



# FEDERAL CIRCUIT COURT OF AUSTRALIA

## National Conference for Donor-Conceived People

MELBOURNE AUSTRALIA

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CHIEF JUDGE PASCOE AO CVO  
FEDERAL CIRCUIT COURT OF AUSTRALIA

### **Human Rights and the Law: The rights of donor-conceived people in the context of Australia's existing human rights framework**

#### **Introduction<sup>1</sup>**

We live in an age where advances in technology, especially in relation to human reproduction, are challenging age-old notions of family, parenthood, and the sanctity of life itself. Nowhere is this challenge more evident than in assisted reproduction; where two adults can make the decision to create another human-being, who may or may not have a biological relationship to one or both of them and whose legal status may be uncertain.

We have seen numerous examples of this in international surrogacy cases, often with terrible consequences for the newly-born child, including abandonment, statelessness, and exposure to potential abuse, as was the case in the Pennsylvanian case of *Huddleston*.<sup>2</sup>

In this context the rights of the child born through assisted reproductive technology assume greater importance.

#### **What is a right?**

In law, a right refers to a benefit that you are born, or are specially endowed, with, and that, in normal circumstances, cannot be taken away from you.

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<sup>1</sup> I wish to acknowledge the contribution of my Legal Researcher, Ms Genevieve Woods, and my Legal Associate, Mr Benedict Porter, in preparing this paper.

<sup>2</sup> *Huddleston v Infertility Center of America, Inc.*, 700 A.2d 453 (Pa. Super. Ct. 1997).



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Generally, rights do not attach to unborn children, although there have been limited instances where property rights through inheritance might attach to an unborn child. In many ways it is unfortunate that rights do not attach to the unborn child but this is a very difficult debate and is inextricably bound with the debate on abortion.

In 1982, the United Nations Convention on the Rights of the Child was created to act as a shield for disenfranchised children. I will call the Convention “the CRC”. It is an international law that demands that every government that agrees with the CRC, make the best interests of the child its primary concern.

Australia was one of the first countries to sign the CRC. It is almost universal with 195 parties. Sadly, however, not all parties observe all of the articles of the CRC.

According to the CRC, all children, no matter where they live or how they were conceived, or what family arrangement in which they happen to live, have the right to know their parents.<sup>3</sup> Moreover, Government has an obligation to help them preserve their identity, including their name, their nationality, and their family ties.<sup>4</sup>

The CRC was ground-breaking, as it was the first international law to recognise the importance of a child to know his or her origins; not only for medical and practical reasons, but also for the sense of identity and belonging which that knowledge entails.<sup>5</sup> It was the first convention to give children, not adults, the right to trace and know their genetic history. However, there are four major issues with the protections the CRC provides.

### **Problems**

The first problem is that although this document creates legal obligations for Australia, it does not make law for Australia. International law can only be enforced in Australia if it has been ratified and passed into legislation by

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<sup>3</sup> CRC art.7.1.

<sup>4</sup> CRC art.8.1.

<sup>5</sup> Besson, S. “Enforcing the Child’s Right to Know Her Origins,” 21 *IntJIPolyFam* 137, at 143.



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Parliament. The Courts may consider international treaties, as part of the decision making process, however the Courts only enforce domestic and not international laws.

Therefore, if Australia was non-compliant with a convention it signed, the consequences would be minimal.

The second problem is that the CRC protects children, not adults. Therefore, to say ‘I have a right to know my parents’ is only accurate if you are a child. If an adult was denied the right to know his or her parents as a child, and as an adult wanted to locate them, he or she does not have a *right* to know, just a curiosity to know. Thus, one could say, that the donor-conceived adult is disenfranchised.

This does not mean that adults are disregarded entirely. The International Covenant on Civil and Political Rights, or the ICCPR, relates to all persons regardless of age. However, like any convention, the ICCPR is only enforceable in Australia if Parliament makes it law. Further, the ICCPR lacks the specific safeguards contained in the CRC. It prohibits unlawful interference with privacy, home, and family<sup>6</sup>, but it does not protect one’s right to identity or the right to know one’s parents. On this point, it is far weaker than the CRC.

