

The Role of Birth Certificates in Relation to Access to Biographical and Genetic History in Donor Conception

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Abstract

In 1984, among its recommendations for the regulation of assisted conception services in the UK, the Warnock Committee proposed that the birth certificate of a donor-conceived person should record the fact of donor conception. While this proposal was never implemented, over twenty years later, a Joint Committee of the House of Lords and House of Commons recommended the use of birth certificates as a means of enabling donor-conceived persons to learn the nature of their conception. In response, the Government has committed to review the role of birth certificates. This paper represents an initial contribution to this exercise. It provides an overview of the legislative, policy and practice context of disclosure of donor conception, outlines arguments against and in favour of potential changes to birth certificates, and describes and critiques current propositions for revising birth certification. The paper concludes that there *is* a case for revising birth certificates and outlines a workable model to promote disclosure without compromising privacy concerns.

Keywords

donor-conception; birth certificates; identity; rights

Introduction

In August 2007, the Joint Committee of the House of Lords and House of Commons which was established to undertake pre-legislative scrutiny of the (then named) Human Tissue and Embryos (Draft) Bill recommended that, “the fact of donor conception should be registered on a person’s birth certificate” (House of Lords and House of Commons, 2007a: Recommendation 28, para 276; hereafter ‘Joint Committee’). This proposal was founded on the Joint Committee’s concerns that the intention of legislation removing donor anonymity could be thwarted because too few donor-conceived people were aware of the nature of their conception in the first place.

We will argue that this move is to be applauded, and consider whether or not all birth certificates should direct individuals (donor-conceived or otherwise) to other information held by relevant statutory bodies, although we acknowledge

that a significant challenge lies in establishing a workable model. We will first outline the policy background to this debate, and consider the case against and in favour of reform of the current practices for birth registration for donor-conceived people, concluding that a change is needed. We will then examine various proposals as to how such a change could be effected. Finally, we will advance our own model of birth annotation that would ensure that donor-conceived people were able to access information held by the Human Fertilisation and Embryology Authority (HFEA) about their donor. While the focus here is on the potential changes to the regulation of birth registration in the United Kingdom, where relevant, comparisons are drawn with other jurisdictions.

Background

The Report of the Warnock Committee marked the first formal departure in the UK from accepted wisdom that donor conception was best conducted in secret. Although the Committee endorsed the accepted practice of maintaining donor anonymity,¹ it was concerned about the potentially damaging impact of family secrets, arguing that “it is wrong to deceive children about their origins”. It recommended that a donor-conceived person should be informed about her or his conception (DHSS, 1984: 4.12) and, at the age of 18, should be allowed to obtain limited non-identifying about their donor (DHSS, 1984: 4.21).

The Committee also noted the “temptation”, where a married woman had conceived a child through DI, for the couple to conceal the nature of the child’s conception and to illegally register the woman’s husband as the child’s father (DHSS, 1984: 4.25) – a “temptation”, as noted by Snowden and Mitchell (1981: 17), that proved irresistible to many couples. In support of the husband’s intention to assume full parental rights and responsibilities regarding the child, the Committee recommended that any child born as a result of DI, to which both a woman and her husband had consented, should be treated as their legitimate child, thus allowing the husband to be legally recognised as the child’s father. It was acknowledged that this recommendation could be seen as “legislating for a fiction” and so compromised the register of births “as a true genetic record”. As a potential way forward, the Committee proposed that “consideration should be given as a matter of urgency to making it possible for the parents in registering the birth to add ‘by donation’ after the man’s name”² (DHSS, 1984: 4.25).

¹) In accordance with common usage, we refer to “anonymity” as regards the donor remaining anonymous to the recipient and any offspring, although strictly speaking, “anonymisation” rather than “anonymity” was to be maintained.

²) At the time, donor insemination – or “artificial insemination by donor” (AID) as it was then known – was the only generally accessible form of donor conception. Egg donation and embryo donation became more generally available only some time later.

Many of the Warnock Committee's recommendations found their way into the Human Fertilisation and Embryology Act 1990 (the 1990 Act). However, the recommendation regarding birth certificate annotation was not taken up and an amendment to implement it, tabled during a House of Lords debate on the Bill in 1990, met spirited resistance. Lord Mackay, the Lord Chancellor, pointed to the Government's previous achievements in "remov[ing] such discriminatory labels as illegitimacy" and thought "it would be a pity to replace one label with another" (Mackay, 1990). Lord Hailsham (1990), characteristically robust, endorsed Lord Mackay's concerns, warning: "If you muck about with a birth certificate, you are labelling a child as a second class person". The amendment was subsequently defeated on a vote of 97 – 35 (*Hansard*, House of Lords, 13 February 1990, Cols 1321-1322).

Although the Government accepted the principle of donor anonymity, it anticipated the possibility of changes in future attitudes towards anonymity that might support further legislative reform (Bottomley, 1990). The 1990 Act (s31) charged the new regulatory body, the HFEA, with maintaining a Register of Information (hereafter, 'Register') that included details relating to donors, recipients of donated gametes and embryos, and children born as a result of all donor procedures provided by a licensed treatment centre. In addition, the 1990 Act provided for a person intending to marry to enquire whether any information held on the HFEA Register contained evidence of an existing genetic relationship with her or his intended spouse³ and - once they reached the age of 18 (i.e. from 2010 onwards) - to access unspecified non-identifying donor information.

Pressure increasingly built up for review and clarification of the 1990 Act. The HFEA itself drew up both essential and supplementary information about donors to be collected by clinics for the Register, although several studies indicated the limited nature of this and its potential inadequacy for donor-conceived people (Maclean and Maclean, 1996; Abdalla *et al.*, 1998; Blyth and Hunt, 1998). In its early years, the HFEA adopted a neutral stance regarding parental disclosure – taking a more proactive position only following its review of the 1990 Act's welfare of the child provisions (HFEA, 2005a, b) and subsequent revision of its *Code of Practice*, advising clinics to "encourage and prepare patients to be open with their children from an early age about the circumstances of their conception" (HFEA, 2007: G.5.4.6).

