Parties to Gamete Donation: From Bounded Selves to Relational Persons

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ABSTRACT

The task of legally characterising complex interpersonal relationships presents a challenge to lawyers, legislators and academics.

In law, relationships between parties are commonly characterised in terms of competing sets of rights. The parties are characterised as adversaries, in conflict, and this conflict is resolved by balancing the competing rights of one against the other. Under this model, rights create metaphorical boundaries between autonomous liberal individuals.

Relational theories of rights challenge the dominant liberal model of the individual and their legal relations by exchanging the metaphor of boundaries for a study of real relationships. In this way, rights function to facilitate and structure relationships between parties, rather than to keep parties separated. Under a relational model, the autonomy of each person can only be understood in the context of their relationships. The rights-holder can not be viewed in isolation.

In this thesis, I consider the legal relationships between Australian parties to gamete donation. In particular, I argue that the relationships may have been well described by a liberal model of rights in the past, but that the liberal model is no longer adequate to characterise the developing interpersonal relationships between the parties. I demonstrate that relational theories of rights provide a sound theoretical basis for characterising the increasingly relational parties to gamete donation, as they exist now and into the future.

In addition to describing technological, social and legal developments in donor conception from the early 1900's to the present day, I place these developments in the context of a broad social shift from liberal to a post-liberal society. In particular, this social shift is characterised by decreased separation between domains of public and private, and represents a deep psychological shift in our understanding of the individual as increasingly interpersonal and relational. In the context of gamete donation in Australia, this shift is manifested in increasing exchange of information

between parties over time. In particular, disclosure of information about donors to donor-conceived offspring has been a significant political and academic focus.

My thesis first demonstrates a link between the broad post-liberal social shift and changing concept of the individual to the evolving relationships between parties to gamete donation and, second, advocates for the current trajectory of change towards increasingly relational parties to gamete donation.

DECLARATION

I, Vanessa Oelkers, certify that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint award of this degree.

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Signed (Vanessa Katrina Oelkers) Date

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The process of completing this PhD has not been straight forward, and has included establishing myself in a new country. As is common to many PhD students, financial, family and health issues have threatened to derail completion of my PhD from time to time. It has been an exercise of persistence, enthusiasm, and plain hard work to finally

hold this completed thesis in my hands. Nevertheless, I look back on this time as a period of extraordinary professional, intellectual and personal growth. I am a different person now.

INTRODUCTION

'Parenthood is a moral relationship with children,
not a material or merely physical one'.[1]

Preamble

When I commenced my research, I knew I wanted to examine the regulation of assisted reproductive treatment in Australia. In a previous professional life, I had developed an interest in improving women's peri- and ante-natal health outcomes, and saw the legal regulation of assisted reproductive technology as an important way of improving end-outcomes for women undergoing such treatments and the children born from them.

I quickly narrowed my research area to assisted reproductive treatments using donor gametes (egg and sperm) and while conducting a preliminary literature review, I noticed that in the other literature, the rights of the parties to gamete donation – that is gamete donors, recipients of donated gametes and donor-conceived offspring – often seemed irreconcilable. Donors were said to have rights to absolute anonymity, while recipients wished for secrecy and had a right to raise their offspring without outside interference, and donor-conceived offspring seemed to have no rights at all. However, more recent literature tended to favour the rights of donor-conceived offspring to know that they were donor-conceived and the identity of their donor. Further, although the asserted rights were logically tied to a duty, there was little recognition of this.

This initial observation led me to consider how the seemingly irreconcilable rights attributed to each party could be reconciled, and whether the correlative duties ought to be explicitly considered. It was at this stage that my research became more tightly focussed on the relationships between parties to gamete donation, and the exchange of information between the parties.

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[1] Joseph Fletcher, *Morals and medicine: The moral problems of the patient's right to know the truth, contraception, artificial insemination, sterilization, euthanasia* (Princeton University Press, 1979), 139.

Most of the legal research in this area sought to establish the rights of the parties and then somehow weigh each party's rights against the others so as to determine whose rights should prevail. However, this liberal approach tends to characterise rights as a means of 'fencing off' each rights-holder from other individuals, and places the parties in conflict with one another. This seemed to me to be ill-adapted to gamete donation because parties to gamete donation are not natural adversaries; the adult parties are united in their desire to conceive a child and the donor-conceived offspring is biologically and/or socially linked to both the donor and recipients. My research has led me to conclude that a more fruitful approach to reconcile the interests of parties to gamete donation is to reconceptualise the role of rights: to see them as a means of structuring relationships between parties: in fact, to characterise *rights as relationships*. This analysis also has the benefit of explicitly acknowledging the legal relationships between rights-holders and duty-holders. I am now convinced that, once the metaphor of boundaries is discarded in favour of a focus on the real relationships, the interests of the parties, as bearers of rights and duties, can be reconciled.

