Public Hearing—Inquiry into the matters relating to donor conception information

Transcript of Proceedings

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CHAIR: I invite you to make an opening statement, after which the committee will have some questions.

Mr Page: I would like to take up some of the points that Mr Smith raised, because I have knowledge of some of those matters directly. I want to thank the committee for inviting me to give evidence today. I acknowledge the traditional owners, the Jagera and Turrbal people.

I come here wearing a number of hats this morning—as a lawyer who specialises in this work, as a lecturer in ethics and the law in this field but, most importantly, as a parent through egg donation. My husband, Mitchell, and I have been fortunate to undertake surrogacy in Queensland with the assistance of two extraordinary women—our egg donor and our surrogate—and the assistance of two Queensland IVF clinics that we also had the assistance of, as required under the National Health and Medical Research Council ethical guidelines and the RTAC code of practice. I note that the NHMRC described it as a 'robust framework' of regulation; I would certainly agree.

An ANZICA counsellor provided donor counselling to our egg donor, Mitchell and me. As required under the Surrogacy Act, before entering into the surrogacy arrangement, there was a second ANZICA counsellor for our surrogate, Mitchell and me. As required under the Surrogacy Act, an assessment was undertaken after the birth by a third ANZICA counsellor for a surrogacy guidance report for the Children's Court.

We have embraced the principle of the Surrogacy Act of promoting openness and honesty about our daughter Elizabeth's birth parentage. She is entitled to know, in my view—as is everyone else—about where she has come from. It is a fundamental human right. Elizabeth goes to day care. She is almost three. Of the 100-plus families at the daycare centre, our family is the only one who has two dads. At the age of 18 months, Elizabeth recognised that, and at that point she started calling Mitchell 'Dad' and me 'Daddy', so I am forever 'Daddy'. Mitchell and I have commenced telling Elizabeth in an age-appropriate manner where she has come from, and we will continue to do so. It is a case of show and tell, not hide and seek.

On balance, I believe that it is important for there to be retrospective transparency for pre-2004 donations—and I will take up the question that the chair asked about anonymity—but if that occurs, officials should be writing direct to the donors and to the parents before notifying the children, as opposed to what happened in Victoria. It was the other way around, so kids discovered from a letter rather than from their parents, who had not told them. Ideally, there should be a national donor registry. It would be an improvement on the current situation in Queensland if there were a state donor registry to be run either by Births, Deaths and Marriages or by Queensland Health. I have nothing against Queensland Health, but I think that our registry is remarkably efficient. It is the most efficient in the country. It is responsive, it is self-funding on a user pays basis, it is low cost and it is a natural fit.

I would hope that there would be legislative and administrative measures enabling a Queensland central register to connect with those interstate, so that a donor-conceived adult can search in one place and have all of the records available to them. Queensland IVF clinics have gone from a secret

squirrel type of model, where children have not been told where they have come from, to mandated transparency. Queensland now leads the world, in my view, with the quality of IVF and donor transparency, but retrospective transparency in a state central register would be even better.

I will take up the points that Mr Smith raised. I have not read his submission, but I am very familiar with his work and with him personally. The first issue I want to cover is anonymity; it is dead and buried. You can go on ancestry.com.au or 23andme.com and find out where you have come from. We are talking about enormous databases. In 20 years time, of course, the databases will be much greater than they are today. Anonymity was removed in Queensland as a matter of practice in 2004, because Queensland clinics are licensed under a Commonwealth-state scheme, which I have set out in length in my paper—I have set out the legislation so that it can be clearly read—the NHMRC ethical guidelines and the RTAC code of practice—that is, the Reproductive Technology Accreditation Committee of the Fertility Society of Australia and New Zealand. I am a director of the society; I am not a member of the RTAC committee.

Mr Smith talked about not being aware of any case of there being a knock in the door. You will see in my written submissions that I have seen such a case. In Queensland, an anonymous sperm donor received a message on Facebook from a third party—someone he did not know, a lesbian couple—to say, 'Here is your son.' He was in absolute shock. He wondered how that might have happened and I said that it could be one of three ways. The clinic could have leaked—my experience is that they do not; they take privacy very seriously—or there could have been some social interaction, either in person or via social media, where people recognise 'that child looks like mine'; I have seencases like that. As I said in my submission, there has been such a case in Sydney. Thirdly, someone could have done one of those online searches. Guess what? He thought the clinic had leaked the information but the truth was that his mum had done a search through ancestry.com. There was the answer. One of the things I suggested was for him to go and see a fertility counsellor. He found that very helpful, because this was something which was confronting for him.