Direct challenges to the UK's position on donor anonymity came from two sources. In 2002, a donor-conceived adult, Joanna Rose, and an unidentified donor-conceived minor, supported by the civil liberties organisation, Liberty,

³ The earliest age that anyone could seek this information is 16, as this is the minimum age for marriage in the UK under s.11 a(ii) Matrimonial Causes Act 1973, s.1 Marriage (Scotland) Act 1977 and the Marriage (Northern Ireland) Order 2003.

sought judicial review of the Secretary of State's response (in June 2001) to their requests for further information about their donors. Their arguments included the assertion that donor anonymity breached their right to 'private life' within the meaning of Article 8 of the European Convention on Human Rights (Council of Europe, 1950). Mr. Justice Scott Baker (as he then was) agreed that Article 8 was engaged, but adjourned further deliberation on whether there had actually been an infringement in order to enable the Government to complete a planned public consultation and review of the arrangements for providing information to donor-conceived people (*Rose and Another v. Secretary of State for Health and Human Fertilisation and Embryology Authority*, [2002] EWHC 1593, [2003] 2 FLR 962; see Jones, 2007: 222–228). The second challenge came from the United Nations Committee on the Rights of the Child in its review of implementation of the Convention on the Rights of the Child in the United Kingdom, which questioned the compatibility of donor anonymity with both the principles and provisions of the Convention (United Nations Committee on the Rights of the Child, 2002).

In December 2001 the Government launched a public consultation on the information to be provided for donor-conceived people requesting information from the HFEA Register. Views were sought concerning the nature of non-identifying information to be made available, as well as whether donor anonymity should be removed for future donor procedures, while making clear that any change regarding anonymity would not be applied retrospectively (DH, 2001). The consultation document also reiterated the Government's view that it was not planning to impose a legal obligation on parents to inform their donor-conceived child of their conception: "This paper is not concerned with the question as to whether donor offspring should be told by their family about the means of their conception (which is a matter for the parents themselves to decide)" (DH, 2001, para 1.10).

On the basis of the consultation (DH, 2003) and further deliberations (Daniels et al., 2005; Frith et al., 2007), the Government introduced the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 1511/2004), requiring the HFEA to collect additional non-identifying donor information that could be made available to a donor-conceived person. In addition, with effect from 1 April 2005, all new donors have been required to provide identifying information (listed in s.2(3) SI 1511/2004), which will be made available to any donor-conceived person ('applicant') seeking this information who has reached the age of 18.⁴

⁴ Any donor who initially donated anonymously between 1991 and 2005 may re-register as an identifiable donor, by providing the requisite information to a person to whom a licence applies (s. 2(3) SI 1511/2004). Any re-registration will be entered on the HFEA register. There is no formal encouragement for donors to change their status, nor advertising that they may do so other than on

Reform of the 1990 Act

After more than a decade, it became apparent that the 1990 Act required more than piecemeal reform. Concerned by the Government's apparent lack of urgency in this regard, the House of Commons Science and Technology Select Committee initiated its own investigation into the operation of the 1990 Act and the need for change, inviting comment from interested parties and drawing on a wide range of expert testimony (Science and Technology Committee, 2005a, b).

In response to the Science and Technology Committee's report, which criticised the removal of anonymity (Science and Technology Committee, 2005a: 67-72), the Government launched its own review of the 1990 Act, including a public consultation (DH, 2005). The Government made clear that despite the Committee's criticism, the decision to remove donor anonymity would not be revisited. Indeed, the consultation invited specific comment on "what measures would be appropriate, if any, to *ensure* that parents tell children conceived through gamete or embryo donation that they are donor-conceived?" (DH, 2005: 6.31, emphasis added). Participants in the consultation indicated a range of responses, from a parent-directed approach as to whether and when to tell their child, to a "full" legal obligation to do so – including specific reference on birth certificates. Other respondents, however, were critical of any provisions to use birth certificates to indicate the individual's donor conception status (DH, 2006a: 6.7; People Science & Policy, 2006: 48-49). In the event, no reference either to parental obligations to disclose or to the potential role of birth certificates was made in either the subsequent White Paper (DH 2006b: para 2.58) or the Tissue and Embryos (Draft) Bill 2007.

In line with recently-introduced procedures for parliamentary scrutiny of proposed legislation, the draft Bill was considered by a Joint Committee of the House of Lords and House of Commons. The Joint Committee also invited both written and oral evidence. The issue of disclosure of donor-conception status, and the perceived role of the State in sanctioning a deception through the issue of birth certificates that did not refer to donor conception, exercised the minds of witnesses and the Committee itself. As with the Department of Health's consultation, witnesses both supported and opposed further measures to ensure that donor-conceived people were made aware of the nature of their conception and, consequently, that information relating to their conception might be available from the HFEA (House of Lords and House of Commons, 2007a). In response to these competing assertions and counter-claims, the Committee

the HFEA website, nor any provision to advise recipients that the donor has changed her/his status (although this has been recommended by some contributors to consultations on revisions to the legislation e.g. PROGAR, DC Network, BAAF, UKDonorLink).

observed that the value of the 2004 Regulations are “illusory if the fact of donor-conception is not known” (2007b: para 272), and:

[R]ecognise[d] the force of the argument that the fact of donor conception should be registered on a person's birth certificate. 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. We therefore recommend that, as a matter of urgency, the Government should give this matter further consideration” (2007b: para 276).

Despite this “urgency” (also highlighted by the Warnock Committee in 1984), in its response to the Joint Committee's report on the draft Bill,⁵ the Department of Health acknowledged the sensitivity of birth certificate annotation but indicated its preference for educational rather than legislative measures to promote parental disclosure (DH, 2007: 69). However, it did promise to “keep the matter under review” and to engage in “constructive dialogue with stakeholders” (DH, 2007: 70).

