

CHAPTER 1

Introduction

1.1 On 16 June 2010, the Senate referred the following matter to the Legal and Constitutional Affairs References Committee (committee) for inquiry and report by 30 November 2010:

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.

1.2 The inquiry lapsed on 26 September 2010, the eve of the 43rd Parliament and, on 30 September 2010, the Senate re-referred the inquiry to the committee with a reporting date of 24 November 2010. The Senate subsequently agreed to extend this reporting date to 9 February 2011.

Background

1.3 The term 'donor conception' refers to reproductive techniques which involve the use of donated gametes and embryos. 'Gamete' is the term used to refer to eggs (also known as oocytes) and sperm. People that have been conceived by donor conception are commonly referred to as being 'donor conceived'. Donor conception relates to a range of procedures such as in-vitro fertilisation that are often collectively referred to as assisted reproductive technology (ART).

1.4 Most often, donor conception occurs in formal clinical settings. However, some parties enter into private donor conception arrangements outside clinics. In private arrangements, parties, particularly single women and lesbians, may choose to conceive using sperm from a donor that they know personally, or they may advertise for a donor. It is not uncommon for sperm donors who identify as gay to donate to lesbian couples in private arrangements.¹

1 Dr Damien Riggs, *Committee Hansard*, 2 November 2010, pp 29-31. See, also, Rainbow Families Council, *Submission 73*, p. 3.

Numbers of donor conceived people

1.5 It is difficult to estimate, and therefore, accurately know the number of donor conceived people in Australia. While the use of donor sperm to achieve pregnancies has existed for a long time, in the 1950s its use became better known, and significantly increased during the 1970s and 1980s.²

1.6 ART clinics in Australia and New Zealand are required to report data to the Australian Institute of Health and Welfare's National Perinatal Statistics Unit, which produces an annual report.³ However, these statistics do not include births resulting from private practices or private arrangements.⁴ They also include figures for New Zealand, which are estimated to be about ten per cent of all live births.⁵

1.7 The numbers of donor-conceived children reported to the National Perinatal Statistics Unit from 2002–2008 in Australia and New Zealand are as follows:⁶

Year	Live births from egg/embryo recipient cycles	Live births from donor insemination cycles	Total
2002	322	340	662
2003	394	313	707
2004	295	307	602
2005	309	310	619
2006	354	278	632
2007	326	275	601
2008	357	266	623
Total	2357	2089	4446

2 Dr Sonia Allan, *Submission 30*, p. 5.

3 See Wang, YA, Chambers, GM, and Sullivan, EA, 'Assisted reproductive technology in Australia and New Zealand 2008', *Assisted Reproduction Technology Series No 14*, September 2010, Australian Institute of Health and Welfare.

4 Wang, YA, Chambers, GM, and Sullivan, EA, 'Assisted reproductive technology in Australia and New Zealand 2008', *Assisted Reproduction Technology Series No 14*, September 2010, Australian Institute of Health and Welfare.

5 The figure is 10.3 per cent – see Wang, YA, Chambers, GM, and Sullivan, EA, 'Assisted reproductive technology in Australia and New Zealand 2008', *Assisted Reproduction Technology Series No 14*, September 2010, Australian Institute of Health and Welfare, p. 4.

6 National Health and Medical Research Council, answers to questions on notice, received 17 November 2010.

1.8 However, the figures from 2002–2008 are not necessarily representative of the entire period covering the 1970s until today. For example, in 2000, it was reported that there were 297 viable pregnancies using donor sperm,⁷ and 91 viable pregnancies using donor oocytes and donor embryos.⁸ Between 1993 and 2009, 1,004 children were born as a result of procedures undertaken by ART clinics in Western Australia⁹ and there are currently more than 4,500 children in Victoria born as a result of donated gametes and embryos.¹⁰

1.9 If there has been an average of 600 donor conceived people born each year since the 1970s, there would be about 20,000 donor conceived people in Australia.¹¹ However, some estimates suggest that there are in excess of 60,000 donor conceived individuals in Australia.¹²

Access to ART procedures

1.10 It does not appear that statistics are collated on the types of families that access ART procedures in Australia; nor would it appear that statistics about a particular mother's status are reported to the Australian Institute of Health and Welfare's National Perinatal Statistics Unit. For example, a breakdown between percentages of infertile heterosexual couples, single women and lesbian couples accessing ART through clinics is not available. This issue is further complicated by the fact that some heterosexual couples as well as, more commonly, single women and lesbian couples utilise private donor conception arrangements and are therefore not recorded in the statistics collected by clinics.¹³

1.11 In Western Australia, between 1993–2009, of the 338 donor conceived children reported by clinics where status could be identified, 115 babies were born to

7 Hurst, T, and Lancaster, P, 'Assisted conception – Australia and New Zealand 1999-2000', *Assisted Conception Series No 6*, 2001, AIHW, National Perinatal Statistics Unit and Fertility Society of Australia, p. 39.

