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26 July 2010

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

Inquiry into donor conception in Australia

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1. This submission is directed at the injustice enshrined in Australian law, which has the effect of preventing a person who was born as a result of donor conception procedures from obtaining access to identifying information about his/her genealogical (donor) father.
2. This submission particularly addresses the law in Victoria. The law differs from state to state, but, for donor offspring, the effective outcome is similar in all parts of Australia.
3. The law in Victoria on this issue, namely the Assisted Reproductive Treatment Act 2008 (ART Act) came into effect only about 12 months ago.
4. The effect of the ART Act is to verify and enshrine the fact that donor offspring born prior to 1 July 1988 (all of whom are self evidently now adult) have no right to access such critical information about themselves.
5. At the time the ART Act was passed, there were many submissions made against this aspect of it
6. Attached is one such submission, in the form of an open letter dated 4 February 2009 written by me to Mr. R J Hulls, Attorney General for Victoria.
7. The manifest injustice of the law in this regard was acknowledged by many Victorian politicians on all sides (as can be seen by Hansard references in the attachment), but despite this, the ART Act was passed, partly because of assurances by the government that this aspect would be reviewed in the very near future. Such is the working of the Federal system that the Senate Committee is, it seems, a forum for that review.
8. How could it be, as a matter of justice, that our law has the effect of preventing a person having access to existing information as fundamental as:
   a. the identity of his/her father;

b. one half of his/her genetic makeup, family medical history, cultural heritage, family tree;
c. the identity or existence of half-siblings?

9. I know a number of donor conceived people who are denied access to this important personal information and who, as a result, feel a deep sense of deprivation, as well as justifiable anger.
10. When viewed against the weight of these fundamental rights denied, the arguments in favour of the denial are, it is submitted, flimsy indeed.
11. Those arguments seem to boil down to the donor's "right to privacy" and "breach of an agreement with the donor".
12. Rights to privacy are routinely overridden where they conflict with the rights of others. For example, defendants in "paternity suits" would no doubt often prefer that their "privacy" had been respected. It is submitted that it is hard to sustain an argument that the "right to privacy" of a donor should prevail against the right of the person fathered as a result of the actions of the donor to have access to knowledge as to the identity of his parent.
13. In relation to the "breach of agreement" argument, the following questions are relevant, namely who are the parties and what is the form of this "agreement" which is given such weight? So far as I aware, there was no particular form of agreement, which typically consisted of a brief application and consent form. Whatever its formality, how could it in any way be said to be "binding" on the person conceived?
14. There is a clear precedent in the case of adoption, where in all enlightened jurisdictions adult adoptees have for the last 20 years or so had access to existing identifying information (subject to first participating in appropriate counselling), whatever assurances may have been given at the time to the parent who gave up the child for adoption.
15. The attached letter to Mr Hulls refers to several other particular matters, which are to some extent, of Victorian application, but which should, it is submitted, be regarded as relevant throughout Australia.
16. The first of these relates to "human rights". Victoria of course has its own Charter of Human Rights and Responsibilities Act (the Charter). However, in those states which do not have an equivalent, the legislature would presumably prefer to have regard to rights of the type set out in the Victorian Charter, given that they can be regarded as being of universal significance.
17. It is submitted that the ART Act is not compatible with the Charter in a number of respects, namely section 8 of the Charter (Recognition and equality before the law), section 17 (Protection of families and children) and in particular section 19 (Cultural rights). The ART Act has the effect of denying access to knowledge of a person's "racial

background". By virtue of that denial, such person, as a person "with a particular… racial…background" is "denied the right in community with other persons of that background, to enjoy… his/her culture…".

18. The second matter referred to is that it is difficult to reconcile this issue with the guiding principles in section 5 of the ART Act. These guiding principles are stated to include:

    "*(a) the welfare and interests of persons born or to be born as a result of treatment procedures are paramount;"*

    "*(c) children born as the result of the use of donated gametes have a right to information about their genetic parents;"*

19. It is submitted that the laws applying throughout Australia (not merely in Victoria) should be measured against similar principles. Presumably other jurisdictions, whose legislation does not specifically contain such "guiding principles", would nevertheless prefer not to be seen as acting in manner which contravenes such self evident "principles".
20. It is my submission that this issue represents a glaring injustice, which now requires urgent redress throughout Australia. It is hoped that that the Committee will see this issue in the same light and will recommend accordingly.

Yours faithfully

D Gordon Ley

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LEY

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4 February 2009

The Honourable Mr R J Hulls
Attorney General
Level 3, 1 Treasury Place
East Melbourne 3002

Dear Mr Hulls

Assisted Reproductive Treatment Act 2008
Denial of identifying information to donor offspring

I write on behalf of DC, a young adult Victorian, who was born as a result of donor conception procedures prior to 1 July 1988.

DC was hopeful that the Assisted Reproductive Treatment Act 2008 (ART Act), which was passed on 4 December 2008, would allow her to access to identifying information about her genealogical (donor) father, which DC sees as a fundamental part of her identity. DC has been told that such information about her does exist, but she has been unable to obtain access to it.