The purpose of my research could be regarded as narrow: to characterise the relationships between parties to gamete donation in order to determine how information should be disclosed between the parties and, in doing so, to trace the development of the law in regulating donor conception practices. However, my research has much broader social and legal implications as it provides an examination of significant social changes that developed from the turn of the twentieth century and have both driven and outpaced legal regulation from the 1980s, through to the present day and beyond. I will argue that, in addition to driving legislative change to the regulation of gamete donation, the enormous social shift from liberal- to post-liberal society, which I will document, represents a deep psychological shift in our understanding of the individual as increasingly interpersonal and relational. Legal change has therefore been obliged to respond creatively to changes in our most fundamental thinking about the nature of human relations, including those associated with family formation.

Overview

Assisted reproductive treatments (ARTs) allow individuals and couples to conceive children through means other than sexual intercourse. Donated human gametes (sperm and eggs) may be used in these procedures for a number of reasons, including where partners have been unable to conceive using their own gametes, when a person carries a hereditary disease or genetic abnormality they do not wish to pass on to a child, or when single women or same-sex couples wish to have children. Artificial insemination by donor sperm has been a documented treatment for male-factor infertility from at least 1909,[2] and use of donor eggs became possible with the advent of in vitro fertilisation (IVF) in the mid-1980s.[3] While donor gametes may allow otherwise infertile couples and individuals to achieve pregnancy, introducing an additional individual or couple to family formation raises significant legal and familial issues.

Before 1984, gamete donation was not legally regulated in Australia, and most gamete donations proceeded under a veil of secrecy[4] and anonymity,[5] in the belief that secrecy contributed to the welfare of all involved.[6] Practices of secrecy and anonymity were enforced by the medical practitioners who provided artificial insemination services because of self-interest and paternalism.[7] Neither donor, nor recipient, nor

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2 Addison Hard, (1909) 27 'Artificial Impregnation' *Medical World* 163. Cited in A Gregoire & R Mayer, (1965) 16 'The impregnators', *Fertility and Sterility* 130.

3 John Leeton, Alan Trounson and Carl Wood, 'The Use of Donor Eggs and Embryos in the Management of Human Infertility' (1984) 24(4) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 265.

4 Sissela Bok defines secrecy as 'intentional concealment'; Sissela Bok, *Secrets: on the ethics on concealment and revelation* (Oxford University Press, 1984). In the context of gamete donation, secrecy relates to the origins of the donor-conceived offspring.

5 Anonymity is intended to maintain the privacy of the parties by managing their personal information. Bok defines privacy as the 'condition of being protected from unwanted access by others'; Sissela Bok, Ibid, 10-11. At this point, I acknowledge that secrecy and anonymity are logically distinct concepts. Nevertheless, the use of anonymous gamete donors is closely linked to secrecy about the nature of conception, and so I associate the two concepts throughout this thesis; Cynthia Cohen, 'Parents Anonymous' in Cynthia Cohen (ed), *New Ways of Making babies: The Case of Egg Donation* (Indiana University Press, 1996) 88, 90.

6 David Handelsman et al, 'Psychological and Attitudinal Profiles of Donors for Artificial Insemination' (1983) 43 *Fertility and Sterility* 95; Mark Sauer et al, 'Survey of Attitudes Regarding the Use of Siblings for Gamete Donation' (1988) 49 *Fertility and Sterility* 721; Robert Nachtigall, 'Secrecy: An Unresolved Issue in the Practice of Donor Insemination' (1993) 168 *American Journal of Obstetrics and Gynecology* 1846; Ken Daniels and Karyn Taylor, 'Secrecy and Openness in Donor Insemination ' (1993) 12 *Politics and the Life Sciences* 155.

7 See Chapter 2 - Privacy and Secrecy in Gamete Donation, page 33.

donor-conceived offspring were given identifying information about the other and only selected non-identifying information (including health information) about the donor was provided to recipients.[8] Practices of secrecy and anonymity kept gamete donors in the shadows, and they were thought of as 'a non-person … from a psychosocial point of view, [the donor] does not exist'.[9] Accordingly, recipients were discouraged from discussing the use of donated gametes with their donor-conceived offspring,[10] and active steps were sometimes taken to maintain anonymity, by destroying donors' records.[11]

By supporting anonymity and secrecy, the practices of treating medical practitioners discouraged the development of any relationship between the parties, and created clear boundaries of privacy 'rights'[12] around the donor and recipients (and by extension, the donor-conceived offspring).[13] It was thought that maintaining privacy would protect the parties:[14] offspring could have no claim against, or contact with, the donor in future, and the donor could have no claim against, nor interfere with, the donor-conceived offspring.[15] Payments made to the gamete donor for their gametes were seen as full and final settlement for their role. Throughout this period, too, the

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8 Damian Adams and Caroline Lorbach 'Accessing Donor Conception Information in Australia: A Call for Retrospective Access' (2012) 19 *Journal of Law and Medicine* 707.

9 Marek Glezerman, 'Two hundred and seventy cases of artificial donor insemination: management and results' (1981) 35 *Fertility and Sterility* 180, 185.

10 As recently as 1987, the UK Royal College of Obstetricians and Gynaecologists was advising parents that 'unless you reveal [donor insemination] to your child there is no reason for him or her ever to know that he or she was conceived by donor insemination'; Royal College of Obstetricians and Gynaecologists, *Donor Insemination* (Royal College of Obstetricians and Gynaecologists, London, 1987).

