Yet over and over again, judicial reasoning has worked with an assumption that the rights of an unborn child can be signed away by contracting adults. Thus in *McBain v. State of Victoria* (2000), it was established that single women could access fertility treatments. A summary of the case notes that:

Justice Sundberg held that fertility treatments, including IVF, were 'services' provided by medical practitioners, within the meaning of section 22 of the Sex Discrimination Act. He dismissed an argument that the word 'services' should be read consistently with the rights of the child under international instruments to know and be brought up by both parents<sup>2</sup>.

Recently, a judgment was handed down from the NSW Supreme Court that a woman could use the sperm of her dead husband. A news report puts it thus:

On Monday, Justice Robert Allan Hulme ruled that the sperm, which he deemed to be "property" in this case, could be released to Ms Edwards who "is entitled to possession" of it.

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<sup>2</sup> <http://www.aph.gov.au/library/pubs/rn/2000-01/01RN03.htm>

"Although there is no direct evidence, the clear and only inference is that she desires to have a child with the aid of assisted reproductive treatment," he said<sup>3</sup>.

In this case a child would in the first place be conceived who would never experience his or her biological father.

It is paradoxical that a slang meaning of the word "contract" is "a criminal agreement to kill a particular person in return for an agreed sum of money"<sup>4</sup>, in other words an agreement between two people profoundly to affect (in this case to take) the life of *another*. Here contracts are entered by adults to remove a child's right.

### **Legislation and statute must embody the rights of children to identity**

Consequently the right of the child to know its identity must be an absolute right, even though the time and the way in which this information is made known may be regulated in the best interests of the child. This right cannot be diminished

(a) by consideration of any possible impact it might have on donor contributions, donors or siblings. Put very crudely humans must elevate themselves to be more than stallions (however noble they felt their intentions to be), who provide gametes and then go away. The offspring they produce are entitled to knowledge of their own identity. This is an inalienable human right.

(b) by the fact that donations were made prior to 1988 on undertakings of anonymity.

This contract of anonymity was a faulty contract, which wrote off the right of the unborn child to identity.

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<sup>3</sup> <http://news.ninemsn.com.au/national/8252460/widow-can-use-dead-husbands-frozen-sperm>

<sup>4</sup> <http://www.thefreedictionary.com/contract>

(c) by the fact that Victorian Charter of Human Rights and Responsibilities Act makes no such consideration for the child. That Act must be amended to include a comprehensive statement of the rights of unborn children to identity (as well as other rights).