Submission

on

Donor Conception in Australia

to the

Senate Legal and Constitutional Affairs Committee

Department of the Senate

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1. Introduction

On 23 June 2010 the Senate asked the Legal and Constitutional Affairs Committee to inquire and report on the past and present practices of donor conception in Australia, with particular reference to:

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

(b) the conduct of clinics and medical services, including:

  (i) payments for donors,

  (ii) management of data relating to donor conception, and

  (iii) provision of appropriate counselling and support services;

(c) the number of offspring born from each donor with reference to the risk of consanguine relationships; and

(d) the rights of donor conceived individuals.

Submissions have been called for by the Committee and are due to be received by 30 July 2010. The reporting date is 30 November 2010.

2. Donor conception – what is it?

Donor conception involves the use of gametes – sperm or egg or both – in the conception of a child, where the intention is for the donor of the gametes not to otherwise be a father or mother of the child.

In other words donor conception intentionally seeks to separate genetic fatherhood or motherhood from other responsibility for the child that is to be conceived.

This notion is contrary to our deepest instincts about fatherhood and motherhood. Those who conceive children incur parental obligations to those children. The society provides, for those who feel incapable of fulfilling these obligations themselves, the possibility of relinquishing a child for adoption. However, this is something done after the birth (or at least after conception) of a child and is a response to the child's need for adequate parenting.

Donor conception has been seen as a means of helping those who are unable to have a child derived from their own gametes.

Male gametes (sperm) have been used for married and partnered women whose husbands or partners are infertile. They have also been used by single women or by women in a same-sex relationship.

Female gametes (eggs or ova) have been used where a woman (married or partnered) has been unable to conceive with her own eggs. The egg is fertilised *in vitro* with the husband or partner's sperm and is implanted in the woman.

In cases where the couple are both infertile an embryo may be used, which has been fertilised *in vitro* with an egg from another woman and sperm from another man. In this case the child will have no genetic relationship to either parent. If the embryo is created specifically for this purpose, it is a form of donor conception.

This should be distinguished from the case where an embryo, initially created for assisted reproductive treatment of a couple, is no longer wanted for this purpose. Where such an embryo is implanted in another woman, this could be seen as an earlier form of adoption – embryo adoption, rather than postnatal adoption. It shares some of the characteristics of postnatal adoption, such as providing a home – in this case initially a womb – and parental care for a child (in this case in the embryonic stage of development) who can't be cared for by its parents or has been abandoned.

3. Donor conception and the good of the child

The practice of donor conception focuses on the interests of the adults involved, particularly the infertile couples and the single women and same-sex female couples, who seek this service as a way of obtaining a child.

As artificial insemination using donor sperm has been practised for many decades now, there is a cohort of adults who were donor conceived. We can now hear their voices and consider the outcomes of donor conception on the children who result from this practice.

Recent accounts, written by adults who were conceived as a result of donor insemination, describe the profound problems of identity and belonging they experienced both as children and as adults.[1] Some of these problems were related to secrecy – not being told the truth about their origins but intuiting that they were different. However, problems also persisted after the truth was revealed or discovered, including a longing to know the absent genetic parent.

In a submission to the NSW Legislative Council Inquiry into Altruistic Surrogacy by Tangled Webs Inc., this group of donor conceived persons argued, on the basis of their lived experience, that: "*A child's best interests are served when it is conceived and gestated by; born to and nurtured by, one mother. To fragment maternal roles through ova donation/gestational surrogacy is to deny a child its entitlement to a whole mother*"[2]

The first detailed survey of children conceived by donor insemination, fittingly titled *My Daddy's name is donor*, compared outcomes and opinions of these children with children who were adopted and with children who were raised by their own biological parents.

> *[Y]oung adults conceived through sperm donation are hurting more, are more confused, and feel more isolated from their families. They fare worse than their peers raised by biological parents on important outcomes such as depression, delinquency and substance abuse. Nearly two-thirds agree, "My sperm donor is half of who I am.".*[3]
>
> *Young adults conceived through sperm donation (or "donor offspring") experience profound struggles with their origins and identities.*
>
> *Sixty-five percent of donor offspring agree, "My sperm donor is half of who I am." Forty-five percent agree, "The circumstances of my conception bother me." Almost half report that they think about donor conception at least a few times a week or more often.*
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> *The role of money in their conception disturbs a substantial number of donor offspring. Forty-five percent agree, "It bothers me that money was exchanged in order to conceive me." Forty-two percent of donor offspring, compared to 24 percent from adoptive families and 21 percent raised by biological parents, agree, "It is wrong for people to provide their sperm or eggs for a fee to others who wish to have children.".*[4]

Family relationships for donor offspring are more often characterized by confusion, tension, and loss.