11 Damian Riggs and Brett Scholtz, 'The value and meaning attached to genetic material amongst Australian sperm donors' (2011) 30(1) *New Genetics and Society* 41, 42.

12 At this point, I acknowledge that there is a substantial body of literature on whether Australia should introduce a right to privacy, either by common law expansion of the laws of confidentiality or through legislative reform to introduce a new action in tort. However, this is not the focus of this thesis, which instead focuses on disclosure and flow of information between parties to gamete donation, but not the world at large; see *ABC v Lenah Game Meats* (2001) 208 CLR 1999; Australian Law Reform Commission *Serious Invasions of Privacy in the Digital Era* (No 123, 2014). For further discussion on privacy in the context of gamete donation. See Chapter 3 – Conceiving Rights as Relationships, 3.4 *Privacy Rights Protecting Liberal Autonomy in the Context of Donor Conception*, pages 52.

13 Ken Daniels, 'The Social Responsibility of Gamete Donors' (1998) 8 *Journal of Community & Applied Social Psychology* 261, 263.

14 Department of Health and Social Security (England), Report of the Committee of Inquiry into Human Fertilisation and Embryology (CM 9314, 1984) (*Warnock Committee Report*), 25; Belinda Bennett, 'Gamete donation, reproductive technology and the law' in Kerry Peterson (ed), *Intersections - Women on Law, Medicine, and Technology* (Aldershot/Brookfield, 1997) vol ix, 246.

15 Damian Riggs and Brett Scholtz, above n 11, 42.

interests of donor-conceived offspring were conspicuously absent from the discussion – the legal focus was short sighted in that it focussed almost exclusively on the short-term needs and fears of the adult parties involved, and regarded donor-conceived offspring only as children.[16]

However, donor-conceived offspring do not remain children, and as they move through adolescence and adulthood it becomes untenable to place other parties' desire for secrecy above the donor-conceived offspring's interest in knowing their biological origins.[17] Anonymity and strict boundaries also did not suit all gamete donors, whose biological connection to donor-conceived offspring was practically and legally denied by enforced anonymity.[18]

From the late 1980s, the culture of secrecy surrounding sperm and egg donation was slowly replaced by acceptance of the right of donor-conceived offspring to know about their donor, and parents were advised to tell their child about the nature of their conception from an early age.[19] Some concerns about anonymous gamete donation were thus acknowledged and remedied by breaking down the strict boundaries that

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16 This conflicts with one of the three neo-Aristotelian parental virtues identified by McDougall, namely, 'future agent focus – the principle that the foetus and child will become an adult one day and an agent of his or her own free will, such that the parenting and the decisions made in regard to the child should not adversely interfere with the child's current and future opportunities, but should also be value-structured to reinforce virtue and morals'. Rosalind McDougall, 'Parental virtue: A new way of thinking about the morality of reproductive actions' (2007) 21(4) Bioethics 181, cited in Damian Adams, 'Conceptualising a Child-Centric Paradigm: Do We Have Freedom of Choice in Donor Conception Reproduction?' (2013) 10 *Bioethical Enquiry* 369, 371-372.

17 Robyn Rowland, 'The social and psychological consequences of secrecy in artificial insemination by donor programmes' (1985) 21 *Social Science and Medicine* 391; Edwina Schneller, 'The rights of donor inseminated children to know their genetic origins in Australia' (2005) 19 *Australian Journal of Family Law* 222; Mavis Maclean, 'Keeping Secrets in Assisted Reproduction – The Tension between Donor Anonymity and the Need of the Child for Information' (1996) 8 *Child and Family Law Quarterly* 243; Eric Blyth, 'Donor Assisted Conception and Donor Offspring Rights to Genetic Origins Information' (1998) 6 *International Journal of Children's Rights* 237.

18 Sonia Allan, 'Psycho-social, ethical and legal arguments for and against the retrospective release of information about donors to donor-conceived individuals in Australia' (2012b) 19(4) *Journal of Law and Medicine* 354, 367-368; Ken Daniels et al, 'Short Communication: Previous Semen Donors and Their Views Regarding the Sharing of Information with Offspring ' (2005) 20(6) *Human Reproduction* 1670, 1673.

19 Louise Johnson, Kate Bourne and Karin Hammarberg, 'Donor conception legislation in Victoria, Australia: The "Time to Tell" campaign, donor-linking and implications for clinical practice' (2012) 19(4) *Journal of Law and Medicine*, 809; See also, Parenting SA, *Donor Conception – telling your child* <www.parenting.sa.gov.au/pegs/peg80.pdf>; ParentLink (ACT), *Donor Conception – telling your child*, http://www.parentlink.act.gov.au/__data/assets/pdf_file/0003/405615/Donor-conception_web.pdf >; Reproductive Technology Council (WA), *Talking to Children about Donor Conception*, <http://www.rtc.org.au/publications/docs/Talking_to_Children.pdf>.