In November 2007 the revamped Human Fertilisation and Embryology Bill was introduced in the House of Lords. As anticipated, this contained no specific measures regarding parental disclosure of donor conception and no reference to birth certificates; although included in the marshalled list of amendments to the Bill, to be moved on Report in the House of Lords, were two that (if successful) would have required the HFEA's *Code of Practice* to include guidance specifically related to the need for donor-conceived children to be told about their origins (Earl Howe, Baronesses Finlay and Barker, 2007, Amendment 129; and Lord Jenkin, 2007, Amendment 130). However, in response to the persistence of some members of the House of Lords (including the tabling of an amendment regarding birth certificate annotation – see below), while re-affirming its belief that, “encouraging openness by the parents of donor-conceived children is currently the best way forward” (Baroness Royall, 2007a), and emphasising its previously-announced commitment to work with Donor Conception Network to explore “ways in which current and potential parents of donor-conceived children can be encouraged to tell the children about their origins” (Baroness Royall, 2007b), the Government gave a “firm commitment” to “carry out a review of practices in

⁵ Given the Joint Committee's criticism of a central plank in the Tissue and Embryos (Draft) Bill 2007 – the proposed amalgamation of the hitherto separate regulatory bodies, the Human Tissue Authority and the HFEA – this Bill was withdrawn and replaced by the Human Fertilisation and Embryology Bill 2007, and introduced to the House of Lords at the end of 2007. The Bill received Royal Assent in November 2008 and will be implemented in 2009.

informing donor-conceived children of the fact of their donor conception and whether there is a need for a change in the law to best ensure that donor-conceived children are informed of their donor conception” within four years of the Act coming into force (Baroness Royall, 2008). This assurance was subsequently repeated on several occasions in the House of Commons by Dawn Primarolo (2008 a-d).

The Case for Reform?

Having considered the policy background to the issue of birth certificate annotation, we will now examine the debate over whether any reform in the birth certification procedure for those conceived by donor gametes is warranted.

The Case against Birth Certificate Annotation

Numerous arguments against marking donor-conceived individuals' birth certificates have been propounded by organisations and individuals; some oppose the removal of donor anonymity *in toto*; whereas others disagree with the use of birth certificates as a mechanism to encourage/enforce disclosure.

One of the main arguments put forward is that this mechanism would be a source of “distress to the parents and ... a constant reminder of the difficulties that they had already encountered” (Society of Registration Officers, 2005). This argument rests on the claim that it would undermine the right of the parent to decide whether to tell their child (Ennals, 1990; BICA, 2006; Bakewell, 2007; Harris, 2007; Lyons, 2007). In this regard it would compromise the privacy of donor-conceived individuals and/or that of their parents (DC Network, 2006, 2008a; GRO, 2006; Society of Registration Officers, 2005; Lyons, 2007; Nathanson, 2007; Joint Committee on Human Rights, 2008). This casts the discussion as a clash of rights between the parent and the donor-conceived person. It *can* be argued that in this circumstance the donor-conceived person's right to gain access to information held about them (namely information about their donor) is weightier than the parents' right to privacy in this regard (Frith, 2001).⁶ Certainly, the UK Government, in removing the anonymity of donors from April 2005,

⁶ There is a considerable amount of literature on the balance of rights between parents and children, for example Kaganas and Piper (2001), Fenwick (2004), Choudhry and Fenwick (2005), Harris-Short (2005), Fortin (2006), Herring and Taylor (2006); see also *Hoppe v Germany* [2003] 1 FCR 176, *Yousef v The Netherlands* [2000] 2 FLR 118. See also Besson (2007) on the careful balancing act between a child's and parental interests in the context of donor conception. However, our focus here lies with the *role of birth certificates* in relation to access to biographical/genetic information rather than on the deliberation of potentially clashing rights *per se*.

implicitly gives the donor-conceived person's right to such information importance that is substantiated by legal measures. Furthermore, some parents responding to the New Zealand Law Commission consultation on this matter put forward a rather different perspective, "some parents argued that ... the more such [marked] birth certificates were in circulation, the less the risk of differential treatment of children. They said they would prefer their child's birth certificate to say that the child is donor-conceived rather than that the father is "unknown", the only option currently available to single women" (New Zealand Law Commission, 2005: para 10.57, page 118).⁷ Therefore, this suggests that not *all* parents of donor-conceived children will necessarily judge birth certificate annotation to be detrimental or intrusive.

A further argument against annotating birth certificates is that it would be an ineffective means of ensuring that parents will in fact tell their children, since parents who are determined not to tell their child could provide false information at registration (DC Network, 2006; GRO, 2006; Merricks, 2007). An extension of this claim is that it would be counter-productive, insofar as parents who have given false birth registration information, but who may later wish to tell their child about his or her conception, may be constrained from doing so for fear of adverse legal consequences (DC Network, 2006). In response to this argument it can be said that these claims may have some purchase. People do break laws, but the fact that some people commit crimes is not an argument against statutes prohibiting such activities. Annotating birth certificates may also not ensure that *all* parents told their donor-conceived children, but it would facilitate the likelihood that *more* were told and put in place a mechanism for some official notification of the information held about them by the HFEA.

A final argument advanced by the DC Network, that has indicated its hope "for no further assaults on birth certificates" (2008b), is concern over third party access to birth certificates and records as "public documents", rather than the perceived rights of parents to protect their privacy by withholding from their child information about his or her conception. This distinction is significant, and is indeed crucial to the discussion of any proposed reforms. Any robust system of birth certificate annotation would encompass measures to ensure that, in this respect, the privacy of donor-conceived people would be maintained.

The Case for Reform

Having examined the arguments against birth certificate annotation, we argue that there are compelling arguments in favour of the reform of birth certificates.

⁷ Similarly, the Victoria Law Reform Commission (2007: 142) observed that some same sex parents of donor-conceived children had supported inclusion of the name of the donor on their child's birth certificate.

As the foregoing discussion has illustrated, proposals concerning birth certificates essentially centre on their potential role as a means to an end – to facilitate an increased awareness among donor-conceived people of their status and of their ability to seek information relating to their biographical and genetic history held on the Register. Such proposals in turn hinge on the widespread belief that too-few parents who have built their families using donor conception tell their children about their conception.