The third problem is that it can be very difficult to determine what exactly is in the best interests of the child. In some circumstances, revelations about identity can be traumatic or confusing, particularly if the child in question is young or vulnerable. The CRC clearly states that the best interests of the child is a dynamic concept; it is an idea that shifts and changes over time and country, and a legal test that has to be assessed on a case by case basis.<sup>7</sup>

It is also clear that an adult’s determination of the best interests of the child cannot be used to overrule the rights given to the child by the CRC.<sup>8</sup> This means that even if a parent believes it is not in the best interests of a child to know his or her origins, the child still has that right. It cannot be removed or diminished

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<sup>6</sup> ICCPR art.17

<sup>7</sup> CRC General Comment 14, para.1

<sup>8</sup> CRC General Comment 14, para.4



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by the judgment of a parent. Moreover, even if a government removed the right in a particular country, the right would still exist, though it would be little use to the children of that country.

The fourth problem is that, because there are many situations in which the right of a child to know their identity may come into conflict with someone else's right, it can be difficult to enforce the right without harming other people. For instance, the right of a child to know his or her parents may conflict with the rights of their biological parents to privacy or autonomy. It may conflict with the contractual obligations that a clinic owes to its donors. It may conflict with the rights of their parents to choose how best to raise their child. It is possible to balance competing interests and to respect the needs and rights of different parties, but it is not easy, and each country has a different method on how to deal with it.

However, the fact that balancing may be difficult does not mean that we should ignore fundamental rights. The process of determining how to protect Australia's children is of the utmost importance. Government is obliged by international law to make it their primary consideration in domestic legislation.

I want to briefly look at other countries around the world to see how they handle the incorporation of the right for a child to know his or her parent into their legal system, before turning to Australia.

### **European experience**

In Europe, some countries have spent great time and care to balance the rights of parents, children, and donors.

Sweden was the first country to abolish anonymity for donors in 1985, in recognition of the importance to donor-conceived persons of knowing their history and identity.<sup>9</sup> This approach has spread, with Austria,<sup>10</sup> Switzerland,<sup>11</sup>

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<sup>9</sup> Law No. 1140.

<sup>10</sup> Law No. 275 of 1992 on Reproductive Medicine.

<sup>11</sup> *Constitution of Switzerland*, art 119(2)(g).



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the Netherlands,<sup>12</sup> Norway,<sup>13</sup> the United Kingdom,<sup>14</sup> and Finland<sup>15</sup> now prohibiting anonymous donations too.<sup>16</sup>

Some countries, such as Ireland, Lithuania, and Malta, do not have any legislation on the rights of donor-conceived persons at all, and the assisted reproductive technology industry is minimally regulated by government.<sup>17</sup> However, in Ireland, bills have been proposed to their Parliament to remove donor anonymity and are set to pass this year.<sup>18</sup> This is noteworthy, as the Irish reforms go far beyond measures present elsewhere in Europe. Under the new law, details of donors and donor offspring are entered into the centralized register and the information is automatically sent to the child at 18. No requests are required, and the child will be informed, regardless of whether their parents or guardians consent.<sup>19</sup>

The advantage of this system is that it ensures that people whose parents choose to keep their genetic origins a secret are still able to trace their history. Their right to know cannot be impeded by their parents or by a lack of awareness of their rights.

Paradoxically, it removes the element of choice from donor-conceived persons who may not want to receive information about their biological history. The details may be upsetting or difficult to process. Moreover, if those people are not already aware that they were donor-conceived, making that discovery by reading a letter from the government is likely to be traumatic and painful.

In contrast, Denmark, for example, allows donors to have complete and indefinite anonymity under law.<sup>20</sup> An unusual side-effect of the increase of countries legislating to protect the rights of donor-conceived children is the

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<sup>12</sup> *Law on data from donors for artificial reproduction* Stb. 2002.

<sup>13</sup> *Act of 5 December 2003 No. 100 relating to the application of biotechnology in human medicine.*

<sup>14</sup> *Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004.*

<sup>15</sup> *Act on Assisted Fertility Treatments* (1237/2006).