The third issue that was raised was about contact vetoes; that sounds very sensible. Victoria has certainly led the world in this area in terms of openness and retrospectivity and I would certainly endorse it. The fourth question that I cover is succession law. Just because someone is a genetic parent, that does not make them a parent as a matter of law; that is under the Status of Children Act or, as the High Court told us in Masson v Parsons in 2019, the Family Law Act. The Succession Act has a wide definition of 'child'. I am not a succession lawyer—I am a family lawyer who did fertility law—but I would suggest looking at that.

The fifth thing I want to mention is donorsiblingregistry.com. This was started in the United States by a mum whose child wanted to know where she had come from. Queensland IVF clinics import sperm. Most Queensland sperm comes from the US, not locally. We do not have enough, we do not pay donors and we require transparency. They have to comply with Queensland requirements to import. Typically, there are about two or three sperm banks in the US that currently export here. All of our Queensland clinics who use US sperm have signed up.

On that question, Mr Smith mentioned private egg donation. It has to go through a clinic—medicine says that; you have to do IVF—but when you have a sperm donor, of course, it can be done privately. I have been doing private sperm donor agreements now I would guess for over 10 years but, lo and behold, there has been a sharp increase in about the last two or three years. I thought that it must be because of the Masson v Parsons ruling on who is a parent, which asks: is he a donor or is he a parent? No, that is an aside.

There have always been single women, principally single women and lesbian couples, who want to have some connection with the man who is providing the sperm so that there is a male role model—there is always that. Sadly, some want to achieve that by sexual intercourse and, as you could appreciate, my advice is to not do that, but what has happened in the last two or three years has been driven by COVID. This sounds surprising but because of COVID there is now a shortage of sperm donors in the United States and that ripple effect has, therefore, come here. Those who might have had a choice before of, say, a dozen sperm donors might only have one or two and so they have then gone to their friends who have said, 'Yes, I will do it,' so it is quite common.

A criticism I would have of the Victorian legislation, the Assisted Reproductive Treatment Act, is that a donor cannot ever be a parent. That is certainly inconsistent with what the High Court has told us in Masson v Parsons. You are at the forefront of changes in society at the moment. Are you familiar with Masson v Parsons? This was the case of a gay man who wanted to be a dad and he supplied his sperm in a private arrangement to a friend of many years who was a lesbian. Subsequently, she married her girlfriend. They had a child and his name, with his consent, was put on the birth certificate. Subsequently, the women had a second child through a clinic recruited sperm donor. Both girls called him 'Daddy'. One day the women announced to the man, 'We're moving to New Zealand with the children.' He was not too impressed by that, so he went to the Family Court to seek an injunction to stop them. The issue then became: was he a parent or only someone concerned with the care, welfare and development of the child? The latter enabled him to litigate, but there were balancing issues about being a parent.

The women ran the argument that they were a couple and, therefore, they were the only parents. That was rejected by the trial judge. They then said that under the New South Wales Status of Children Act the birth mother was the only parent and he was a donor and therefore not a parent. He ran the line that under the Family Law Act, federal legislation, 'as a matter of fact I am a parent' and the trial judge accepted that.

The women appealed. The Full Court of the Family Court said that the trial judge got it wrong—that there was a unitary scheme between the federal act and the state act and you look to the federal act first and then, if you are not there, go to the state act. He was not in either and it did not matter about genetics, intentions or parenting—tough luck. He then got special leave to appeal to the High Court. The High Court said that the Family Law Act reigns supreme. If there is a conflict with state legislation—there is no unitary scheme—it is a question of fact. He did not supply his sperm on the express or implied understanding not to be a parent; he supplied his sperm on the express or implied understanding to be a parent and put his name on the birth certificate because he wanted to be a parent and, lo and behold, he then parented.

implied', which said to me that the agreement between these parties was oral, so it is much better to have a written agreement. What is the status of this written agreement? It is uncertain, but those who contact each other through the websites that Ian Smith was talking about will rarely go and talk to a lawyer. It is cowboy country. How do you regulate it? Good luck. I think it is almost impossible to regulate. I think the idea of opting into a registry—I think Victoria made a mistake and probably did not envisage that this would happen—is great.

