

In Defense of the Sperm Donor

Submission to Senate Legal and Constitutional

Affairs References Committee

“Inquiry into donor conception in Australia”

From: Andrology Department, Concord RG Hospital, NSW

Standing:

The Andrology Department has provided public hospital sperm donor services since 1978. Originating at Royal Prince Alfred Hospital, in 1999 the clinical, laboratory and sperm bank facilities were transferred to the new Andrology Department at Concord Hospital. For over 3 decades the same Clinical Andrology staff (Assoc Prof AJ Conway, Professor DJ Handelsman) have operated this program continuously whereby our clinical and laboratory service has screened and followed over 600 sperm donors. Consequently we have extensive historical and contemporary experience in recruiting, screening and counselling of sperm donors.

For the purpose of this Inquiry we have unique status. We provide the medical screening and the ongoing responsibility solely for anonymous sperm donors without the inherent conflict of interests that follows from providing clinical services to the recipients of donor sperm as well. All other Australian infertility clinics or services using anonymous donor sperm employ the same clinic staff (doctors, nurses, counsellors) - who are primarily responsible to the recipients for their medical care – but also do the recruiting, screening and counselling of sperm donors. For such infertility services donor sperm is a necessary commodity. When clinical staff, whose primary responsibility is to the recipients, also recruit sperm donors, the welfare of the sperm donors is inevitably relegated to a secondary, instrumental status.

For this Inquiry, as in other settings where sperm donation issues are raised by lobby groups, sperm donors have no authentic independent voice. Consequently, they remain vulnerable to be systematically deprived of their privacy rights without apparent protest until harm ensues at which time it is too late. In this context, it is disappointing that the Inquiry's Terms of Reference make specific reference to the rights of offspring but not those of the sperm donors.

We strongly support the rights of offspring to gain access to identifying information on the sperm donor so long as the sperm donor's consent is obtained. For about 2 decades (depending on the clinic) it has been standard policy to require advance consent from sperm donors at the time of their donation to identification by their genetic offspring once they have reached maturity. However, prior to that time (in the 1980s and before), sperm donors provided their donations on the basis of a legal undertaking to provide enduring protection of their privacy. Their donations were given in good faith on these undertakings and would not have been given without them. We further support the right of offspring to gain identifying information from such past sperm donors if the donors agree voluntarily to do so. However, as the donors have breached no obligations to void that legal contract, it would be fundamentally wrong in moral terms and oppressive in legal terms, to force retrospective overriding of the donor's privacy rights.

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We make this submission only because it is apparent from submissions to this Inquiry that there are calls to systematically override the interests of sperm donors without their consent in this specific situation. Despite the far more visible and audible demands from offspring and/or recipients, such retrospective overriding of sperm donor privacy rights without their freely given voluntary consent is harsh, oppressive and a damaging denial of natural justice.

Background:

In the tripartite arrangement for donor sperm-based conception (donor, recipient, offspring), the sperm donor is a shadowy figure. Dwelling in his own privacy and having acted from unknown, misunderstood or misinterpreted motives, he lacks any independent voice to defend legitimate legal, ethical and privacy rights. In their desire for undisturbed individual privacy, they form no public lobby group. As a result, calls to subordinate donor's privacy rights to those of the offspring may even appear uncontested.

Forcible involuntary disclosure of a donor's identity can create major damage to his private world. After the passage of two decades, sperm donors may forget or regret actions from much earlier life. If they have not given prior consent to identification, this is a major step they must be afforded the right to consider freely, without undue pressure or threats. They may or may not agree that in their very different life circumstances, they wish to accept what may be an unwelcome intrusion into their lives. It is not hard to imagine many circumstances we are aware of where disclosure of such past actions would constitute a damaging intrusion in the donors life. The sperm donor no less than anyone else in society is perfectly entitled to maintain privacy over matters they prefer not to divulge to family, friends and/or workmates. Conventional institutional searching for these anonymous sperm donors whose contact details have inevitably changed places his privacy at great risk (see below). The donor remains innocent of any wrongdoing to void his consent contract and has done nothing other than charitably trying to help infertile couples complete a family. He should not be subjected to forcible identification against his wishes. Such retrospective legislation is inherently oppressive and should be anathema to any law-abiding society.

