

THE CENTRE FOR
**SOCIAL
JUSTICE**

**Briefing Paper from Family Law Review on the
Human Fertilisation and Embryology Bill [HL]**

**PROVIDING CHILDREN WITH INFORMATION
ABOUT THEIR BIOLOGICAL PARENTS AT
ADULTHOOD**

Published 21 December 2007

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ABOUT THE FAMILY LAW COMMISSION

The Family Law Commission was established in response to a key recommendation from the Social Justice Policy Group (SJPG), commissioned by David Cameron to make policy recommendations for the next Conservative manifesto, which reported in July 2007 with the publication, Breakthrough Britain.

The recommendation from the Family Breakdown Working Group (one of the six groups comprising the SJPG) was for "a review of family law conducted by a dedicated independent commission".

The Report continued, "The relationship between the law and family breakdown and legal aspects of marriage, divorce, cohabitation, parental rights and the rights of the extended family (especially grandparents) are highly complex but require consideration. We recommend that this be carried out under the auspices of an independent body such as the Centre for Social Justice."

This recommendation was taken up and a Family Law Review instituted. One area currently being considered by some members of this body concerns the Government's Human Fertilisation and Embryology Bill, currently proceeding through Parliament, which is intended to update UK law on embryology and assisted reproduction.

A question facing legislators is whether children conceived by donor conception will be informed about their true biological origins. Currently such children have no guarantee that they will be told if their legal parent is not their biological parent. One proposed means of ensuring donor-conceived offspring can find this out is to register the fact of donor conception on their birth certificate. This briefing paper from the Family Law Review looks at the arguments for annotating birth certificates, within the context of exploring the importance of biological origins.

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INTRODUCTION

Currently, all children born by donor conception can apply to the Human Fertilisation and Embryology Authority at the age of 18 to seek to ascertain their biological origins. Anonymity of donors was ended from 2005. The new Bill proposes that donor conceived children will also be able to find out about any donor siblings, by mutual agreement.²

However there is currently **no obligation** upon the legal parents to disclose the fact of donation to the donor conceived person at age 18, and the fact of donor conception will **not be registered** on a person's birth certificate.

This paper proposes that:

When children are registered at birth, information on whether they have been conceived through donated gametes should be included on their birth certificate, which should clearly indicate this, such as in the way we suggest below.

¹ Hosted by the CSJ and chaired by Dr Samantha Callan. Paper prepared by Professor Brenda Almond, Philippa Taylor and Samantha Callan

² 31ZE in draft Bill.

THE PROPOSED LEGISLATION - BACKGROUND

The Joint Committee³ observed that the part of the draft Bill which deals with legal parenthood and registration of births in cases involving assisted reproduction: “seeks to take a new approach to parenthood, moving towards the concept of parenthood as a legal responsibility rather than a biological relationship”.⁴ That is, provisions proposed for the small minority of births involving donor conception are explicitly intended to change the meaning of parenthood for everyone.

Clauses 42-47 of the draft Bill provide for ‘two mother’ families by enabling a second woman to be treated as a parent of the child. The Bill states that in these circumstances ‘no man is to be treated as the father of the child’ (Clause 45(1)).⁵ Previously two women would have had to go through adoption procedure to become joint ‘mothers’. These children will have a ‘mother’ and another ‘parent’ who is also a woman on their birth certificate.

The Bill also provides for ‘two father’ families because clause 54 extends the categories of couples who can apply for parental orders (fast track adoption) where a child has been conceived using the genetic material of one of the couple and carried by a surrogate mother. Under the 1990 Act these parental orders were only available to married couples but the new Bill will extend them to civil partners and any ‘two persons who are ‘living as partners in an enduring family relationship.’

A child born through donor conception can become the legal child of either a same sex couple or a heterosexual couple. Clearly there will be issues raised about who their legal parents can be, but the remit of this briefing is specifically with the need for a child to have access to truthful formal records about biological parenthood, should they wish to do so, at age 18. Since it is already agreed that donor-offspring will have this right (see above) our concern is that they have some way of knowing

³ The Government published the a draft *Human Tissue and Embryos Bill* in May 2007. This draft Bill was scrutinised by an ad hoc Joint Committee drawn from both Houses of Parliament. The final draft Bill was published 8th November 2007.

⁴ HC Paper 630-I 2006-07, p70

<http://www.publications.parliament.uk/pa/jt200607/jtselect/jtembryos/169/169.pdf> (at 6 November 2007)

⁵ So too does Clause 41 (2). This is in the context of using sperm from a dead man without his prior consent.

that they ARE donor-offspring, independently of whether their legal parents want them to or not.

This is an issue affecting ever increasing numbers of children. By the end of 2005, 57,000 children had been born by donor-assisted conception in the UK, and many more world-wide.

We therefore propose that:

When children are registered at birth, information on whether they have been conceived through donated gametes should be included on their birth certificate, which should clearly state 'by donation'.

REASONS FOR INCLUDING 'BY DONATION' ON BIRTH CERTIFICATES OF CHILDREN BORN BY DONOR CONCEPTION

'Colluding in a deception'

Where two people of the same sex are legal parents, while deception as to parenthood will not be possible, confusion might be, if these same records describe the same-sex partner of a woman having a child by donor insemination in the essentially biological terms 'parent', 'mother', or 'father'.

Where the child has heterosexual legal parents, deception is possible because there is no indication that the child's legal father is not actually the biological father. Thus they may never be made aware of the nature of their conception. The birth certificate shows someone else as the father and the child has no right to be informed that he is not their biological, genetic father.