had previously separated gamete donors, recipients of donated gametes and donor-conceived offspring. Legislation first enacted in Victoria in 1984,[20] and then introduced over the following two decades in four other Australian states,[21] prohibited the use of anonymously donated gametes in assisted reproductive treatments, and subsequent legislation established compulsory[22] and voluntary donor registers to store identifying and non-identifying information about gamete donors, recipients and donor-conceived offspring, and regulated the disclosure of stored information to the parties.[23] Today, State legislation[24] and National Health and Medical Research Council *Guidelines*[25] recommend against anonymous gamete donation in all Australian states and Territories, on the basis that donor-conceived offspring have an interest in gaining access to indentifying and non-identifying information about their donor.[26]

For the purposes of this thesis, 'identifying information' includes any information that directly identifies the individual (donor, recipient or donor-conceived individual) or is intended to facilitate direct contact. Examples of identifying information include name, date of birth and addresses (home, PO Box, email etc). 'Non-identifying information' includes any information that does not disclose the identity or means of contacting the individual. Examples of non-identifying information include details of

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20 *Infertility (Medical Procedures) Act 1984* (Vic).

21 *Assisted Reproductive Treatment Act 1988* (SA); *Human Reproductive Technology Act 1991* (WA); *Assisted Reproductive Technology Act 2007* (NSW).

22 Compulsory donor registers operate in in Victoria, Western Australia and New South Wales. There is legislative provision for one in South Australia, but a compulsory register does not yet operate. Compulsory donor registers are not retrospective, and so only donors who made their donation after the relevant state register was implemented have information stored in these registers. Accordingly, donor-conceived offspring can only gain access to information about their donor from compulsory donor registers where the donation was made after 1 January 1998 in Victoria (*Infertility Treatment Act 1995* (Vic) s80), 1 December 2004 in Western Australia (*Human Reproductive Technology Act 1991* (WA) s49 (2d); *Human Reproductive Technology Amendment Act 2004* (WA)), and 1 January and 1 September 2010 in New South Wales (*Assisted Reproductive Technology Act 2007* (NSW) s37) and South Australia (*Reproductive Technology (Clinical Practices)(Miscellaneous) Act 2009* (SA)), respectively.

23 *Assisted Reproductive Treatment Act 2008* (Vic); *Assisted Reproductive Treatment Act 1988* (SA); *Human Reproductive Technology Act 1991* (WA); *Assisted Reproductive Technology Act 2007* (NSW).

24 Ibid.

25 Australian Government National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2004* (revised 2007) (NHMRC Guidelines). The NHMRC *Guidelines* are currently under review.

26 Richard Chisholm, 'Information rights and donor conception: Lessons from adoption?' (2012) 19 *Journal of Law and Medicine* 722, 733; Ken Daniels and Karyn Taylor, above n 6; Erica Haimes, 'Secrecy: what can artificial insemination learn from adoption?' (1988) 2 *International Journal of Law and Family* 46; Robert Snowden, 'Sharing information about DI in the UK' (1993) 12 *Politics & Life Sciences* 194.

medical history, physical appearance, cultural heritage/religion, personality traits, education level, sporting/personal achievements and reasons for donating. Clearly, there is some overlap between these two types of information, and this is discussed further at Chapter 10.[27]

The introduction of legislation and guidelines from the 1980s to regulate donor conception took place at a time when the accepted boundaries between public and private domains were shifting, and the State had begun taking a more active role in regulating previously private spheres of the family and the home. The new legislation created and defined legal relationships between parties to gamete donation, and facilitated the exchange of information between parties. Before the passage of the new laws, practices of secrecy and anonymity had developed in the absence of legislation and had erected impenetrable boundaries between the parties.

The boundaries between private and public spheres are becoming increasingly flexible as we move towards a post-liberal society. As I explain in Part 2, this 'flexibility' at the margins of public and private spheres is not limited to gamete donation. It is a major and generalised social shift.

In this thesis, I consider how the roles of parties to gamete donation have changed over time against the backdrop of a major cultural shift in society and in family formation. I observe that the law has responded to social developments (as is generally the case) but that the current law is markedly outstripped by the speed of the social changes, which are tending towards a post-liberal and flexible attitude towards boundaries. In this rapidly-developing social context, the metaphor of boundaries to explain the nature of rights becomes far less meaningful than a study of the real relationships, whereby rights are viewed primarily as a means of structuring relationships between parties. I further propose that future developments of the legal rights of parties to donor conception should be based not on a metaphor of boundaries, but on the relationships themselves.

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27 Chapter 10 – Knowing That They are Donor Conceived, 135

Given the continued use of donated gametes in assisted reproductive procedures in Australia,[28] rapid advances in genomic medicine, and increasing acceptance of alternative family structures, my thesis topic is timely and relevant to legal and ethical theorists, legislators, clinicians, and parties to donor-conception. It should provide an intellectual foundation for considering future legal developments in the regulation of donor conception practices, and other complex interpersonal relationships that may arise in the context of family formation.

Aim and scope

The aim of my research is to trace the development of legal relationships between parties to gamete donation in Australia over time, in order to explain how these relationships have developed, and anticipate how they will continue to develop into the future. My particular concern is the exchange of information between parties to gamete donation. I also suggest how the relationships should develop. In particular, I advocate for a shift in focus from perceiving the rights of the parties as boundaries between them, to characterising rights as a means of forming and structuring their relationships.