Prior to circa 1990, sperm donation in Australia (and all comparable countries), was considered a simple, charitable and altruistic act aiming to help complete a family for a couple who suffered the misfortune of male infertility. Becoming a sperm donor was a social generosity analogous to blood donation. Reflecting this, legislative regulations specifying sperm donor risk declarations and consent were till very recently virtually identical to those for blood donation. Prior to 1990s, the sperm donor information and consent forms clearly offered enduring privacy and no further rights or obligations in relation to the offspring. The experience of sperm donor programs, after introduction of the mandatory disclosure requirement, was a dramatic reduction in willingness to become sperm donors. This clearly highlights that most sperm donors of the pre-mandatory disclosure era would not have become sperm donors had disclosure been required with their donation. Whatever hindsight wisdom that may be applied now, the legal contract entered into voluntarily and in good faith by the donor and institution should not be breached without his freely given voluntary consent.

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Response to Terms of Reference:

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.

In regard to human reproduction, we submit that the diversity of State's legislatures allows for experimentation with different attitudes to legislation in regard to human reproduction. Historically some states (Vic, WA) have opted for early and prescriptive legislative approach (requiring updating amendments) whereas others (NSW) have opted for a more *laissez faire* approach. Nationally/federally we benefit from the contrast viewed as experiments. In this case we believe national legislation would be stifling, inflexible and may give false permanence and rigidity to what may be passing fashions and/or reflexive calls for prohibitions. Therefore we submit that state-based legislative frameworks are sufficient.

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

(i) payments for donors,

Payment to sperm donors is not essential but has traditionally been used to enhance recruitment. Where they exceed token sums, they are undesirable as well as unnecessary. Payments for "time and travel" are simply a disguised form of payment. The French national sperm donor service (CECOS) never paid sperm donors and had no shortage while there was no disclosure requirement. Our service paid donors a token amount (\$10, then \$20 per donation until the mid 1990's when payments ceased.

The dramatic decrease in availability of sperm donors since the 1980's (when plentiful recruitment was easy) to the late 1990's and onwards (when recruitment has been extremely difficult), is entirely due to the introduction of the disclosure requirement when the offspring reach maturity. Payment cannot and does not overcome this major obstacle to recruitment. Prior to 1990 sperm donation was considered a purely altruistic act and, contrary to the mythology, most donors were not students but individuals with experience of infertility among their family or friends which motivated them to become sperm donors. These men often did not take payments. But their view of the sperm donation was that it was obligation-free, consequence-free and charitable, rather like blood donation.

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

We support the requirement for prospective mandatory registration of new sperm donors so their identities can be disclosed under the appropriate agreed circumstances to offspring, on their request, after reaching maturity.

We also support voluntary registers of past sperm donors to make his details available to offspring, on their request, after reaching maturity. However, this must only be on the basis of the donor relinquishing his privacy rights in a strictly voluntary manner, without undue pressure or legislative threat.

Such a voluntary register can work but it would need to have a well targeted and effective public information campaign to encourage previous sperm donors to join. This option is within the hands of the state and/or federal government although it may require patience and persistence.

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There are practical issues in maintaining contact with past sperm donors. After two decades from donation to the donor offspring reaching maturity, some donors may be difficult or impossible to contact (death, emigration, change of name). Even if theoretically contactable, they may not wish to be contacted at all, to participate in any voluntary register or make contact with offspring. These decisions must remain at the discretion of the donor according to their legal right to privacy and moral/ethical right to autonomy.

The impact of such forcible or even accidental disclosure on the past sperm donor should not be underestimated merely because it is unfamiliar. As just one example, we have experience of a sperm donor where contact with the recipient led to breakdown of the sperm donor's family, and attempted suicide of the donor's wife, when the donor and recipient formed a relationship presumably related in some way to their genetic offspring in common.

