Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: +61 2 6277 3560
Fax: +61 2 6277 5794
Email: legcon.sen@aph.gov.au

8 November 2010

To the Senate Committee Inquiry into Donor Conception,

I write in response to questions I took on notice at the Senate Committee Inquiry into Donor Conception in Australia. In particular:

1. In the context of the remaining records that are not well regulated out there, would the Commonwealth have the power to mandate protection of those records in some way?

I suggest that pursuant to the Commonwealth's constitutional power to make laws with respect to 'external affairs' (*Australian Constitution* s51(xxix)) the Australian Parliament would have the power to legislate to protect existing records and to require the subsequent release of information to donor-conceived individuals about their genetic heritage. Such power would also extend to setting up a national database which would provide for consistency across the nation in relation to data retention and release. The external affairs power enables the Australian Parliament to make laws with respect to matters physically external to Australia;[1] and **matters relating to Australia's obligations under bona fide international treaties or agreements, or customary international law**.[2]

Australia has obligations under a number of international treaties that relate to the protection of children, ensure children are not discriminated against, that their best interests are considered paramount, and that no child is denied the right to an identity or to know and/or have

1 *Horta v Commonwealth* (1994) 181 CLR 183.

2 *Commonwealth v Tasmania* (1983) 158 CLR 1; *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Horta v Commonwealth* (1994) 181 CLR 183.

a relationship with their parents. The relevant articles of such treaties are provided below with comments about how the current denial of access to information to donor-conceived individuals about their genetic heritage contravenes Australia's obligations under them. Such arguments are included to illustrate why the Commonwealth should use its external affairs power to preserve information relating to donor conception nationally. Constitutional limitations regarding the states are then considered showing that there is no impediment to the Commonwealth in legislating to regulate (first and foremost to preserve any records held) in the state public and private sectors in relation to the retention of donor records.

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

- **Article 2 requires States Parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.**
    - The status of a child's parent as 'recipient' or 'donor' should not therefore preclude the child from having information about their genetic heritage. That donor conceived children are denied information regarding their genetic heritage because their parents chose to conceive using donor gametes or because their genetic parent is a 'donor' is discriminatory – all other children in Australia have access to such information or at the very least avenues (such as the Family Court) to obtain it.

- **Article 3 (1) provides that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'**
    - The best interests of the child includes access to information about their biological heritage for reasons such as having information about familial medical history, psychological health and well-being, development of identity, avoidance of consanguineous relationships, knowledge of genetic siblings and parent(s). In addition, allowing privacy issues to trump such a 'primary consideration' is not acceptable – the right to privacy is not absolute in Australia.

- **Article 7 specifies that every child has a right to know and be cared for by their parents**.

- Denying donor-conceived individuals access to information contravenes this right. Whilst the non-biological parents are considered *legal* parents of the child, this should not preclude or ignore that a child has a right to know their genetic parent(s) or at least information pertaining to that parent.

- **Article 8 states that every child has a right to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.**
    - Denying a donor conceived individual access to information about their genetic heritage contravenes this right by denying them access to important information that can help in development of identity and preserve family relations.

- **Article 13 provides that the child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds...**
    - Denying donor conceived individuals the right to seek and receive information about their genetic heritage contravenes this right.
    - Note: the exercise of this right may be subject to certain restrictions as provided by law and are necessary a) for respect of the rights or reputations of others; or b) for the protection of national security or of public order, or of public health or morals. Whilst the 'right to privacy' of donor's may be raised in relation to (a), I emphasise that there is no *absolute* right to privacy in Australia. In fact, there are clear exceptions to the protection of private information and examples of the ability to release information in many areas of the law. For example there exists statutory provision for the release of identifying information in relation to reporting of communicable diseases, and the retrospective release of identifying information to adoptees regarding their biological parent(s);[3] there also exists common law authority in the context of:
        - breach of confidence which provides that private information may be released in circumstances where the withholding of information would lead to iniquity;[4]

3 *Adoption Act 1993 (ACT); Adoption Act 2000 (NSW); Adoption of Children Act 1994 (NT); Adoption Act 2009 (Qld); Adoption Act 1988 (SA); Adoption Act 1988 (Tas); Adoption Act 1984 (Vic); Adoption Act 1994 (WA).*

4 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 282 (Lord Goff); *Gartside v Outram*

- comparative law which suggests a broader balancing of public interests approach;[5]
- the law of negligence where the release of information may protect a third party from serious harm.[6]

Privacy protection legislation and the National Privacy Principles also recognises that information may be released where the use or disclosure of such information is **required or authorised by or under law**.

The Universal Declaration of Human Rights

- **Article 7 states that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.**
  - It is discriminatory to provide all children in Australia *EXCEPT* those conceived as a result of donor conception information about their genetic heritage.
  - As noted above, all states of Australia provide a right to adoptees to access information about their biological parents. Such information is available regardless of when a person was adopted. Legislation pertaining to the right of adoptees to have information about their biological parent(s) acts retrospectively.
  - The Family Court of Australia will (and does) order DNA testing when trying to determine genetic parentage pursuant to issues governed by the *Family Law Act 1975* (Cth). State *Status of Children Acts* create a legal fiction to recognise *legal* parentage of individuals born as a result of donor conception. Such legal recognition is valid but should not preclude or prevent a child knowing or being able to access information about their *genetic* parent(s) – again, it is only in the donor conception context that this occurs.