However, section 59 of the ART Act which requires the Registrar to disclose, on application by a donor offspring, any identifying information held about the donor, only applies if the offspring was conceived using gametes donated since 1 July 1988 (and requires consent of the donor in the case of persons conceived from donations made between 1 July 1988 and 31 December 1997).

The result is to verify and enshrine the fact that persons born prior to 1 July 1988, including DC, have no right to access any such information about themselves.

The pleas of DC and other affected Victorians have been ignored. The fact that this can be a source of distress to those affected is well known and highlighted by many speakers in both Houses during the recent debate.

Mr. Jennings, the responsible Minister in the Legislative Council, himself said during the debate (Hansard page 5449);

> *"We acknowledge that this is an area in which there have been a range of expressions of concern to ensure that human rights with regard to one's identity – to have confidence about one's genetic make-up, cultural background and a whole*

variety of other rights – should be protected and consistent with our obligations both under the charter in Victoria and other relevant equal opportunity provisions and international conventions. We understand that is extremely important, and it has been a feature of the information available from various forms of registers that have been in existence for some time."

Despite this, Section 59 was passed without amendment.

During the debate in the Legislative Council on 4 December 2008 (Hansard page 5449) Mr. Jennings read into Hansard a prepared statement to the effect that the Government proposed to refer issues associated with providing donor-conceived people with more access to information about their genetic origins to Law Reform Committee of the Parliament, which would be asked to consider and advise on, amongst other things:

a. issues that would arise if all donor conceived people were given access to identifying information about their donors and their donor conceived siblings, regardless of the date of the donation; and
b. the legal, practical and other issues that would arise if the Birth Certificates of donor conceived people indicated their genetic origins
c. possible implications under the Charter of Human Rights and Responsibilities

However, late in the debate, on the same day, (Hansard page 5488) Mr. Jennings seems to cast doubt on the promised reference to the Committee. He questioned "whether the reference has the same relevance or rigor that needs to be applied to it." He stated "the proponents of reform in terms of the amendments to the original Bill have, by and large, had a reasonable day out in relation to the accommodation that the government has given to the intention of their amendments." He concluded that the Government would be "happy ….to consider on reflection whether there is still the utility of the reference that I flagged, and then make a decision about what is the best way forward."

There was no basis for these comments insofar as DC is concerned. For her, the issue had exactly the "same relevance or rigor" as before. She does not believe that her interests had had "a reasonable day out".

It is also noted that, in the Legislative Assembly, later on the same day, (Hansard P 5043) Mr Hudson stated:

"I therefore welcome the Attorney-General's assurances that we will address what remains as one of the major anomalies in this bill, which is that children born prior to 1 January

1988 are still not able to have access to information about their origins unless their donors have placed their names on a register, and they agree to that information being made available. That is an anomaly, because we have created two classes of children. I am pleased that the Attorney-General has agreed that that anomaly should be looked at and addressed. I look forward to amendments coming back before the house that give effect to that so that we can treat all children, irrespective of when they were born, in exactly the same way. That is what we owe the children of Victoria."

Further, Mr Merlino later in the same debate (page 5055) said:

> *"In the second-reading debate I spoke at length about the rights of children to know the truth of their genetic heritage. They have the right to answers to questions such as 'Who is my father?', 'Who is my mother?' and 'Where are my genetic roots?'. It is a truth that goes to the core of who we are as human beings. The failure of the original bill to address this injustice for donor children was of great concern to me. The amended bill deals in part with this issue by allowing donor children born after the passage of this bill to have access to the truth of their heritage. The bill does not deal with donor conceived children born prior to 1998, but as the member for Bentleigh has said, the Attorney-General has given an undertaking that, in conjunction with the Minister for Health, he will address this issue. I look forward to the minister addressing this issue and the subsequent amendments to this legislation."*

DC and many other Victorians in a similar position to her, who were extremely disappointed that their pleas for access to this vital information were ignored in the passage of the ART Act, can now only hope that these statements indicate that the matter will be speedily addressed and resolved.

It is impossible for DC to reconcile the guiding principles in section 5 of the ART Act as they apply to her, with section 39. These guiding principles are stated to include:

> *"(a) the welfare and interests of persons* ***born or to be born*** *as a result of treatment procedures are paramount;"*
> (underline added)
> *"(c) children born as the result of the use of donated gametes have a right to information about their genetic parents;"*

DC does not intend to let the matter rest.

Charter of Human Rights and Responsibilities Act (the Charter)

It will be submitted that the ART Act is not compatible with the Charter in a number of respects. For convenience, I enclose extracts of some of the relevant sections of the Charter.

Sections 8 (Recognition and equality before the law), section 17 (Protection of families and children) and section 19 (Cultural rights) specify rights with which, in the case of DC, it is submitted that the ART Act is not compatible.