There was a question earlier about the cost. It is not that expensive. About three years ago, I was interviewed by Liz Hayes on 60 Minutes. There was an awful man who went by the acronym of 'Joe Donor'. Look him up; you will find him very easily online. I basically told him to stop. He had had 100 children by that stage, either by artificial insemination or by natural insemination. He was an American

who came here to help women. Of course, it was ego driven and it was screwing up those kids. I wonder how many of them were called Robert, John or Peter if they were boys.

In any event, he ran the line, 'Well, you either have to go with someone like me or spend lots of money going through an IVF clinic.' If you go to an IVF clinic for a sperm donor, what are you paying for? You are paying for the sperm, which is most likely imported from the US. You are paying for artificial insemination—if you talk to the clinic they will use jargon such as intrauterine insemination, IUI, but that is artificial insemination—or you are paying for IVF, if you need to do IVF. If you manage to do IUI plus sperm, the sperm costs between $1,000 and $2,000. It is not much in the scheme of things. If you do IUI it is not much. If you do IVF there are a number of clinics, as QFG has pointed out in its submission. I think they call it 'fertility centre bulk-bill'. They might be able to bulk-bill or they might have a clinic they pay full rate. It might cost between $1,000 and $20,000 if they are paying for the full IVF cycle.

Mrs GERBER: That was amazing. That was very comprehensive. Thank you. You answered all of my questions to previous submitters. Thank you for your evidence. Thank you for your written submission as well.

Mr Page: I apologise that my written submissions are so long, but they set out the NHMRC guidelines rather than just a summary and they set out examples. These are real-life examples, not ones I have made up.

CHAIR: They were very helpful.

Mr KRAUSE: My question goes to your submission about succession law, which you touched on. In relation to that High Court case where, in the end, the Family Law Act prevailed and the gentleman was deemed to be a parent, how does that relate to different aspects of succession law around the country?

Mr Page: I am not a succession lawyer, but if he is a parent, under the Family Law Act, one would think he would be recognised as a parent for succession law. What the High Court has done is given us a dose of reality but also given us a curveball. The High Court has left open the possibility that there may be more than two parents. They comment on that under the Family Law Act. The assumption that we have—it has been set out clearly in Queensland legislation since the Surrogacy Act was enacted and amended the Births, Deaths and Marriages Registration Act—is two parents. That is what we clearly say in Queensland. Whether we like it or not, there are people who are creating children where they might be a throuple. I have seen a man and two women living together and creating a child, and an IVF clinic cannot refuse to provide treatment because of the Sex Discrimination Act. Who gets recognised as the parents? Only two of them, maybe—maybe only one. I have seen situations where gay men have provided sperm to single women or lesbian couples. Who gets recognised? This is a matter that gets unfortunately litigated too often in what is now the Federal Circuit and Family Court of Australia. It would be good to have some certainty about that. The High Court has thrown us a curveball because it is reality, but also you have to look at each case to then make a determination: is that person a parent?

Mr KRAUSE: It turns on those facts.

Mr Page: Yes.

CHAIR: How do you suggest legislation can deal with that curveball that the High Court has thrown us?

Mr Page: I think it is really covered under the Family Law Act. Under the Status of Children Act there is recognition, for example, of women with a de facto partner being recognised as parents—actually, I want to comment one brief thing about the Status of Children Act—but it does not recognise them if they are married. They are recognised under section 60H(1) of the Family Law Act as parents but not under our state legislation, so it would be good to update it. That came through before the federal changes to the Marriage Act.

With regard to section 23 of the Status of Children Act, I saw that Professor Allen did not refer to it by the section but referred to the phrase that 'the man has no rights or responsibilities for the child'. There has been a case in North Queensland in the Family Court which says that he is a parent, albeit one with no rights or responsibilities.

In our own surrogacy matter, that caused us grief because we had a single surrogate. Who was to be on the birth certificate beforehand? The standard view was only the surrogate. I can tell you: it gave me lots of grief as the lawyer as to which one. It is always a delight to have a test case except when they are your own. It gave me lots of grief as the lawyer as to who was to be on the birth certificate, and I came to the conclusion that the decision was wrong. Subsequently there has been a decision of the Childrens Court that says, no, it is wrong, and I have cited both of them in the paper. It would be good to have clarity.