Lack of Parental Disclosure

Assumptions that donor anonymity and secrecy were considered essential requirements for effective delivery of donor conception services are well-documented (Novaes, 1998). Self-evidently, these practices have militated against the conduct of research into families' experiences of donor conception, and such studies have been of very recent origin.

Currently available evidence concerning parental disclosure of donor conception indicates a complex picture. On the one hand, some parents of donor-conceived children have been at the forefront of reforms to improve donor-conceived people's access to their biographical and genetic history (Donor Conception Support Group of Australia Inc., 1997; Montuschi and Merricks, 2000; Lorbach, 2003; Blyth and Ryll, 2005). Studies over the past dozen years indicate that, in some countries at least, an increasing proportion of parents declare their inclination to inform their children about their conception (Adair and Purdie, 1996; Rumball and Adair, 1999; Hunter *et al.*, 2000; Brewaeyns *et al.*, 2003, 2005; Scheib *et al.*, 2003, 2004; Lycett *et al.*, 2004, 2005; Leeb-Lundberg *et al.*, 2006; Lalos *et al.*, 2007). Swedish research, in particular, has been especially informative. In a 1982 study, Milsom and Bergman reported that barely 1% of couples interviewed intended to tell their child that they had been conceived using donor conception. In 2000, Gottlieb *et al.* reported a study in which 11% of parents of donor-conceived children had told their children about the nature of their conception and a further 40% of parents stated their intention to tell their child "later". Comparing the responses of parents whose children had been conceived before and after the removal of anonymity, the authors state: "[t]he results indicate that attitudes toward informing the child about DI have changed over time" (Gottlieb *et al.*, 2000: 2054). Their prediction of a probable increase in parental disclosure with time was borne out when the same group of parents was interviewed again some years later (Lalos *et al.*, 2007), by which time 61% had already told their child about her or his conception, and a further 22%, who had not yet told their child(ren), were still intending to do so.

On the other hand, concerns that too few parents inform their donor-conceived children are still widely expressed (see for example, Milsom and Bergman, 1982;

Snowden *et al.*, 1983; Cook *et al.*, 1995; Golombok *et al.*, 1995, 1996, 2002a, 2002b; Brewaeys, 1996, 2001; McWhinnie, 1996; Brewaeys *et al.*, 1997, 2005; Nachtigall *et al.*, 1997, 1998; van Berkel *et al.*, 1999; Gottlieb *et al.*, 2000; Kirkman, 2003); while Lycett *et al.* (2004) caution that published studies may *over-emphasise* the likelihood of disclosure since parents who are less likely to disclose seem also less likely to participate in these research studies. Furthermore, disclosure patterns appear to vary according to the type of gamete used and family structures – increased levels of disclosure have been recorded for egg donation, and among lesbian and single-parent headed families (Golombok *et al.*, 2002b, 2006; Scheib *et al.*, 2003; Brewaeys *et al.*, 2005). Also, actual disclosure patterns do not necessarily match stated intentions - some parents who state their intention to disclose may not do so, while others who indicate that they will *not* disclose may go on to do so (Golombok *et al.*, 2002a, 2006; Murray and Golombok, 2003).

Lack of parental disclosure, therefore, provides one of three key arguments in support of recording *in some way* the fact of donor conception on birth certificates. Donor-conceived people (DC Adults UK, 2005; Whipp, 2005; Ellis, 2007; Gollancz, 2007a,b; Victorian Law Reform Commission, 2007; Rose, 2007; International Donor Offspring Alliance, 2008) and – as we have noted previously - some parents of donor-conceived children (New Zealand Law Commission, 2005; Victorian Law Reform Commission, 2007) are themselves among its most enthusiastic proponents.

Deception by the State

Gollancz (2007a, b) highlights the second argument in support of birth certificate annotation: the involvement of the State in deception (see also Deech, 2007; Rushbrook, 2007, 2008; Centre for Social Justice, 2008). According to this argument, not only are donor-conceived people possibly deceived by their parents, but the State colludes with this deception. Unsurprisingly, this has concerned lawmakers themselves, with Lord Teviot making the point succinctly as long ago as 1990: “It is one thing for an individual to give false information and to risk prosecution but quite another for a Government to create a legal fiction” (see also House of Lords and House of Commons, 2007b). More recently, Robert Key MP (2008) has reiterated this concern thus: “I think that the state has a moral duty not to be party to a deliberate deception about a person’s genetic history”. Therefore, whilst it is clear that unanimous support among lawmakers on this topic is unlikely, as the relevant Parliamentary debates in 1990, 2004 and 2007/08 have shown, there nevertheless remains a genuine concern among a number of lawmakers over the State’s collusion in deception.

An Accurate Record of Genetic Parentage

The third argument for some form of birth certificate annotation for donor-conceived people is the claimed need to ensure an accurate record of one's genetic parentage (Saltoun, 1990; Teviot, 1990; New Zealand Law Commission, 2005; Department of Health, 2006a; People Science & Policy, 2006; Almond, 2007; Bainham, 2007; Deech, 2007; House of Lords and House of Commons, 2007a, b; Rushbrook, 2007, 2008; Victorian Law Reform Commission, 2007; Centre for Social Justice, 2008; Simmonds, 2008). Some have gone further and made calls for this to be acknowledged as a fundamental human right. For example, lawyer David Gollancz, conceived by donor insemination in the 1950s, who has long campaigned to end donor anonymity, articulated these views in evidence to the Joint Committee:

It follows that I wish to see not merely the relatively guarded changes which were made in 2001 but, above all, a requirement that donor offspring be put in a position where they can find out, *independently of their social parents or anyone else, first that they were donor-conceived and then who their donor was*. The statutorily sanctioned fraud which is the donor offspring's birth certificate must be abolished and replaced with a document of record which puts each person's personal history in their own hands (Gollancz, 2007a, emphasis added).

Further, in an article written for a national newspaper he argued that “[n]o one is entitled deliberately to deceive other people, or deprive them of essential information, about their personal history. Our stories belong to us and we are entitled to the truth” (Gollancz, 2007b).