More than half (53 percent) agree that: "I have worried that if I try to get more information about or have a relationship with my sperm donor, my mother and/or the father who raised me would feel angry or hurt."

Seventy percent agree that: "I find myself wondering what my sperm donor's family is like," and 69 percent agree that: "I sometimes wonder if my sperm donor's parents would want to know me."

Nearly half of donor offspring (48 percent) compared to about a fifth of adopted adults (19 percent) agree, "When I see friends with their biological fathers and mothers, it makes me feel sad." Similarly, more than half of donor offspring (53 percent, compared to 29 percent of the adopted adults) agree that: "It hurts when I hear other people talk about their genealogical background."[5]

More than half say that when they see someone who resembles them they wonder if they are related. Almost as many say they have feared being attracted to or having sexual relations with someone to whom they are unknowingly related. Approximately two-thirds affirm the right of donor offspring to know the truth about their origins. And about half of donor offspring have concerns about or serious objections to donor conception itself, even when parents tell their children the truth.[6]

These issues are very serious. They justify a moratorium on all practices that involve an intentional fracturing of parenting before the conception of a child. This includes all forms of donor conception and all forms of surrogacy.

No child should be intentionally conceived in a manner that we now know imposes such burdens on children for their entire life. Adult desires are insufficient to justify these practices. Some legislation on assisted reproductive technology or surrogacy requires that, before treatment or before a surrogacy arrangement is approved, the best interests of the child must be taken into consideration. It should now be plain that, to do this authentically, treatment involving donor gametes or any form of surrogacy should never proceed.

Recommendation 1:

There should be a moratorium on all forms of donor conception and surrogacy, because by intentionally fracturing parenthood before the conception of the child, they necessarily impose intolerable burdens of identity bewilderment on the child. Such procedures are never in the best interest of the child to be conceived.

4. Donor conception legislation and regulation (ToR (a))

State and territory laws on donor conception vary to some extent.

In general there are few if any limits on artificial insemination. This process is naturally harder to regulate as it may be carried out without medical assistance, although there are obviously health risks in doing so, such as the transmission of HIV.

The best way to regulate artificial insemination would be to repeal the laws which absolve the sperm donor of paternal responsibility for the child conceived with his sperm. No man should be able to father a child and avoid responsibility.

The Commonwealth could take the lead in this process by amending the Family Law Act 1975 to provide that a man who provides sperm for the purpose of donor conception is the father of the child for the purposes of that Act. Provisions in the Act to the contrary should be repealed.

Recommendation 2:

The Family Law Act 1975 should be amended to provide that the genetic father of a child is a parent of the child for the purpose of the Act. All contrary provisions should be repealed.

Assisted reproductive technology that involves more complex medical procedures is more strictly regulated in some states (Victoria, Western Australia and South Australia) than in others.

However, there might be a constitutional barrier to a state restricting the use of donor sperm for assisted reproductive technology. In the case of *McBain v State of Victoria [2000] FCA 1009*[7] it was held by the Federal Court of Australia that provisions of the Commonwealth's *Sex Discrimination Act 1984* effectively overrode the Victorian law which restricted access to assisted reproductive technology to married couples. An attempt by the Commonwealth Attorney General to persuade the High Court of Australia to review this decision was dismissed on procedural grounds.[8]

While it may be possible for a state to ban all use of donor gametes, a court could consider that this was effectively discriminatory against single women who, by definition, have no male gametes readily available.

The Commonwealth should amend the Sex Discrimination Act 1984 to exempt assisted reproductive technology and surrogacy from its reach, so that states can make laws based on the best interests of children and other proper considerations of public policy without a constitutional impediment.

Recommendation 3:

The Sex Discrimination Act 1984 should be amended by inserting after section 8 the following:

8B No application to human reproductive technology or surrogacy

Nothing in this Act renders it unlawful for a person to discriminate against another person on any one or more grounds of discrimination referred to in this Act in connection with the provision of any service, including any procedure, or in the making of any decision, including the exercise of a discretion under any law of the Commonwealth, a State or a Territory, dealing with assisted reproductive services or surrogacy.