<sup>16</sup> European Commission, Health and Consumer Protection Directorate-General, "Report on the Regulation of Reproductive Cell Donation in the European Union" 2006, pg 7.

<sup>17</sup> *ibid.*

<sup>18</sup> *Children and Family Relationships Bill 2015* (Bill Number 14 of 2015).

<sup>19</sup> *ibid.*

<sup>20</sup> *Danish Act on Artificial Fertilisation* (Consolidated Act. no. 923 of 4 September 2006).



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increased popularity of a “safe sperm” market. ‘Safe sperm’ is genetic material acquired from donations deposited in countries that allow anonymous donations, such as Denmark. As one of the few remaining countries with legislated donor-anonymity in Scandinavia, Denmark has developed a thriving and lucrative reproductive tourism industry. This offers an economic reason not to change their laws that protect donor anonymity.

As such, prospective parents from countries like Britain, which does not allow anonymous donations as of 2005, are travelling to Denmark to undergo fertility treatments, or are purchasing sperm over the internet to use in treatment in the United Kingdom because the parents want to ensure that the donor remains anonymous forever.

This reproductive tourism industry is growing rapidly, with the largest clinic in Denmark, “Cryos”, boasting that they have increased the world’s viking population by over 30,000 as a result of their treatments. The industry is profitable. Danish sperm purchased over the internet can cost up to AU\$800. Or, accounting for the multiple trips for treatment between the UK and Denmark, some women spend up to AU\$150,000 for their donor-conceived child.<sup>21</sup>

This flourishing market is in direct contravention of the rights of the child. It enables parents to defy the domestic laws that ban donor anonymity, ignores the safeguards governments have put in place to protect children, and places their wants or convenience above the rights of their child.

The best way to prevent such legal loopholes is to ensure uniformity of law amongst nations, which is what the CRC attempts to do. Europe is special in that a collection of states have grouped together and chosen to submit

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<sup>21</sup> Johnston, J. 20 January 2015. “The Rise of the Baby Vikings: Single British Women Desperate for Children Turning to Sperm Donors in Denmark”, *Daily Mail*, Accessible online at: <<http://www.dailymail.co.uk/femail/article-2917432/The-rise-BABY-VIKINGS-single-British-women-desperate-children-turning-sperm-donors-Denmark-ll-play-no-offspring-s-lives.html>>; Goodwin, M. 2010. “Baby Markets: Money and the New Politics of Creating Families” (Cambridge University Press) pp 147, 209-210; Cohen, J. 2006 “Procreative Tourism and Reproductive Freedom” *Reproductive Biomedicine Online*, 13(1) 145.



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themselves to a ‘super’ High Court. As such they have progressed towards a certain degree of conformity.

European states are integrated in a regional parliament called the European Union; a cooperative economic enterprise with its own complex system of government and courts. The system includes a charter called the European Convention on Human Rights and a court dedicated to the implementation of this document, known as the European Court of Human Rights.

The European Union has created laws which mandate that all sperm and egg donations must be voluntary and unpaid. One might ask, if pan-European law can be created to regulate those aspects of donation, then surely the law can be extended to ban donor anonymity throughout Europe? And theoretically, the answer is yes. However, to achieve this requires uniform political will in a positive political environment, which is not common.

However, the European Convention on Human Rights contains the same provision as the ICCPR regarding the protection of privacy, home, and family life. This right has not been defined precisely, but it is generally agreed to include the right to know the identity of one’s parents and the circumstances of one’s birth.<sup>22</sup> The existence of this rule has led to several cases involving the right of donor-conceived persons to access certain information regarding their origin.<sup>23</sup>

In one case, the Court allowed a man, placed in care as a child, to access his personal file to locate his parents.<sup>24</sup> In another, the Court permitted a child to identify her father through DNA testing.<sup>25</sup> And in another, the Court allowed a man to confirm his own paternity by obtaining a DNA sample from the deceased body of the man whom he believed to be his father<sup>26</sup>.