Indeed, a child's right to birth registration forms part of their right to a legal identity, name and nationality, reflected in international conventions on human rights. For example, Article 24 (2) of the International Convention on Civil and Political Rights protects a child's right to “be registered immediately after birth and ... have a name”. Similarly, the United Nations Convention on the Rights of the Child 1989 provides that: “Every child shall be registered immediately after birth and shall be given the right to a name, and the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents” (Art 7 (1)); whereas Article 8 of the same Convention promotes respect for the child's right to “preserve his or her identity”. Bainham (1999) has argued that, in the absence of a definition for ‘parents’, the precise interpretation of these Articles may be subject to debate; and, given the context at the time the Convention was drafted, goes on to make the case for ‘parents’ being interpreted as genetic parents. Finally, one might also look to Article 8 of the European Convention on Human Rights, whereby ‘private life’ might incorporate ascertaining the identity of a genetic parent (*Mikulic v Croatia* (App No 53176/99) [2002] 1 FCR 720). Although, in the context of donor conception in

the UK, as outlined above, while Article 8 was found to be engaged in the *Rose* case, it was not necessary for the Court to decide whether in fact it had been breached.

Thus, it is argued that donor-conceived people are denied such a right to the accurate recording of their parentage. However, this raises the question of whether or not birth certificates should be a record of genetic or social parentage. Currently, for donor-conceived people, they are – at least in part⁸ – a record of the latter, and as such donor-conceived people are not denied a right to citizenship or nationality. In order to address this question it is useful to review the civil birth registration system in the UK, including the process itself and ideological concerns over the purpose and function of birth certificates *per se*.

History of Civil Birth Registration and Certification in the UK

Civil birth registration in the UK (along with civil registration of marriages and deaths) developed as part of wide-scale constitutional reforms initiated in the 1830s (England and Wales in 1837, Ireland in 1845 and Scotland in 1854), influenced by the French Napoleonic Code, transferring responsibility for vital registration from the church to the state. Mass migration to urban areas accompanying industrialisation, and a desire by the medical profession for more accurate data on health and mortality provided other drivers for reform (Higgs 2004a). However, the central concern behind the development of the civil registration system lay with the “need to protect property rights via the accurate recording of lines of descent” (Higgs, 2004a: 78; 2004b: 8, 11). Hence, birth certificates were and continue to be perceived as documenting one’s genetic heritage.⁹

Whilst historically the development of a civil registration system was crucial in protecting property rights by providing evidence of succession for inheritance purposes, other administrative functions of birth certificates include determining entitlement to citizenship, benefits and government services; eligibility for marriage or civil partnership; obtaining life insurance; various employment purposes; school, college or university enrolment, and can be indicative of who has parental

⁸) By this we mean that where donor eggs or sperm are used then there will often be a genetic connection between one named parent and the donor-conceived child. Hence, for single women or those in lesbian relationships, in many instances the birth-mother will have a genetic link to the child; likewise, where either eggs or sperm are used by couples in heterosexual relationships, one party will also have a genetic tie to the child. Clearly, where donor eggs *and* sperm, or embryos are used, then neither parent has a genetic relationship to the child in the strict sense of genetic parentage (i.e. ignoring gestational ties, at least for the purposes of this analysis).

⁹) Though it should be noted that Higgs (2004a) also identified the role of the birth certificate in providing proof of age in relation to factory and education legislation, and noted resistance by families (reluctant to lose children’s contribution to the family economy) and employers (reluctant to lose cheap labour) to restrictions on autonomy.

responsibility for a child (in England and Wales, section 4(1)(a) and (1A) Children Act 1989, as amended). Indeed, the registration of the child's birth provides an "historical" (legal) assertion of parental status which, in the context of donor conception, simultaneously excludes others who may be genetically related to the child from making the same claim (Jones, 2006: 77-79). The possibilities for multiple 'parents', generated by the use of donor gametes, has led to extensive debate on the issue of birth certificates as a record of historical or genetic 'truth', and has also raised questions regarding who should be named as such on the resulting child's birth certificate (see, for example, Smart, 1987: 103-106; Teviot, 1990; Dewar, 1992: 84; Collier, 1995: 175-214; Bainham, 1999; Jackson, 2006; Holm, 2007).

Clearly the important functions of birth certificates are not limited to recording genetic parentage, but also to establish who is legally responsible for the child and to provide a record of their citizenship. As Dow (1998: 5) argues, "Registration of birth is the State's first acknowledgement of a child's existence. It represents recognition of a child's significance to the country and of his or her status under the law. This ticket to citizenship opens the door to the fulfilment of rights and to the privileges and services that a nation offers its people". We would argue further, that birth certificates should in addition provide access for an individual to information held about them by a state body and be a means to ensure that donor offspring are told that they were conceived with donor gametes.

As we have observed above, birth certificates are used for a variety of purposes. Here, it should also be noted that, within the UK context, the generic term "birth certificate" may be used to refer to one of two distinct documents. The first, the so-called "long" birth certificate, is actually a "certified copy of an entry" pursuant to: the Births and Deaths Registration Act 1953 (England and Wales); the Births and Deaths Registration (Northern Ireland) Order 1976 (S.I. 1976/1041 (N.I. 14)) (Northern Ireland) or the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (Scotland). This document provides details of the individual's name, sex, date and place of birth, forename, surname, and (where relevant) the maiden name of the mother; the forename, surname and occupation of the father. The Certificate of Birth, colloquially known as the "shortbirth certificate", provides details of the individual's name, sex, date and place of birth – but provides no information regarding parentage. When a child is made the subject of an adoption order, an adoption certificate (formally "a true copy of an entry in the Adopted Children Register") is issued by the relevant General Register Office (GRO). This replaces the original "long" birth certificate and can be used for all purposes for which a "long" birth certificate would otherwise be required. Similarly, when a child born following a surrogacy arrangement is made the subject of a Parental Order, a Parental Order certificate ("a true copy of an entry in the Parental Order Register") is issued. A new Certificate of Birth is also issued following the adoption or parental order,

providing details of the name by which the child will be known following the order. At age 16 in Scotland, and 18 in the rest of the UK, an adopted person or a person subject to a parental order can apply for a copy of their original “long” birth certificate from the relevant GRO.