I observe a change away from the liberal ideal of strongly separated parties, towards a post-liberal model of relational parties. And, over the course of this thesis, I explain why this direction of change is desirable and beneficial. I maintain that this evolution runs parallel to a broad social shift from liberal towards post-liberal society. This social shift is defined by a softening in the boundaries between public and private spheres. In the case of gamete donation in Australia, the shift is manifested in increasing exchange of information between parties to gamete donation over time. I will show why this flow of information is in the interest of all parties.

My contribution to the body of research on donor-conception practices is limited to considering the nature of relationships between parties to gamete donation and the exchange of information, and demonstrating that the interests of the parties are best

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[28] See e.g. Alan Macaldowie et al, *Assisted Reproductive Technology in Australia and New Zealand* (Australian institute of Health and Welfare, 2012). However, the uptake of ARTs has recently slowed and even reversed following a decrease in Medicare funding for fertility treatment in 2010. The total number of ART cycles undertaken in Australia dropped, and the number of treatment cycles using donated gametes decreased by 13.4% within a year.

reconciled by replacing the metaphor for rights from boundaries to relationships. In this way, rights are understood as a means of structuring relationships between parties. I do not intend to consider whether the practice of gamete donation is desirable, nor do I critically evaluate the way ARTs are funded or who may gain access to them. These issues have been discussed extensively by others[29] and are outside the scope of my thesis. The present study is focussed on explaining and anticipating the future development of the legal relationships, and information exchange, between parties to gamete donation over time, within a broader social context. I engage mainstream theories of rights, in addition to relational theories of autonomy and law to illustrate the trajectory of change, and anticipate the evolution of society and future developments in regulating donor conception. It is my intention to advocate for a legislative response to reflect the ongoing social change.

Although my research is informed by an international literature, to provide context to the research, I specifically consider legislation from Australian jurisdictions. To date, no common law jurisdictions have legislation in place that is explicitly informed by relational theories of rights. The results of my research are relevant on a general and international level, as legislators seek to bring laws in-line with social developments. My research may also help to shift the focus and approach of legislators - from using rights to create boundaries between parties and instead to use rights to structure relationships that satisfy the interests of parties.

I have also limited the scope of this thesis to domestic gamete donation within Australia. I have not considered transnational gamete donation, whereby an Australian individual or couple may travel internationally to undergo assisted reproductive

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[29] See e.g Mark Connolly, Stijn Hoorens and Georinga Chambers, 'The costs and consequences of assisted reproductive technology: an economic perspective' (2010) 16(6) *Human Reproduction Update* 603; Mark Connolly et al, 'Assessing long-run economic benefits attributed to an IVF-conceived singleton based on projected lifetime net tax contributions in the UK' (2009) 24(3) *Human Reproduction* 626; Philipa Mladovsky and Corinna Sorenson, 'Public Financing of IVF: A Review of Policy Rationales' (2010) 18(2) *Health Care Analysis* 113; Gabor Kovacs et al, 'The Australian community overwhelmingly approves IVF to treat subfertility, with increasing support over three decades' (2012) 52(3) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 302; Imogen Goold, 'Should older and postmenopausal women have access to assisted reproductive technology?' (2005) 24(1) *Monash Bioethics Review* 27; Vanessa Lentz, 'Asking the Inconceivable - Ethical and Legal Considerations Regarding HIV-Seropositive Couples' Request to Access Assisted Reproductive Technologies (ARTs): A Canadian Perspective' (2008) 16 *Health Law Journal* 237; Belinda Bennett, above n 14; Maurice Rickard, *'Is it Medically Legitimate to Provide Assisted Reproductive Treatments to Fertile Lesbian and Single Women?*' (Social Policy Group, 27 February 2001).

treatment using gametes sourced from an international jurisdiction. In these cases, Australian law is unlikely to apply, and it is beyond the scope of this thesis to explore in detail the legislative arrangements (or lack thereof) that exist in other jurisdictions, in addition to the social, economic, cultural, and moral implications of transnational gamete donation and assisted reproductive treatment.[30]

Finally, the larger goal of my research is to demonstrate that relational theories of rights are particularly well suited to analysing many complex interpersonal relationships, beyond the relationships between parties to gamete donation.

Method

My research employs mixed methods, with a primary focus on fundamental legal research — research with the goal of securing a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, social and political implications of law in this field.[31] At the heart of my research is a doctrinal and theoretical analysis of the legal regulation of donor conception practices, and theories of rights that support different regulatory approaches. However, in order to gain a meaningful understanding of the law, it must be sited in a social context.

To this end, I draw on the disciplines of biomedicine, sociology and law. My references to biomedical developments and practices in donor conception are modest and provide a background exposition of the use of donated gametes in ART. I draw on socio-political theory more extensively insofar as socio-politics form a significant motivation for legislative change. To this end, I undertake a historical and contemporary analysis of liberal and post-liberal socio-political theory to understand the shifting divide between public and private realms. I go on to provide a conceptual analysis of relational theories of autonomy and, in particular, feminist theories of autonomy and rights.