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<sup>22</sup> *Odièvre v. France*, 2003-III Eur. Ct. H.R. at [29]; *Jäggi v. Switzerland*, 47 Eur. Ct. H.R. 30 (2006) at [25].

<sup>23</sup> ECHR article 8.

<sup>24</sup> *Gaskin v United Kingdom*, 1989 at [49].

<sup>25</sup> *Mikulic v Croatia*, 2002 at [66].

<sup>26</sup> *Jäggi v. Switzerland*, 47 Eur. Ct. H.R. 30 (2006) at [44].



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This reflects the ongoing progress in Europe towards the recognition of the right to know one's parents and origin, but the process is slow and inconsistent.

In the long term, such progress may lead to consistency and better support for donor-conceived persons everywhere, but in each case, the Court was very careful to ensure that by supporting the child's right to know, it did not suppress the rights of the parents or donors. It is, therefore, a process of nuance and balance, and case-by-case judgments.

### **Canadian experience**

Canada is another jurisdiction that warrants examination as the Canadian legal system is very similar to our own.

In Canada, clinics are required under federal law to collect information about donors, but donors are not required to surrender their confidentiality.<sup>27</sup> In addition, the regulation of clinics that operate under the federal law, is divided between the national and provincial governments.<sup>28</sup> As a result, the administration and maintenance of donor records is inconsistent and haphazard. There are many cases of donor-conceived children being denied access to their biological history simply because their records were lost or across provincial borders.

Canada, unlike Australia, has a Charter of Rights and Freedoms. This means that if a law is passed by Parliament that is contrary to an aspect of the Charter then the law or part of the law may be deemed invalid. Under the Charter, it is unlawful to discriminate against a class of persons in legislation.<sup>29</sup>

In 2011, the Canadian courts grappled with a case brought by Miss Olivia Pratten, a Toronto journalist and donor-conceived person.<sup>30</sup> Ms Pratten claimed that it was discriminatory for the government to allow adoptees to access information about their biological parents, but not for donor-conceived persons.

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<sup>27</sup> *Assisted Human Reproduction Act* (S.C. 2004, c.2).

<sup>28</sup> *Reference re Assisted Human Reproduction Act 2010 SCC 61, [2010] 3 S.C.R. 457.*

<sup>29</sup> Canadian Charter of Rights and Freedoms 15(1).

<sup>30</sup> *Pratten v British Columbia (Attorney General)*, 2011 BCSC 656.



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The Court determined that it was not discriminatory. The legislation, the Court said, did not fail to provide support to donor-conceived persons in favour of adopted persons, rather the rights of the two classes of people were the same but adoptees, specifically, were provided extra protection.

In the province of Victoria, similar disparity in access exists – not between donor-conceived persons and adoptees, but between those who were born before and after 1988.<sup>31</sup> These are not distinct classes of people, like adoptees and donor-conceived people, but rather the same class of person divided by an arbitrarily chosen date.

Despite the failure of Ms Pratten’s claim, the case is very valuable, as it gave the Canadian Supreme Court the opportunity to acknowledge the difficulties faced by donor-conceived persons. Justice Elaine Adair recognised that “*for donor offspring, having information – both identifying and non-identifying – matters deeply, both to complete their personal identities and to alleviate the stress, anxiety and frustration caused by not knowing.*”<sup>32</sup>

Her Honour acknowledged that “*donor offspring experience sadness, frustration, depression and anxiety – in other words, they suffer psychological and psycho-social difficulties – when they are unable to obtain information. They feel the effects both for themselves and, when they become parents, for their own children*”.<sup>33</sup>

Her Honour also criticized the laws that protected donor anonymity, noting that “*the secrecy that often surrounds the process of conception, even when done with the best of intentions, can have devastating effects on donor offspring when the truth is revealed. Moreover, knowing the truth (that the other biological parent was a donor), but having no means to discover what the truth means for one’s life, can be a significant source of anxiety, depression and frustration for donor offspring*”.<sup>34</sup>

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<sup>31</sup> *Infertility (Medical Procedures) Act 1984*, ss19 and 20.

<sup>32</sup> *Pratten v British Columbia (Attorney General)*, 2011 BCSC 656 at [111].