5. Payments for donors (ToR (b) (i))

Australia, unlike the United States, has to its credit resisted allowing payment of valuable consideration for the provision of gametes. Either state and territory laws, or the guidelines imposed on clinics which wish to be accredited by the national body, have restricted payment to the "*reimbursement of reasonable out-of-pocket expenses associated with the procedures*".[9] Furthermore, "*Gamete donation must be altruistic. Commercial trading in human gametes and/or the use of direct or indirect inducements, must not be undertaken.*"[10]

Monash IVF offers $90 for each of ten donations, or a total of $900 to its sperm donors.[11] This could be an inducement to a cash-strapped student.

IVF Albury has offered travel reimbursement packages valued at $7000 to Canadian men to come to Albury and make ten donations over a two week period.[12]

If sperm donation is meant to be genuinely altruistic, it would be better to prohibit all payments, including so-called reimbursement payments.

Recommendation 4:

All payment for gametes donation, including so-called reimbursement for reasonable expenses, should be prohibited.

6. Number of offspring born from each donor (ToR (c))

It is clear from the reports of donor conceived children that there is a real concern about the possibility of becoming romantically involved with an unknown donor sibling.

Australian guidelines currently limit the number of families that each sperm donor can provide sperm for to five. Depending on the geographical elements – whether the families live in Sydney or in a small country town – the statistical chance of such encounters varies.

However, the problem is more fundamental than the issue of possible consanguine romantic relationships. In the normal course of human life, some men father children to two or more women. Obviously the more women with whom a man has children, the more complex are the familial relationships created.

With sperm donation, these complex familial relationships are intentionally created. It is unjust to the children so conceived that they have siblings being created intentionally in up to four other families. Such siblings have no real chance of getting to know each other until they have all turned 18. This is reckless and thoughtless. It can't be justified by adult desires for children.

If sperm donation is not banned altogether, then the use of the sperm from any one man should be limited to one family only. This is demanded by the best interests of the children concerned.

Recommendation 5:

The sperm donated by any one man should only be used by one family. This is necessary to prevent the intentional conception of donor siblings who would be raised apart from one another.

7. Rights of donor conceived children (ToR (d))

Donor conceived children have a right to know their biological and genetic origin, including full identifying information about their genetic parents. Access to such information should be available on request at age 18, or earlier with the agreement of the legal parents.

This right should not be dependent on the date of the procedure which led to their conception or on any guarantees of anonymity given to sperm donors in the past. No one – neither clinic nor the state – has the right to offer anonymous fatherhood to a man in order to obtain sperm to conceive a child.

Recommendation 6:

All donor conceived children from age 18, or earlier with the agreement of their legal parents, should be entitled to access full identifying information about their genetic parents.

8. Medicare and procedures involving donor gametes

Medicare pays for many assisted reproductive technology procedures. In order to serve the best interests of the child, the regulations should be amended to prevent any payment by Medicare for a procedure involving donor gametes.

Recommendation 7:

Medicare regulations should be amended to prevent any payment by Medicare for a procedure involving donor gametes.

9. Conclusion

A decades-long social experiment with donor conception can now be examined based on its results. The evidence is in that such procedures impose unjustified burdens on the children conceived in this manner.

Everything possible should be done to prevent any further donor conceptions.

The rights of existing donor conceived children to know their full biological and genetic heritage should be upheld.

10. Endnotes

1. *Who Am I? Experiences of Donor Conception*, Idreos Education Trust, 2006.

2. http://www.parliament.nsw.gov.au/prod/PARLMENT/committee.nsf/0/996784755f12f19dca2574ea00187d5b/$FILE/Submission%2021.pdf

3. Marquadt, E *et al.*, *My daddy's name is donor: a new study of young adults conceived through sperm donation*, Institute for American Values, 2010, p 5; http://www.scribd.com/doc/32495612/My-Daddy-s-Name-is-Donor

4. *Ibid.*, p 7.

5. *Ibid.*

6. *Ibid*, p 6-7.

7. http://www.austlii.edu.au/au/cases/cth/FCA/2000/1009.html

8. Re McBain [2002] HCA 16; http://www.austlii.edu.au/au/cases/cth/HCA/2002/16.html

9. National Health and Medical Research Council, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, 2007, para 17.21.2, p 76; http://www.nhmrc.gov.au/_files_nhmrc/file/publications/synopses/e78.pdf

10 . *Ibid.*, para 6.5, p 27.

11. http://www.monashivf.com/default.asp?action=article&ID=21695

12. http://news.bbc.co.uk/2/hi/health/3410351.stm