Yesterday, I am delighted to say—I spent a lot of time working on this—the Northern Territory passed its Surrogacy Act. The Surrogacy Act amends the Northern Territory Status of Children Act which had the same provision in it and my advocacy was to please get rid of it; please make plain that the donor is not a parent.

I saw in some of the submissions that there was a reference to 'we don't know how this happened'—that the donor was not known, was anonymous. It was a conscious decision of IVF clinics, but it was also the conscious decision of this parliament.

When then attorney-general Clauson spoke to the amendment of the Status of Children Act to make recognition of sperm donors, he made it quite plain that sperm donors were not to be parents. The approach taken by then attorney-general Shine since then and the amendments under the Surrogacy Act have taken the same approach.

CHAIR: How do you fix it then?

Mr Page: I say in my submissions that it may be a COAG matter or a Commonwealth matter, but it would be useful to have agreements in place to identify who is a parent. In the Masson v Parsons case, they are reported to have spent approximately $4 million in total in litigation. The Full Court of the Family Court, special leave, the High Court: they spent $4 million to that point and then they went back to the Family Court for more. Most people cannot afford that. I did not act for any of them, but at one stage the father phoned me out of the blue and said that he had been eating a lot of canned beans and instant noodles to pay for it. It would be good to avoid that and all the stress associated with that. It would be good to have agreements in place that say very clearly what the respective roles are, but I suspect that is probably a federal matter with the Family Law Act.

CHAIR: But we could still deal with an aspect of it in the Status of Children Act?

Mr Page: Absolutely. It would be good to raise it and it would be good to have it certainly mentioned at COAG or the attorneys-general.

CHAIR: Leaving that to one side—and I am not saying that that is not a valid submission, but purely from the committee's point of view—if we were, for argument's sake, to make a recommendation, we could make a recommendation that there be amendment to the Status of Children Act. Even though that would not be a complete solution, it would be a step in the right direction?

Mr Page: It would be good to start so that these people who are confused about parentage and asking, 'What is my role?' have some guidance from parliament. That would be helpful.

Ms BOLTON: I asked Professor Gelber earlier regarding Queenslanders who go overseas instead, and there are concerns around that, and her response was that we need to close the loop on that. However, that does not stop someone physically going overseas. That was in your submission, so can you just expand on that?

Mr Page: In respect of closing the loop, we are now allowed to go back overseas, and people do go back overseas. What do we have a shortage of in Queensland? We have a shortage of sperm donors. That is relatively easily fixed; it is a technical thing. It is easy for men to produce sperm. Men produce sperm every day of the week. We have issues about caps—we have cap limits under the NHMRC ethical guidelines—and we have federal and state legislation about payment and similar matters; however, eggs are much more problematic. According to the American Society for Reproductive Medicine, the whole process of egg donation takes 50 hours of commitment and daily injections in the stomach—as opposed to a sperm donor, which is one hour, tops, including counselling. There is great psychological commitment. There is the potential risk, with the egg collection, of maybe dying, like any minor surgery. Therefore, egg donors here are as scarce as hen's teeth.

What have Queenslanders been doing? They have been going all over the world. They have gone to Argentina, the United States, Spain, Greece and all the countries where surrogacy has happened internationally. The idea that we can prevent them from doing so is fanciful. However, under our legislation we say that if you pay an egg donor a commercial amount you commit a criminal offence. We also say under section 12 of the Criminal Code that if part of the offence occurs in Queensland, or the effect occurs in Queensland, then that is a criminal offence in Queensland. The Commonwealth legislation, which also has a 15-year jail term, says clearly 'international trade and commerce'. They are potentially committing serious criminal offences. Most of them who do it do it in complete ignorance of that, but they will still do it. As I said, it is fanciful to think you can stop it.

It is better that we have greater flexibility here, and clinics are now taking up importing eggs from overseas. That has to be Commonwealth and Queensland compliant, so NHMRC and RTAC compliant. At the moment they only import from one source in the United States, but there was also another clinic in Ukraine that they were importing from—clearly not now.

CHAIR: Thank you, Stephen, for your written submission and also for coming today to present to the committee.