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.*



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Her Honour's judgment is a powerful vindication of the experience of donor-conceived persons, and it is a recognition that many governments, including Australia's, have yet to make.

### **Australia**

Turning to Australia. Although Australia is a party to the ICCPR, it has not been incorporated into national law. Moreover, Australia does not have a Charter of Rights. Therefore legal proceedings cannot be commenced for breach of the ICCPR and legislation cannot be struck down for violating human rights. That means, at a federal level, laws that discriminate against people on the basis of their birth may be permitted.

In the state of Victoria, the ICCPR has broadly been translated into state law in the form of the Charter of Human Rights and Responsibilities Act.<sup>35</sup> However, even there, there is no law preventing discrimination on the basis of birth. This means that it would not be possible to bring a legal case in Australia on the same grounds as *Pratten*, because the Australian government is not prevented by federal or state laws from discriminating against donor-conceived persons.

### The right to know you parents

'Parent' is a surprisingly difficult word for the Courts. There are two categories of parent in Australian Family Law; biological parent and legal parent. They are not always the same, as most in the room will know.

A biological parent of a child is the person from whom genetic material was used to create the child. Therefore sperm and ova donors are biological parents. Obviously, there has to be at least two sets of genetic material, however there are cases where a third party donates a *portion* of their DNA to replace a faulty part of one of the intended parent's DNA, which was then used to create a child.<sup>36</sup> The law is still struggling to determine whether this third party could be considered a biological parent of the child. The law can recognise parentage

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<sup>35</sup> *Charter of Human Rights and Responsibilities Act (VIC) 2006*

<sup>36</sup> <http://news.sciencemag.org/biology/2015/02/u-k-parliament-approves-controversial-three-parent-mitochondrial-gene-therapy> and personal discussions with geneticists.



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simply on the basis of biological link,<sup>37</sup> which is also important for citizenship. So, does the child have a right to know their biological parents? The answer is Yes.<sup>38</sup>

In Australia a legal parent can be a different person to those that provided the genetic material, however the birth mother is presumed to be the legal parent of the child to whom she gave birth.<sup>39</sup> Australian Courts often have to determine legal parentage, especially in surrogacy cases.

In surrogacy cases, under the *Family Law Act*,<sup>40</sup> legal parentage immediately goes to the birth mother (and her husband or de-facto partner if she has one). Remembering that in surrogacy cases, the birth mother is not necessarily related to the child, the law nonetheless, states that the birth mother will remain the legal parent of the child until he or she is recognised as the child of another by a court order. This protects the child from being parentless.

The laws governing the surrogacy arrangements in Australia are a matter for each individual state, however most states do not recognise commercial surrogacy; that is, where the surrogacy arrangement was for profit.<sup>41</sup> This creates problems as many people do commission a child via commercial surrogacy. This means that the birth mother may remain the legal mother of a child she never wanted, and to whom she may not even be genetically related.

If parentage orders cannot be made because the child is the result of commercial surrogacy arrangement, then the Family Courts may make parenting orders.<sup>42</sup> This is because it is in the best interests of the child that someone has legal responsibility for the child,<sup>43</sup> even if these people are not the legal parents, nor the birth mother, nor biologically related to the child, or have broken the law to create the child. Thus, it can get very confusing.

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<sup>37</sup> As discussed in *Groth & Banks* [2013] FamCA 430.

<sup>38</sup> UN Convention on the Rights of a Child art.7; *Family Law Act 1975* (Cth) s.60B(2).

<sup>39</sup> *Family Law Act 1975* (Cth) s.69P.

<sup>40</sup> *Family Law Act 1975* (Cth) s.60H; and also see, for example, *Surrogacy Act 2010* (NSW) s.5.

<sup>41</sup> For example: *Surrogacy Act 2010* (NSW) s.8.

<sup>42</sup> *Family Law Act 1975* (Cth) s.61D.

<sup>43</sup> *Family Law Act 1975* (Cth) s.60B.



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If a Court has made a parentage order for the intended parents, new birth certificates can be issued to the people who arranged the child to be born,<sup>44</sup> and, if the new parents want to, the birth mother can be forgotten. So, does the child have the right to know the birth mother if not their legal parent? The answer is No.