The Joint Committee on the *Human Tissue and Embryos (Draft) Bill* clearly recognised that there is a strong motive registering the fact of donor conception on a person's birth certificate because: "*This would create the incentive for the parent(s) to tell the child of the fact of his or her donor conception and would go some way to address the value of knowledge of genetic history for medical purposes. Moreover, unlike where children are born through natural conception, assisted conception by its nature involves*

the authorities and we are deeply concerned about the idea that the authorities may be colluding in a deception. However, we also recognise that this is a complicated area involving the important issue of privacy, as well as issues of human rights and data protection” (our emphasis).⁶

In response to this latter concern, we concur that putting such information on a document that is open to public scrutiny could compromise the privacy of donor conceived children and their legal parents. However already some birth certificate records are not open to public scrutiny (for example, the original birth certificates of adopted children) so, with this precedent in place, it would be feasible to make the full birth certificates of donor offspring similarly inaccessible to the public, and only available to the child when they reach adulthood, whilst providing a short form for routine use.

What we are therefore suggesting is a compromise to meet both the issues of concern to the Joint Committee.

The trend to legal parenthood

The proposal to register a non-related person as a second parent on a child’s birth certificate downgrades biological parenthood and reinforces the separation of the child’s biological parents from each other. It puts the interests of adults ahead of the interests and rights of children, who may want to know and benefit from both sides of their genetic makeup, not only for emotional reasons, but also for medical or health reasons. This ‘need to know’ has been almost universally accepted in the case of adoption and it is well accepted that it has provided a better foundation for good family relationships in adoptive families than the earlier policy of silence about the facts.

Recognising alternative close relationships is one thing, redefining parenthood is another. What is missing from the idea of legal, social or de facto parenthood – the ‘family diversity’ model - is the core idea that parenthood is based in biological realities beyond governmental or judicial redefinition.

⁶ HC Paper 630-I 2006-07, p73.

Sooner or later nearly everyone asks the questions ‘who am I, where did I come from?’ Being able to answer that question is fundamental to one’s personal sense of identity. *“My experience is that genetic identity and genetic relationships have a very deep, very special, almost magical part to play in the psychological health of human beings.”* Whereas, in contrast, deliberately denying children this information can lead to *“...rootlessness, identity problems, future difficulties with their social parents and problems in attaining adulthood.”*⁷

The problem of discrimination

The argument in favour of the proposals has been put in terms of breaking down the last barriers of discrimination against gay and lesbian people. However, while not all married couples wish to have children, and some are unable to do so for whatever reason, heterosexual marriage has always been closely linked to the objective of having and raising children. In contrast, few have put the case for recognising gay and lesbian relationships in those terms. Instead, the emphasis has been on recognising a close personal relationship. But if there is a significant difference in function and style in the two situations, there is no requirement on anti-discrimination grounds for every aspect of the law to apply in the same way to both. In other words, while like cases should be treated alike, where there is difference, there is no discrimination.

This is not an issue about recognising lesbian or gay relationships, but about preserving recognition of biological parenthood. Placing on birth-certificates the names of people who could not be related to a child in virtue of their sex/gender will generate confusion, and more children will be put in difficult and unreasonable situations, including becoming the subject of complex legal battles when relationships break down. Ultimately, the central issue must be what is in the best interests of children and will be to their benefit.

⁷ Rushbrooke, R., 1999, Towards an open infertility industry. *Journal of Fertility Counselling* 6: 29–31

OTHER ISSUES

As society becomes aware of more disorders that have a genetic basis (e.g. breast cancer or glaucoma) or a genetic component to them, donor conceived offspring will increasingly want (need?) information on their genetic heritage in order take appropriate precautions for their future health (e.g. regular check-ups and/or dietary or lifestyle changes). If they develop a major health problem it will become increasingly untenable to deliberately deny people such crucial information. Despite the recent proliferation of predictive genetic tests for serious illnesses,⁸ medical geneticists often prefer to rely in practice on family history rather than DNA analysis. This does provide a valid reason for alerting people if their family history is not accurately reflected in their legal parenthood.

False information would continue down the generations, (to the donor offspring's children, grandchildren etc), who will also have misleading information about their genetic ancestry. In their case it will be completely closed off and inaccessible.

It is quite likely that not registering information on donor conception will leave the Government open to legal challenges in the future for denying children the right to have access to essential information about themselves at adulthood.

⁸ See **Can a gene test predict the future? 30/11/07**, <http://news.bbc.co.uk/1/hi/health/7121026.stm>

CONCLUSION

We should no longer close off access to a biological parent legally and practically by providing misleading birth certificates for those born by donor-assisted fertility treatment. Under the proposals, it seems that the intention is that birth certificates will continue to be designed either to deceive or, in the case of same-sex couples, to create a legal absurdity by giving full parental recognition and rights to an unrelated person of the same sex as the mother.

We are not arguing to remove the legal parents from the birth certificate, but instead to provide the additional ‘by donation’ information that will provide the missing, but essential, genetic record for the child if they wish to find out more about their biological parents at adulthood. The priority must be to ensure this option is available for donor conceived children in the same way that it is for adopted children.

In their response, the Government said they would keep the matter under review. We urge Parliament to use this opportunity to have a full debate about whether including information on the birth registration about use of donor conception would be beneficial to the welfare of children created through fertility treatment, or to support amendments to the current bill such as that proposed by Lord Howe.⁹

“The fragmentation of parenthood means more fragmented lives for children who will be jostled around by an increasingly complex set of adult claims.”¹⁰

⁹ See Amendment 63 in **Human Fertilisation and Embryology Bill [HL]— Amendments to be debated in the House of Lords** at

<http://www.publications.parliament.uk/pa/ld200708/ldbills/006/amend/ml006-ia.htm>

¹⁰ Cere D. 2005 *“The Future of Family Law: Law and the Marriage Crisis in North America”* p38