In particular, section 19. The ART Act has the effect of denying DC access to knowledge of her "racial background". By virtue of that denial, DC, as a person "with a particular… racial…background" is "denied the right in community with other persons of that background, to enjoy… her culture…".

It is submitted that the fact that DC is denied access to her genetic history, with the potential health and other issues that flow from that, is not compatible with section 19 of the Charter.

On 10 October 2008 (Hansard page 4188) Mr. Jennings in the Statement of Compatibility with the Charter stated in respect of the ART Act as follows:

> *"While it is recognised that refusing access to donor information…… may involve an interference with the right of a donor conceived child to access information regarding their identity and genetic history, this reflects the factthat donations prior to this time could be or were made anonymously and to change those conditions would amount toan unreasonable interference with the donors' rights to privacy".* (underline added).

Mr Jennings rightly recognises that rights of DC are interfered with by the ART Act (although the Statement of Compatibility does not specifically refer to section 19 or other particular provisions of the Charter which may be applicable).

The Statement of Compatibility states, as justification for the limitation of the rights of DC, only the words underlined above.

Where is the rigor, where is the evidence which you would expect before overriding an acknowledged human right?
What can be derived from the words "could be or were made anonymously"? Where is the evidence that they were made "anonymously"?

The expression "to change these conditions" suggests that there was a set of uniform and understood "conditions", which I believe is not the case. In any event the "conditions" were not agreed to by the donor conceived child.

It is claimed by the Minister that there would be "unreasonable

interference with the donors' rights to privacy". The information which is being denied to the offspring is as much about the child as it is about the donor. There may be many situations in life in which a person may be reminded about something from their past, despite their wish to forget. It is submitted that there is no sufficient justification for allowing a donor to choose to hide, from his offspring whom he chose to create, his identity and therefore the genetic identity of his child. Any "interference" with his privacy, in such circumstances, could hardly be described as "arbitrary" (Charter section 13).

It is a matter for a donor who is identified and contacted by his child to decide what, if any, ongoing contact he wishes to have with the child.

DC finds it hard to accept that the right of a sperm donor to keep private the fact that his actions resulted in the birth of a child should prevail over the right of the child (when he/she is an adult) to have access to available information about the identity of her father, and therefore her ancestry, racial origin and genetic makeup. The rights of DC which are denied are disproportionately much more important than those of the donor which are being protected.

It is appreciated that in some cases information about donors does not exist. Presumably nothing can be done about this. However, DC has been told that some identifying information about her does exist; she is being denied access to it.

It is intended that this letter may be used as an open letter and forwarded, for example, to other politicians and to the Human Rights and Equal Opportunity Commission requesting a review of the operation of the Charter in relation to the ART Act.

DC (and other donor conceived persons) would be happy to meet with you if you wish. I have no doubt that you would be impressed by her and the justice of her cause.

Hopefully, it will be recognised that this is a matter which can and should be resolved without the need for any lengthy enquiry; the ART Act dealt with many less obvious and more contested issues than this. The fact that this remains unresolved can perhaps be regarded as an anomaly which can be easily fixed.

Would you kindly indicate the current position in relation to this matter? I appreciate your assistance and look forward to hearing from you.

Yours Faithfully

D GORDON LEY

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT

17. Protection of families and children

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

8. Recognition and equality before the law

(1) Every person has the right to recognition as a person before the law.

(2) Every person has the right to enjoy his or her human rights without discrimination.

(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination

13. Privacy and reputation

A person has the right—

(a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with;

17. Protection of families and children

s. 17

(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

(2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

19. Cultural rights

(1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.

28. Statements of compatibility

(1) A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.

(3) A statement of compatibility must state—

(a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and

(b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

30. Scrutiny of Acts and Regulations Committee

s. 30

The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with

human rights.

38. Conduct of public authorities

s. 38

(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

(2) Sub-section (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

41. Functions of the Commission

The Commission has the following functions in relation to this Charter—

(a) to present to the Attorney-General an annual report that examines—

(i) the operation of this Charter, including its interaction with other statutory provisions and the common law; and

(ii) all declarations of inconsistent interpretation made during the relevant year; and

(iii) all override declarations made during the relevant year; and

(b) when requested by the Attorney-General, to review the effect of statutory provisions and the common law on human rights and report in writing to the Attorney-General on the results of the review; and

(c) when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights; and

(d) to provide education about human rights and this Charter; and

(e) to assist the Attorney-General in the review of this Charter under sections 44 and 45; and

(f) to advise the Attorney-General on anything relevant to the operation of this Charter; and

(g) any other function conferred on the Commission under this Charter or any other Act.

SCHEDULE

5. Public Administration Act 2004

5.2 After section 7(1)(f) **insert**—

Sch.

"(g) **human rights**—public officials should respect and promote the human rights set out in the Charter of Human Rights and Responsibilities by—

(i) making decisions and providing advice consistent with human rights; and

(ii) actively implementing, promoting and supporting human rights.".