Making any attempt to contact past sperm donors is a highly sensitive matter in protecting their privacy. Substantial numbers of sperm donors from the pre-disclosure era have decided to keep this issue strictly personal and private and specifically do not wish to disclose their donor history to their family or friends. Where that is their decision, we are obliged to respect it within the bounds of the legal contract entered into by the donor and institution. In this setting, their privacy is easily breached inadvertently by conventional methods of making contact. We therefore developed careful and sensitive procedures to contact sperm donors when required. Above all, in general, we do not make contact with previous sperm donors unless (a) it responds to their requests (such as for non-identifying information on outcomes) or (b) important new information becomes known such that it is in their best interests and of their family(s) to disclose to them (this has happened only once in 3 decades with a new genetic disorders was identified in a donor offspring where the genetic mutation was not from the mother's family and could have affected the donors family). Our approach is based on personal knowledge of the individual donor and their stated preferences on how or where to make contact if essential. For example, it is only acceptable to make personal contact with the man directly by phone. It is not acceptable to write or leave phone messages in case details left create suspicion about or divulge matters that defeat the purpose of his privacy protection regarding matters he may wish not known to his family, friends or workmates.

(iii) provision of appropriate counselling and support services;

This is an important underpinning of any donor conception services which we support.

We oppose the over-reach of anonymous sperm donor consent which requires their partners counselling and/or consent to their becoming a sperm donor such as required by RTAC and some state's regulations.

It is unethical, a breach of the donor's personal autonomy, to require anyone else's consent to his becoming a sperm donor. A personal decision to donate sperm by a healthy, legally competent man desiring to make an altruistic gift, does not require psychological exploration or counselling. Clear written information on the implications for the potential sperm donor with the option for further explanation is sufficient. Sperm donation is an act comparable with many other normal life decisions - such as deciding to have a child, making a will, taking a bank loan or becoming a blood donor - none of which require prior "counselling" or consent of a conjugal partner. The converse, requiring a man to consent or be counselled about his wife's request for a termination of pregnancy or undergoing sterilisation, opening a bank account or taking a loan

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have long since been regarded as an unacceptable intrusion on another person's autonomous decision making.

It is also impractical to pursue such a requirement as the sperm donor may later marry (or remarry) and his present and future children have just as much an interest as his present female partner in his potential offspring and their future relatives.

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

We make no specific submission in respect of this issue.

(d) the rights of donor conceived individuals.

We note highlighting of the rights of offspring without reference to those of sperm donors which, in some circumstances, they seek to override.

We take this opportunity to highlight a frequently raised but false analogy between donor conception and adoption. Sperm donation is basically a purely voluntary, trouble-free and generally altruistic act with usually no adverse lingering consequences for the donor. This vividly contrasts with adoption where the central tragedy of the relinquishing mother is inescapable. Uniting adoptees with their biological parents provides late relief of this tragic relinquishment. By contrast the wishes and curiosity of sperm donor offspring have to be balanced against sperm donor rights to privacy. Any complaints should be directed to their mothers and not used to retrospectively and forcibly override sperm donor privacy without the donor's voluntary and informed consent.

We highlight another falsity arising in the demands for access to sperm donor identity. This is the claim that genetic history from the sperm donor is essential for the medical care of offspring. These claims are incorrect and misguided. At the outset sperm donors are carefully screened medically for transmissible genetic or infectious diseases at the time of donation. Any major known genetic diseases are screened out. For complex diseases with a measurable but usually minor genetic component (like virtually all common diseases), such knowledge is desirable but not essential. Where genetic tracing for known mutations is considered desirable and feasible, this may be achieved by using donor DNA with consent for screening but without necessarily revealing his identity. For example, if a sample of sperm donor DNA is retained (eg to insure against identity mixup), subject to donor consent, this material could be used for such genetic mutation testing without disclosing the donor's identity. Furthermore, the acute or emergency medical care of any person does require detailed family genetic history. There is no evidence, or even legitimate suggestion, that the acute or emergency medical care of anyone is any worse if such information is unavailable as may often occur for orphans, adoptees or children of single parents (or of forgetful or ill-informed parents).

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