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30 For an introduction to the issues of transnational assisted reproductive treatment (also known as 'reproductive tourism' see e.g. Anne Donchin, 'Reproductive Tourism and the Quest for Global Gender Justice' (2010) 24(7) *Bioethics* 323; V Couture, R Drouin, SL Tan, JM Moutquin and C Bouffard, 'Cross Border Reprogenic Services' (2015) 87(1) *Clinical Genetics* 1. See also Jocelyn Downie and Francois Baylis 'Transnatinal Trade in Human Eggs: Law, Money and (In)Action in Canada (2013) 41(1) *The Journal of Law, Medicine and Ethics* 224.

31 Terry Hutchinson *Researching and Writing in Law* (Reuters Thompson, 2010) 8.

I apply these methods in a novel way to characterise the trajectory of socio-political change that has occurred in Australia and other common-law countries from the 1980s, and demonstrate a link between this socio-political change and the development of law to regulate the relationships between parties to gamete donation, in particular, as they pertain to the flow of information between the parties. I use this link as a basis for extrapolating future socio-political development and advocating for future legal developments to be informed by relational theory in order to structure relationships between parties to gamete donation that satisfy the interests of the parties.

Structure

This thesis is divided into four parts, comprising a background part and three substantive parts. The three substantive parts separate the three eras of donor conception The first era is defined by a focus on the past, the adult parties but not the child, and practices of secrecy and anonymity. The second contemporary era is defined by the introduction of legislation and professional guidelines, an increasing focus on the needs of donor-conceived offspring, an end to donor-anonymity and a shift towards greater openness about donor conception. The third era is to be realised in the future, and should see an end to secrecy surrounding gamete donation, recognition of non-traditional family structures, and flexible laws that will allow parties to gamete donation to define their relationships on their own terms.

As we move from one era to the next, the relationships between the parties follow a clear path from being strictly separated by boundaries, to becoming increasingly relational. I demonstrate that these developments parallel a broader socio-political movement away from liberal socio-political views and towards a post-liberal socio-political context. This represents a change of perspective, whereby the metaphor of rights as boundaries is replaced by an understanding of rights as relationships.

Part 1: Background

The first Part of my thesis provides background to the ethical, legal and socio-political themes of my work by explaining the concept of donor conception — what gametes are, and how and why donor gametes may be used in assisted reproductive treatments

and describing some major biomedical innovations in assisted conception that have occurred from the 1980s.

Part 2: Past

In the second Part of my thesis, I provide a historical account of the practice of donor conception, with a focus on the period from the turn of the nineteenth century to 1984.[32] During this period, donor conception involved only artificial insemination with donor sperm, and operated within a liberal socio-political climate, that favoured strong separation between the public and private spheres.

Within this liberal socio-political setting, practices of anonymity and secrecy played a crucial role in reinforcing the liberal understanding of individual autonomy and offered (adult) parties strong privacy rights as a means of establishing firm boundaries between the self and 'others'. Under the liberal model, parties' interests tended to be viewed in conflict and rights were invoked to define metaphorical boundaries between the parties. Secrecy and anonymity functioned to protect the parties not only from each other, but also from society's disapproval.[33]

Part 3: Present

In Part three of my thesis, I explain the significant changes that occurred in Australia from 1984, with the gradual introduction of state legislation and professional *Guidelines* to regulate Assisted Reproductive Treatments, including the use of donated gametes. In particular, I focus on the developing prohibition of donor anonymity and moves towards reducing secrecy by facilitating flow of information between parties to gamete donation. Throughout this period, the importance of familial and genetic health information to parties to gamete donation becomes

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32 This period represents the time when donor-assisted conception began to be documented in the literature, and the introduction of legislation to govern the practice; Addison Hard, above n 2; *Infertility (Medical Procedures) Act 1984* (Vic).

33 See e.g. Kara Swanson, *'Adultery by doctor: artificial insemination 1890-1945*' (2012) 87(2) Chicago-Kent Law Review 591, 603; Clair Folsome, 'The status of artificial insemination; A critical review' (1943) 45 *American Journal of Obstetrics and Gynaecology* 915, 923-924; J Schock, 'The Legal Status of the Semi-Adopted' (1941-1942) 46 *Dickinson Law Review* 271, 272.

increasingly apparent and, in addition to other factors,[34] supports the flow of information between parties to gamete donation.

My doctrinal and historical analysis of legislative changes to the regulation of donor conception would not be complete without also considering the socio-political background to these changes. I observe that law in this area has reacted to relaxing social attitudes towards demarcated public and private spheres as we move from a liberal- towards a post-liberal socio-political context. In particular, I introduce relational theories of autonomy as a preferable alternative to the liberal ideal of the 'bounded self',[35] who was created and maintained by secrecy and anonymity in the past. Instead, increasingly 'relational selves'[36] are structured by current law that prohibits anonymous donation and encourages openness and information exchange. I apply Jennifer Nedelsky's theory of self, autonomy and law[37] to explain how legal rights can be understood to structure the relationships between parties to gamete donation. I specifically draw attention to the re-shaping of privacy rights (and thus relationships) from the late 1980s to present day, and advance the view that relational models of rights and autonomy can best account for the current softening of boundaries between the parties without compromising their autonomy. I argue that successive legislative and social changes have created increasingly relational parties to gamete donation, and that this is a positive development.