- **Article 25(2) Motherhood and childhood are entitled to special care and assistance. All**

(1857) 26 LJ Ch (NS) 113, 114 (Wood VC) ("there is no confidence as to the disclosure of iniquity"); *Beloff v Pressdram* [1973] 1 All ER 241, 260; *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd* (1980) 51 FLR 184, 213-214; *A v Hayden* (1984) 156 CLR 532.

5 *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1168 (Lord Wilberforce); *Hosking v Runting* [2005] 1 NZLR 1.

6 *BT v Oei* [1999] NSWSC 1082.

children, whether born in or out of wedlock, shall enjoy the same social protection. Denying access to information about their biological origins for donor conceived individuals means that such individuals do not enjoy the same social protections that children conceived as a result of intercourse receive. (For example they do not have access to the same medical information; are at higher risk of psychological disorders and substance abuse as a result of being denied information; and risks of forming consanguineous relationships.)

CONSTITUTIONAL LIMITATIONS:

The Australian Law Reform Commission in considering the Commonwealth's ability to legislate on privacy[7] recognised that there is an implied constitutional limitation that a federal law may not discriminate against a state,[8] or prevent a state from continuing to exist and function as an independent unit of the federation.[9] They however note that in *Western Australia v The Commonwealth* a majority of the High Court of Australia determined that:

> For constitutional purposes, the relevant question is not whether State powers are effectively restricted or their exercise made more complex or subjected to delaying procedures by the Commonwealth law. The relevant question is whether the Commonwealth law affects what Dixon J [in *Melbourne Corporation v The Commonwealth*] called the 'existence and nature' of the State body politic … A Commonwealth law cannot deprive the State of the personnel, property, goods and services which the State requires to exercise its powers and cannot impede or burden the State in the acquisition of what it so requires.[10]

In the context of the Commonwealth legislating to preserve information regarding donor-conception, whilst it is possible that state powers may be 'effectively restricted or their exercise made more complex or subjected to delaying procedures', **such legislation would not affect the existence and nature of the 'State body politic' and therefore would be legitimate**.

It is noted that in the context of privacy, the Australian Law Reform Commission concluded that the 'Commonwealth could legislate to regulate the handling of personal information in the state public

---

7 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice, (ALRC Report 108)* (2008).

8 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 78; *Victoria v Commonwealth* (1957) 99 CLR 575; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Western Australia v Commonwealth* (1995) 183 CLR 373.

9 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 78; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Victoria v Commonwealth* (1971) 122 CLR 353; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; *Austin v Commonwealth* (2003) 215 CLR 185.

10 *Western Australia v Commonwealth* (1995) 183 CLR 373, 480 as cited in ALRC, above n3.

and private sectors to the exclusion of the states'.[11] It is further recognised that 'a number of pieces of federal human rights legislation, including the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Racial Discrimination Act 1975* (Cth), already exist and regulate the activities of state and territory public sector authorities.' Clearly regulating in relation to matters which directly affect children and families within Australia and reflect Australia's obligations under international treaties to which we are a party would therefore be acceptable.

Of course there are other ways in which the Commonwealth may legislate on matters that may otherwise fall to the states including for example having the states refer their power to the Commonwealth. Such an approach would not however meet the urgency required to preserve documents pertaining to donor conception, and given the Commonwealth's power under s51(xxix) would not be the preferred approach noting again that it is not necessary.

2. What information, as a minimum, should be required of fertility clinics on their registers when they have the donor come in? When the donor signs the form to register, do you have a strict set of criteria as to the information that should be made available to donor conceived individuals in due course?

I am of the opinion (having consulted with donor-conceived individuals) that as much information as possible should be collected, and made available to donor-conceived individuals in due course. At a minimum, I would suggest:

Identifying Information:

Name

Date of Birth

Address

Occupation

Medical History (Personal and familial to the extent to which it is known) – this should be updated every five years. The onus to update such information should fall to the clinics or registry rather than the donor (who may not follow up).

Non-identifying information such as:

Education (Level and Qualifications)

11 Australian Law Reform Commission, above n3.

Eye colour

Hair colour

Height

Weight

Marital Status

Number of children (if any)

Sex

Year of Birth

Place of birth

Nationality/culture with which the donor identifies

Religion (if any)

Reason for becoming a donor

Number of offspring born through other donations

Identity of other offspring born through other donations

Interests/hobbies/sporting activities

**Anything else the donor considers central to their personality would also be useful for a donor-conceived individual to know.

I note it is difficult to delineate some of the information as identifying or non-identifying as some information in combination might lead to the identification of a person, but alone would be considered non-identifying.

I hope that this information is useful to the inquiry and again thank the Senate Committee for giving me the opportunity to put forward my views.

Kind regards,

Dr Sonia Allan