In practice the Certificate of Birth is decreasingly acceptable for identification purposes,¹⁰ thus ensuring that an increasing range of third parties will become aware whether an individual is adopted or subject to a parental order. In addition, anyone in possession of minimal information who is prepared to pay the modest GRO fee can obtain a copy of the “long” birth certificate of any other person. This provides the context in which proposals relating to birth certificates and donor conception should be understood and evaluated.

Proposed Models for Birth Certificate Reform

Having considered the case for and against some form of birth certificate reform, it is argued that something should be done about the current system of birth certification for donor-conceived people. In this section various models that have been proposed to address the problem of this lack of information (in some form) on such birth certificates will be considered. However, as we hope to make clear in the ensuing discussion, any proposal seeking serious consideration must ensure that: first, individual privacy is not compromised; second, additional bureaucracy and public expense are proportionate; and third, it must recognise the involvement of two state agencies when a child is born as a result of a donor procedure, the HFEA (through its register of information) and one of the UK's three GROs for England and Wales, Northern Ireland, and Scotland.

Symbols on Birth Certificates

Baronesses Barker and Warnock and Earl Howe proposed amendments during the House of Lords debate on the Human Fertilisation and Embryology Bill that the fact of donor conception should be recorded by a symbol on the child's birth certificate (Howe, 2007, Amendment 63; Barker, Warnock and Howe, 2007, Amendment 68B; see also *Hansard* House of Lords, 10 December 2007, Vol 469 Cols 91-108, and 28 January 2008, Vol 471 Cols 502-512). The intention of a somewhat oblique reference to donor conception represented “an attempt to try

¹⁰ For example, from 4 May 2004 anyone born on or after 1 January 1983 applying for their first UK passport has to provide a “long” birth certificate; this ‘move is one of several recent initiatives to improve passport security to combat fraud and identity theft’. See www.ips.gov.uk/passport/press-archive-2004-05-04.asp (accessed October 2008) – although the “long” certificate specifically includes a warning that “a certificate is not evidence of identity”.

to build in a degree of protection and privacy” (Barker, *Hansard* House of Lords, 10 December 2007, Vol 469 Col 95). However, as was indicated during the parliamentary debates, it would not take long for the nature of any such symbol on a birth certificate to be deciphered, as a result of which the record might as well have been explicit in the first place. This specific proposal was, therefore, not supported. A somewhat similar proposal – and which would have similar effect – was contained in the response of the British Infertility Counselling Association to the Department of Health’s consultation on the 1990 Act. The HFEA reference number would be included on the “long” birth certificate of a donor-conceived person, although no details were provided as to how this might happen in practice (British Infertility Counselling Association, 2006). The possible limitations of this model would be privacy concerns, that people would recognise this as an HFEA number and what that entailed.

“Birth Certification Transparency” (Rushbrooke)

In written evidence to the Joint Committee (Rushbrooke, 2007) and revised in subsequent email communication, Rushbrooke (2008, on file with authors) has proposed a root and branch reform of birth registration as it applies to donor conception. Under Rushbrooke’s proposals, responsibility for handling information regarding donor conception would be transferred from the HFEA to GROs. Sixteen weeks after providing a donor procedure, a doctor will be obliged to notify the GRO – except where it is known that the procedure did not result in conception – and this information will be stored on a new GRO database – provisionally termed the “Donor Transparency Register” (DTR). When a child’s birth is registered with the GRO, a check will be made with DTR and if a match exists, the name of the donor(s) will be placed on the “full” (i.e. “long”) birth certificate with the name of the other genetic parent (where only one donor has been used). This certificate will be accessible by the donor-conceived person only on reaching the age of 18¹¹ and, to protect privacy regarding this ‘sensitive information’, will become publicly accessible only either 5 years after the donor-conceived person has accessed it, or after her/his death. The 5-year gap is meant to ensure that the donor-conceived person is psychologically ready for potential contact/being informed by others accessing the “full” certificate – however, as discussed below, we would seriously question whether this goes far enough in protecting that person’s private life (for psychological reasons or otherwise).

¹¹) This is intended to bring provisions for donor-conceived people into line with those governing access to adoption records. However, while Rushbrooke’s proposals would achieve this in relation to England, Wales and Northern Ireland, they do not acknowledge that an adopted person in Scotland may access their adoption records from age 16.

A “full” donor conception certificate will also be provided, showing the child’s legal parents, explaining why the child’s genetic and legal parents are not the same, and indicating the type(s) of donor conception used. (A requirement included in the 2007 proposals that a donor conception certificate would be issued only following a successful application by the child’s legal parents for a court order confirming their status, was dropped from the 2008 proposals). “Short” versions of both the birth and the donor conception certificates would be available from the GRO. The “short” birth certificate will be “indistinguishable” from the “short” donor certificate (Rushbrooke, 2008) and neither would indicate the use of donor conception. While Rushbrooke anticipates that the “full” donor conception certificate would be required for a passport application (thus ensuring that at some point the donor-conceived person would ascertain their status anyway and so providing an incentive for parents to tell their child earlier), the “short” certificate should be used for all other purposes for which evidence of identity is currently required.

We have identified serious drawbacks with Rushbrooke’s proposition. First, it entails significant additional bureaucracy in terms of new systems at the GRO to handle and process this information, including the issue of *four certificates* in respect of each individual. Further, it is not clear why two versions of the “short” certificates would be required if they are to be “indistinguishable”. Second, there is inadequate protection of the individual’s privacy. There will be public access to the individual’s “full” birth certificate, which will indicate the difference between the individual’s genetic and “legal” parent(s). Furthermore, the proposed limits on public access to the birth certificate of a donor-conceived person will effectively function as a proxy indicator of donor-conception status since these provisions will apply to the birth certificate of no other individuals. In addition, Rushbrooke proposes that the “short” *donor* conception certificate will be used for most purposes to provide evidence of identity – by definition this will disclose to the world at large the individual’s status.