In Part 2 of my thesis, I also introduce a series of three case studies involving fictional but realistic scenarios that may arise in gamete donation.[38] I apply a relational analysis to the issues raised in each case study in order first, to explain how the relationships between the parties are currently structured by legal rights and second, evaluate critically how well the current relationships promote values important to the parties, and how legal rights could be used to re-structure the relationships between parties to gamete donation. The case studies allow for a practical application of relational

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34 See Chapter 10 – Knowing That They Are Donor Conceived, 10.1 Gaining Access to Information: Ending Sectrcy for Parties to Gamete Donation. 133.

35 Jennifer Nedelsky, 'Law, Boundaries, and the Bounded Self' (1990) 30 *Representations* 162, 168.

36 Jennifer Nedelsky, *Law's Relations: a Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011); Jennifer Nedelsky (1993a) 'Reconceiving Rights as Relationships' *Review of Constitutional Studies* 1(1), 8.

37 Jennifer Nedelsky (2011) ibid.

38 See Chapter 8 – Illustrative Case Studies, page 113.

theory, and support my thesis that relational theories provide a valuable tool in understanding the relationships between parties to gamete donation.

The first and second eras demonstrate a significant shift in the way that donor conception is viewed ethically and legally and, in particular, a shift in the way that donors, recipients and donor-conceived offspring relate to one another. Donors moved from being considered (legally and ethically) anonymous 'non-persons', to biologically connected and identifiable individuals, as walls of secrecy between the parties were significantly dismantled. Nevertheless, there remain considerable problems in the way that information about the parties is collected, stored and disseminated. In particular, prohibitions on anonymous donation only apply prospectively, donors are not obliged to update information provided when they made their donation, and there remains a culture of secrecy whereby many recipients of donated gametes do not disclose to their donor-conceived offspring the nature of their conception.[39]

Part 4: Future

In the final Part of my thesis, I look to the future. I advocate for a continuation of the current shift from a metaphor of rights as boundaries to a focus on the real relationships between the parties. This is more than a shift in terminology: to conceptualise rights as a means of structuring relationships allows a fresh perspective. It allows us to move beyond metaphor and the process of asserting and 'weighing-up' competing parties' rights in order to establish where boundaries between the parties lie, to more deeply consider and critique the rights that structure relationships between the parties, in their full social context.

In particular, I critically analyse the current legislation in light of developing socio-political attitudes towards donor conception, which are defined by the twin goals of ending donor anonymity both prospectively and retrospectively, and ending secrecy between parties to gamete donation. To this end, I apply Nedelsky's relational theory of law to demonstrate first, that the current law does not adequately support these goals, and second, that change is desirable because an end to anonymity and secrecy furthers the interests of donors, recipients and donor-conceived offspring.

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[39] See Chapter 10 - Knowing That They are Donor-conceived, page 135.

Furthermore, I anticipate broader changes to the legal regulation of donor conception as alternative family structures challenge liberal theories of rights and further justify a relational approach to conceptualising rights as relationships.

PART 1 BACKGROUND

CHAPTER 1:

GAMETE DONATION IN ASSISTED REPRODUCTIVE TREATMENT

My thesis follows a chronological structure, tracing the practice of donor-conception from the past, to the present and into the future. I explain how the relationships between parties to gamete donation are defined and structured by legal rights. More than that, I illustrate clearly a shift in what legal rights are doing *for* the parties to gamete donation and how the legal relationships between the parties are being re-shaped over time, from separated and bounded selves towards relational parties.

However, before commencing my substantive argument, I need to explain the concept of donor conception — what gametes are, and how and why donor gametes may be used in assisted reproductive treatments. In this part, I provide background knowledge critical to understanding the ethical, legal and socio-political themes of my thesis. In particular, I explain the use of donor gametes in assisted conception, and describe some major biomedical innovations in assisted conception that have occurred from the 1980s and affected the use and demand for donated gametes.

1.1 What is Gamete Donation and What is Not Gamete Donation

For the purpose of my thesis, 'gamete donation' includes the donation of human eggs and sperm. In Australia, gamete donors may be reimbursed for reasonable expenses but not paid for their donation and so I refer to them as 'donors'.[40] Oocytes may be donated by women as a primary donation, or as part of an egg-sharing program, whereby a woman undergoing IVF agrees to donate some of her oocytes, usually in return for reduced cost fertility treatment.[41] I also use the term 'gamete donation' to refer only to donation for reproductive purposes; although gametes may be donated

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40 See Chapter 2 – Privacy and Secrecy in Gamete Donation *2.7 The tyranny of the gift*, page 43, for further discussion of donation and gift relationships.

41 The practice of egg-sharing is not without controversy. See e.g. Editorial, 'Eggs shared, given, and sold' (2003) 362(9382) *The Lancet* 413; Zaynep Gürtin, Kamal Ahuja and Susan Glombok, 'Egg-sharing, consent and exploitation: examining donors' and recipients' circumstances and retrospective reflections' (2012) 24(7) *Reproductive BioMedicine Online* 698.

for research purposes, this is not the concern of my thesis. Where the focus is on conception, rather than donation, I use the term 'donor conception', as a shorthand for 'conception with donated gametes'.