8 Hurst, T, and Lancaster, P, 'Assisted conception – Australia and New Zealand 1999-2000', *Assisted Conception Series No 6*, 2001, AIHW, National Perinatal Statistics Unit and Fertility Society of Australia, p. 36.

9 Western Australia Department of Health, answer to question on notice, received 24 November 2010.

10 Victorian Assisted Reproductive Treatment Authority, *Time to Tell*, <http://www.varta.org.au/www/257/1003057/displayarticle/1003349.html>, accessed 10 December 2010.

11 See, for example, Dr Sonia Allan, *Submission 30*, p. 5.

12 Donor Conception Support Group (DCSG) website, 'National inquiry into donor conception practice', <http://www.dcs.org.au/legislation/inquiry.html>, accessed 30 June 2010; Mrs Caroline Lorbach, DCSG, *Committee Hansard*, 2 November 2010, p. 14.

13 See, for example, *Submission 157 (name withheld)*, p. 1.

single women.¹⁴ No figures were recorded for lesbian couples. In one clinic in Victoria, it is estimated that 60 per cent of clients are currently heterosexual couples, with about 20 per cent being single women and 20 per cent being same-sex couples,¹⁵ whereas another clinic has about a 33 per cent split for heterosexual couples, lesbian couples and single women.¹⁶

1.12 Prior to 2000, some states had legislated to require that a woman be either married and living with her husband on a genuine domestic basis or be living with a man in a de facto relationship in order to access fertility treatment, including donor conception.¹⁷ However, in *McBain v the State of Victoria and Ors*,¹⁸ the Federal Court of Australia held that state Acts which restricted women's access to fertility treatment on the basis of marital status were invalid.¹⁹ The consequence of this decision was that it opened up access to fertility treatment to both single women and same-sex couples.

Commonwealth funding arrangements for ART procedures

1.13 The Commonwealth provides funding for ART processes, including donor conception, through the Medicare scheme. There are ten items listed on the Medicare Benefits Schedule relating to ART, attracting a 75 per cent or 85 per cent rebate. These include such services as:

- superovulated treatment cycle proceeding to oocyte retrieval;²⁰
- ovulation monitoring services for assisted insemination; and
- preparation of semen for the purposes of assisted insemination.²¹

14 Western Australia Department of Health, answer to question on notice, received 25 November 2010.

15 Ms Rita Alesi, Victorian Infertility Counsellors Group, *Committee Hansard*, 3 November 2010, p. 76.

16 Ms Marianne Tome, Victorian Infertility Counsellors Group, *Committee Hansard*, 3 November 2010, p. 76.

17 See, for example, the *Fertility Treatment Act 1995* (Vic), as at 2000. In *Pearce v South Australian Health Commission* (1996) 66 SASR 486, 10 September 1996, per Bollen, Millhouse and Williams JJ, the Full Court of the South Australian Supreme Court unanimously declared that provisions of the *Reproductive Technology Act 1988* (SA) discriminated on the ground of marital status, and thus were in breach of the *Sex Discrimination Act 1984* (Cth).

18 [2000] FCA 1009, 28 July 2000, per Sundberg J.

19 This was on the basis that section 22 of the *Sex Discrimination Act 1984* (Cth) makes it unlawful for a person to refuse to provide services to another on the ground of that person's marital status; and section 109 of the Australian Constitution provides that where a state Act is inconsistent with a Commonwealth Act, the state Act is invalid to the extent of the inconsistency. This decision was upheld by the High Court of Australia in *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16, 18 April 2002.

20 'Superovulation' is the release of a larger than usual amount of oocytes stimulated by fertility medication.