Finally, since the donor-conceived person her or himself will be unable to obtain her or his full birth certificate until the age of 18, this will discriminate against her or him in comparison with other individuals who are able to obtain a copy of their birth certificate from the GRO without any age restriction.

International Donor Offspring Alliance

The International Donor Offspring Alliance (2008) has proposed a two-part system of birth certification, in which a “Certificate of Parentage” would record the fact of assisted conception and the names of the individual’s social and donor parents. This would be available only to a donor-conceived person and his or her social parents. A “Certificate of Birth”, which would be acceptable as evidence for

all those matters for which a birth certificate is currently required, would provide details of the individual's date and place of birth only (i.e. the information that is currently included on a "short" birth certificate).

This proposal also has inherent drawbacks. First, the donor-conceived person would require knowledge of the nature of her or his conception in order to obtain a 'Certificate of Parentage' (unless this is to be supplied routinely when the individual also applies for a 'Certificate of Birth'). As with Rushbrooke's proposal, it partially satisfies privacy concerns only in that the inability of a third party to access the original birth certificate will indicate that there may be something unusual about the circumstances of the individual's birth registration.

Partnership Focus Group: On the Rights and Life Long Needs of Children Created by Donor Assisted Conception

The Partnership Focus Group (2008) has also proposed (as "just one example of a possible way forward") the issue of a new certificate for all new births, a "Certificate of Birth", that identifies an individual's legal parentage and which would be used for public purposes. The Group also calls for statutory prescription that this certificate must be accepted for all official purposes where a birth certificate is currently required. The "Certificate of Birth" would indicate that it was not necessarily a statement of the individual's biological parentage (see below the discussion of the New Zealand style model for criticisms of this type of approach). For this information an individual should also have a second certificate, a "Certificate of Genetic Heritage" that would be provided where an individual's genetic and legal parentage are different, for example when the individual has been conceived through donor conception or a surrogacy arrangement or is adopted; this would indicate how identifying information about their genetic parentage could be obtained either from the GROs or the HFEA. In order to retain privacy, this certificate would be available only to the individual concerned and to her or his 'custodial' [*sic*] parents. There is a privacy concern here that the 'Certificate of Birth' would indicate that it was not a record of biological parenthood and this would distinguish it from other birth certificates.

The "New Zealand" Style Model

This model is derived from a recommendation in a report produced by the New Zealand Law Commission, to the effect that (all) 'Birth certificates should include a statement to indicate that the Births, Deaths and Marriages register contains other information that may be accessed by the person whose certificate it is' (2005: Recommendation R 18). Hence, the privacy of donor-conceived individuals would be protected as they would not be singled out for attention,

but it would also put them (and others, e.g. adopted persons) on notice that some other information might be held by a state body, enabling them – if they so wished – to seek access to that data. Taking this model and applying it to the UK context, *all* ‘Certificates of Birth’ (i.e. the “short” birth certificate) would include the following text: “Further information relating to the individual whose birth is recorded on this certificate may be held on the Human Fertilisation and Embryology Authority Register of Information, the Parental Order Register or the Adopted Children Register”. Also, *all* “long” birth certificates would include the following text: “Further information relating to the individual whose birth is recorded on this certificate may be held on the Human Fertilisation and Embryology Authority Register of Information”. It should be noted that reference need only be made to the HFEA Register for the “long” birth certificate since adopted people and people subject to a parental order will have an adoption certificate or parental order certificate respectively in lieu of a “long” birth certificate”, thus clearly indicating their status (Blyth, 2008).

In essence this proposal requires only that the form of words on birth certificates is modified and means that, while no privacy issues are compromised, all individuals would have access to a birth certificate informing them of the existence of other registers which *may* contain information of direct relevance to them. The individual could then make further enquiries as she or he wishes. Support for this type of model might be found in the following comments of Robert Key MP:

One issue has not been mentioned so far: what should be put on a birth certificate? I think that the state has a moral duty not to be party to a deliberate deception about a person's genetic history. The evidence convinces me that everyone has the right to know the identity of their biological parents, and it also suggests that the best approach is for the social parents to inform their children at the earliest opportunity, at the most appropriate moment, of their origin. However, for the avoidance of doubt and to be fair to everyone, there is a case for printing on every birth certificate a notice of other state agencies that may hold additional information on a person's genetic history. Therefore, no one would be discriminated against and everybody would know that it might be worth checking, if there is any doubt and one's “parents” have not told one (Key, 2008).

In common with the other proposals we have reviewed here, we would also advocate the provision of additional advice, counselling, information and support to people contemplating building their family through donor conception so that from the outset they are informed about the new text on birth certificates and the merits of early disclosure to their children.

However, there are clearly a number of issues raised by this proposal. The first of these is that the group to be benefited by this measure would be very small compared to the overall number of births in the UK who had not been conceived using donated gametes. The Department of Health (on behalf of the GROs) has

indicated that, “there are worries expressed by the GROs that the number of people who would benefit from the extra information is very small as a proportion” (personal communication, 19/05/2008, on file with the authors). Hence, there might be a risk of creating considerable unease for (the majority of) people other than those who might potentially benefit from this reform. Clearly, the proportionality of this measure would need to be considered. Therefore, there is a possibility of creating anxiety for the majority of children born to benefit a small minority.

Second, it would involve deception as to put on the birth certificate of someone about whom there is *no* information on the HFEA Register or other registers that ‘there may be information ...’ is not true - an untruth that was known at the time. Thus, it could be argued that this proposal replaces one deception (as the current situation with donor-conceived peoples’ birth certificates) with another.

Finally, there are practical considerations. If the statement was published on *all* birth certificates then the HFEA could possibly have to field a high increase in the number of inquiries for information held on its register. Such an increase in inquiries would be unlikely to be supported by extra resources able to handle those inquiries appropriately. Thus, donor-conceived people who need support and access to the information may not be able to get it and thus this measure could, ultimately, be detrimental to their interests.