In donor-conceived cases, under state and federal law, donors are presumed not to be the legal parents.<sup>45</sup> The birth mother is presumed to be legal mother and her husband/ de-facto partner is presumed to be the legal parent too if they consented to the birth. These presumptions cannot be refuted. However, these limited and brief provisions are not without criticism or controversy.<sup>46</sup>

### **Donor Registries**

As many of you will know from experience, until recently donors were not compelled to provide identity information. Four states<sup>47</sup> have enacted legislation requiring that if a child is born from donated material then critical information of the donor must be submitted to a Central Register to be accessed by the donor-conceived child after he or she turns 18.<sup>48</sup> The Register will contain mandatory information, such as the name, sex, and date of birth of the child; the name of the birth mother; and the donor's name, date and place of birth, address, ethnicity and physical characteristics, any other children, and medical history, which includes other donations at other clinics. Of course, this Registry is of little assistance to those wishing to obtain information about events prior to the enactment of such legislation.

The absence of a national Registry is notable. Not having a pan-Australian Registry risks people slipping through the cracks. A national Registry would facilitate a common point of data collection of all people who donate, who use donated material, and for those wishing to investigate their genetic origins.

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<sup>44</sup> See for example, *Births, Deaths, and Marriages Registration Act 1995* (NSW), s.25D.

<sup>45</sup> *Family Law Act 1975* (Cth) s.60H; and also see, for example, *Status of Children Act 1996* (NSW) s.14.

<sup>46</sup> See for example, *Aldridge v Keaton* (2009) 42 FamLR 369; *Re Michael* (2009) 41 FamLR 694; *Re Mark* (2003) 31 FamLR 162; and *Re Patrick* (2002) 28 FamLR 579.

<sup>47</sup> New South Wales, Victoria, South Australia, and Western Australia.

<sup>48</sup> For example, see *Artificial Reproductive Technology Act 2007* (NSW) Part 3.



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Moreover, it would offer conformity to the type, manner, and form in which information is made available to and by relevant parties.<sup>49</sup>

A national Registry would prevent a safe-sperm market from developing in Australia that would respond to inconsistent state laws. Further, and this will not come as a surprise to those here, via the frequent use of a particular donor's material, there is an Australian who has 31 half-siblings.<sup>50</sup> A national registry may go some way to either preventing that situation or at least providing adequate information and support to those related siblings.

However, symbolically, a national registry would be some way to meet the international obligations imposed by the CRC and the ICCPR to prevent discrimination against children; provide the best interests of the child; protect the rights of the child of freedom of expression, to know their parents and preserve their identity; and the rights of all of privacy, home, and family.

### **Conclusion**

I want to conclude by saying that future advances in technology may complicate the situation even further. Scientists have told me they are 5-10 years away from developing a functional artificial womb for humans.<sup>51</sup> Therefore, if such a scenario were to eventuate, a child may not even have a birth mother. The artificial womb is a few years away from reality however the law needs to prepare, because, as seen with donor conception, slowly enacted laws mean people are left vulnerable to abuse and denial of their rights.

Technology moves on, but we as humans still want to know who we are and where we came from. Indeed, in medical terms it can be critical to have this information to remain alive and have a future.

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<sup>49</sup> Attorney-General's Department, answer to question on notice, provided 19 November 2010, as cited in; Australian Senate Standing Committee on Legal and Constitutional Affairs, Reference Committee report: "Donor Conception Practices in Australia" p.9.

<sup>50</sup> Australian Senate Standing Committee on Legal and Constitutional Affairs, Reference Committee report: "Donor Conception Practices in Australia" p.24 (note77).

<sup>51</sup> <http://www.geneticliteracyproject.org/2015/06/12/artificial-wombs-the-coming-era-of-motherless-births/> and personal discussions with geneticists.



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It is therefore impetorative that the community has the opportunity to debate these issues, that Parliament moves swiftly to protect the rights of donor-conceived people, and the law provides proper protection that is easily understood and accessible to all.