1.14 Additional funding for ART procedures is provided through the Extended Medicare Safety Net (EMSN), which provides an additional rebate for Australian families and single people who incur out-of-pocket costs for out-of-hospital services. Once the relevant annual threshold of out-of-pocket costs has been met, Medicare covers 80 per cent of any future out-of-pocket costs for out-of-hospital services for the remainder of the calendar year. However, on 1 January 2010, an upper limit was placed on the benefits that can be paid under the EMSN for ART procedures.²²

Conduct of the inquiry

1.15 The committee advertised the inquiry in *The Australian* newspaper fortnightly from 30 June 2010 to 25 August 2010, and from 14 October 2010 to 10 November 2010, and invited submissions by 30 July 2010. Submissions continued to be accepted until 7 February 2011. The committee also wrote to a number of organisations and individuals inviting submissions. Details of the inquiry and associated documents were placed on the committee's website.

1.16 The committee received 162 submissions from various individuals and organisations which are listed at Appendix 3. Due to the nature of some of the personal stories and experiences included in certain submissions, the committee determined that relevant submissions would be published with the name of the submitter(s) withheld and/or with particular information removed. A number of submissions were also accepted as confidential and were not published. All public submissions were published on the committee's website.

1.17 The committee held public hearings in Canberra on 29 October 2010, in Sydney on 2 November 2010 and in Melbourne on 3 November 2010. Witnesses who appeared at the hearings are listed at Appendix 4. The *Hansard* transcript is available on the committee's website at: <http://aph.gov.au/hansard/>.

Scope of the inquiry

1.18 The terms of reference for the inquiry relate to donor conception regulation and legislation across federal and state jurisdictions. Early donor conception practices were not governed by any specific legislative regime, but were essentially a private arrangement conducted between the clinic, donors and recipient parents.²³ Anonymity

21 Department of Health and Ageing website, 'Assisted Reproductive Technology ART Services', <http://www9.health.gov.au/mbs/search.cfm?q=assisted+reproductive&sopt=S>, accessed 1 July 2010.

22 There are 12 procedures covered by the new upper limit placed on benefits that can be paid under the EMSN: Department of Health and Ageing website, 'New item structure for Assisted Reproductive Technologies', <http://www.health.gov.au/internet/mbsonline/publishing.nsf/Content/News-20091224-Assisted-Reproductive-Technologies>, accessed 20 December 2010.

23 Donor Conception Support Group website, 'National inquiry into donor conception practice', <http://www.dcs.org.au/legislation/inquiry.html>, accessed 30 June 2010.

of donors was generally a requirement for the participation of both donors and recipient parents.²⁴ As a result, many parents were encouraged not to advise their children that they were donor conceived, and it appears that many donor conceived people are not aware that they are donor conceived.²⁵

1.19 Today, there are only four states in Australia that regulate donor conception: Victoria, South Australia, Western Australia and New South Wales. Much of the evidence and discussion in this report is centred on the experiences of donor conceived people, particularly those from the states with legislation regulating donor conception practices. This may reflect the coverage that the issue of donor conception has had in those states. As a result, this report is not a comprehensive examination of all issues relating to donor conception and ART practices in Australia.

1.20 On the whole, the regulation of donor conception in Australia does not appear to have accorded donor conceived people the right to information and access to records that may assist in improving their sense of identity. The committee is hopeful that its report and recommendations will assist in raising awareness in all states and territories about the issue of donor conception, particularly in those jurisdictions that do not have legislation regulating donor conception practices.

Structure of the report

1.21 The committee's report is structured in the following way:

- Chapter 2 examines the regulation of donor conception practices in Australia, and considers concerns raised during the inquiry in relation to regulation of these practices;
- Chapter 3 examines issues in relation to the management of data relating to donor conception and the need for a national register;
- Chapter 4 discusses payments for donors, and the provision of appropriate counselling and support services;
- Chapter 5 considers the risk of consanguinity and limits on donations;
- Chapter 6 considers the rights of donor conceived individuals; and
- Chapter 7 sets out the committee view and recommendations.

Note on references

1.22 Submission references in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcripts.

24 Donor Conception Support Group website, 'National inquiry into donor conception practice', <http://www.dcs.org.au/legislation/inquiry.html>, accessed 30 June 2010.

25 *Submission 42 (name withheld)*, p. [1]; *Submission 78 (name withheld)*, pp [1-2].