Linking HFEA and GRO Records

This approach is founded on a requirement for liaison between the HFEA and the three GROs to enable a link to be made between GRO and HFEA records (Blyth, 2007). Briefly, whenever the HFEA is notified of a donor-conceived birth, this information is provided to the relevant GRO. That GRO records a link between its own birth registration and the HFEA’s records. Later, when an application for a birth record is made to the GRO, and the GRO is satisfied that the applicant is either the individual to whom the registration relates or his or her legal parent - *and those persons only* - the “full” birth certificate that is provided will indicate that the HFEA Register contains information regarding the individual to whom the certificate relates. One method of achieving this is by means of an appendix to the certificate which may be detached if the certificate is subsequently required for purposes such as a passport application or provision of identification (for which, as we have noted above, the “full” certificate is increasingly requested). As now, an un-annotated birth certificate will be provided by the GRO to any other applicant, thereby protecting the privacy of the individual to whom the certificate relates. Consequently, if the individual chooses to

contact the HFEA, the measures that exist with regard to applications to the Register will come into operation (i.e. age limits relating to information disclosure and provision of counselling). Further, we advocate that information and advice concerning birth registration should be provided to people undergoing a donor procedure as part of the information, counselling and other preparation provided by a licensed treatment centre to such persons, as will be required upon enactment of s.13(6C) (a) and (b) Human Fertilisation and Embryology Act 1990, inserted by s.14(3) Human Fertilisation and Embryology Act 2008. Ongoing information, advice and support should also be made available to the family following the birth of a child.

The registration of a child's birth is likely to precede the formal linking of HFEA and GRO data, and so this model remains reliant both on parental veracity and on clinics' ability to ensure that no births are 'lost to follow-up'. Nevertheless, non-compliance should be greatly minimised by: the provision of information and advice as outlined above; knowledge of the future co-ordination of the HFEA and GRO records; and knowledge that if the donor-conceived person requests a birth certificate from the relevant GRO, this will indicate his or her status.

Further, this proposal safeguards individuals' privacy, so that the donor-conceived person or his or her legal parents only will be able to access information disclosing the donor-conceived person's status. The GROs' current responsibilities and track record for safeguarding sensitive data relating to the Adopted Children, Parental Order, Stillbirth and Gender Recognition Registers indicate that this information would be in safe hands (a not-insignificant consideration at the present time). That is, the GROs have already implemented a system for ensuring that internal linking of entries in the Register of Births and the Gender Recognition Register (GRR) thus, "a confidential link between the original and new details will be maintained by the Registrar General. The Gender Recognition Register will not be open to public inspection or search" (GRO, 2008). Second, this proposal also promotes the individual's "agency" by safeguarding their right *not* to know if they so choose – an aspect that is overlooked in the models discussed above. Third, the proposal would not establish any provisions that are different from current provisions for public access to birth records that would alert an enquirer who is not the donor-conceived person him/herself to the possibility of donor-conception; it avoids establishing a completely separate registration system for donor-conceived births, and ensures that all forms of donation, sperm egg and embryo, are adequately taken into account. It does, however, involve additional resources insofar as the GROs and the HFEA will have to establish systems for the recording of this information. However, since the state legitimises donor conception, it seems perfectly reasonable that it should accept the responsibility this entails. In any event, the limited numbers of individuals involved indicate that any such resource requirements are proportionate, and

indeed are less onerous than the number of inquiries that might occur if a blanket statement were placed on *all* birth certificates.¹²

Conclusions

In this paper we have argued that there is a case for reform of birth certificates for donor-conceived people. If this case is accepted, the question becomes ‘what is the best way of achieving this?’ Any proposal must safeguard the privacy of the donor-conceived person, the bureaucracy and cost must be proportionate and it should not place an undue burden on any particular party. As the Joint Committee on Human Rights commented recently, “We consider that the registration process should only be changed if there is objective evidence that it is necessary and that the change will not have a disproportionate impact on the ability of donor conceived people to keep their birth status private if they wish to do so” (Joint Committee on Human Rights, 2008). While we have outlined six possible models of birth certificate annotation, all providing benefits and disadvantages, we argue that there is a strong case for some kind of reform of birth certificates, but the devil is in the detail. In our view, the model that formally links HFEA and GRO records, outlined above, provides a solution that is both proportionate in cost and bureaucracy, whilst simultaneously protecting the private lives of donor-conceived people *and* enabling those who wish to do so the opportunity to access further information about their biographical and genetic history. Therefore, given our now modern sophisticated means of record keeping a solution that meets all the relevant criteria is achievable if there is the will to do so. The recent proposals for joint birth registration (DWP, 2008), and the implications for birth certification of the recognition of a woman being named as the ‘other parent’ under the provisions of the Human Fertilisation and Embryology Act (see especially sections

¹² After this paper was accepted for publication, on 4th December 2008, the parliament of Victoria approved the Assisted Reproductive Treatment Bill 2008 that includes broadly similar measures. The Bill transfers responsibility for maintaining the Register of births resulting from assisted reproductive treatment from the Infertility Treatment Authority to the Registrar of Births, Deaths and Marriages. A government amendment, tabled only during the final hours of debate on the Bill, introduces a new provision in the state’s Births, Deaths and Marriages Registration Act 1996. This requires that where a “birth registration statement” specifies that the child was conceived by a donor treatment procedure, the Register entry must be annotated with the words “donor conceived”. An “addendum” to the birth certificate, available to the donor-conceived person only, will indicate that the Birth Register contains further information – see www.legislation.vic.gov.au. The amendment was approved by both houses of Parliament, the Legislative Council and the Legislative Assembly – although not without some controversy and expression of concerns as to how the provision would operate – see <http://www.parliament.vic.gov.au/downloadhansard/council.htm> and <http://www.parliament.vic.gov.au/downloadhansard/assembly.htm>. The (now) Assisted Reproductive Treatment Act 2008 will come into effect during 2009.

42–47, amending the parenthood provisions of the 1990 Act) indicate that change is certainly possible, if not inevitable.

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