Although 'gamete donation' may technically include traditional surrogacy[42] whereby the surrogate donates her own ovum in addition to gestating a baby (or babies) for another, I do not consider traditional surrogacy as a form of gamete donation for the purposes of this thesis. Primarily, this is because surrogacy arrangements are governed by separate legislation[43] and involve a different legal relationship between donor, recipient and offspring.

Throughout this thesis, I focus on donated gametes, but not donated embryos. Arguably the context of embryo donation, and relationships between the parties, is materially different from gamete donation. While gamete donation involves the donation of gametes pre-conception, embryo donation typically involves couples making decisions about whether to destroy or donate their excess embryos at the conclusion of their own IVF treatment.[44] For example, in a recent study of Australian couples contemplating, but ultimately rejecting, embryo donation, there was a stark distinction made by participants between gametes, which were perceived as individual and incidental, and their embryos which were described as 'part of us' – the genetic combination of themselves and their partner, or, as one participant described it, the 'DNA' of her relationship.[45] This view is reinforced by Sheryl De Lacey, who states that '…the experience of embryo donation is distinct from that of gamete donation'.[46]

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42 Traditional surrogacy involves the use of the surrogate woman's own oocyte, whereby she is inseminated with the intending father's sperm and surrenders the infant to the intending parents at birth. A traditional surrogate is both and oocyte donor and surrogate, and is the biological mother of the resulting child.

43 See *Parentage Act 2004* (ACT) s 24; *Family Relationships Act 1975* (SA) s 10G, 10H; *Surrogacy Act 2008* (WA); *Surrogacy Contracts Act 2012* (Tas); *Surrogacy Act 2010* (Qld).

44 See Catherine McMahon and Douglas Saunders, 'Attitudes of couples with stored frozen embryos toward conditional embryo donation' (2009) 91(1) *Fertility and Sterility* 140; Gabor Kovacs, Sue Breheny and Melinda Dear, 'Embryo donation at an Australian university in-vitro fertilisation clinic: issues and outcomes' (2003) 178 *Medical Journal of Australia* 127.

45 Jenni Millbank et al, 'Embryo donation for reproductive use in Australia' (2013) 20(4) *Journal of Law and Medicine* 789, 793.

46 Sheryl De Lacey, 'Decisions for the Fate of Frozen Embryos: Fresh Insights into Patients' Thinking and their Rationales for Donating or Discarding Embryos' (2007) 22 *Human Reproduction* 1751, 1757; Robert Nachtigall et al, 'Parents' Conceptualization of their Frozen Embryos Complicates the Disposition Decision' (2005) 84 *Fertility & Sterility* 431. Jenni Millbank et al, *Enhancing Reproductive Opportunity: A Study of Decision-Making Concerning Stored Embryos* (Broadway, NSW: University of Technology, 2013).

Although the legal relationships between embryo donors, recipients, and offspring conceived from embryo donation also deserve attention, that research is beyond the scope of this thesis.

1.2 Why is Gamete Donation Used?

Although many couples are able to conceive children without difficulty, it is estimated that 9% of couples at any given time experience infertility.[47] Medical infertility[48] is a widely acknowledged cause of infertility for heterosexual couples, and may be overcome with a range of assisted reproductive treatments (ARTs) including gamete donation when one partner's gametes are absent or cannot be used. In addition to couples suffering medical (primary and secondary) infertility, other individuals and couples are now seeking fertility treatment for social (secondary) infertility. They are incapable of reproducing without assistance due to social factors, such as homosexuality or single-status.[49]

1.3 What are the Processes Involved in Gamete Donation?

Until the 1980s, infertile couples that wished to have a family had limited means of realising their desire; they could either adopt genetically unrelated children or, for couples that wanted a child genetically related to at least one parent, or for whom adoption was not an option, sperm donation and traditional surrogacy[50] were available.

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47 J Bovin et al, 'International estimates of infertility prevalence and treatment-seeking: potential need and demand for infertility medical care' (2007) 22 *Human Reproduction,* 1506.

48 Medical infertility is caused by a dysfunction of the male or female reproductive system, which prevents a pregnancy without intervention. Medical infertility may be primary (the individual has never achieved a successful pregnancy) or secondary (the individual has achieved a successful pregnancy in the past, but is now unable, or it is undesirable to use one's own gametes due to infections or inherited disease). Medical infertility may occur in heterosexual or homosexual couples or single individuals, although it is usually associated with heterosexual couples.

49 Although 'social infertility' is generally associated with single individuals and homosexual couples, there is a reasonable argument that the term should be applied more extensively, to include women with husbands in the armed forces, career couples, and heterosexual couples who deliberately delay childbearing (the latter are generally described as medically infertile): Martyn Stafford-Bell, 'Social Infertility' (2006) 8(3) *O & G Magazine; The Royal Australian & New Zealand College of Obstetricians and Gynaecologists* 25.

50 See above, n 45.

Originally, only fresh sperm could be used in assisted reproduction procedures using donated gametes. However, the introduction of effective cryopreservation[51] techniques in the 1950s[52] allowed the use of cryopreserved semen in assisted reproductive treatment procedures using donated gametes. Although eggs may now be cryopreserved,[53] the technique is new and fresh donated eggs are generally used to create embryos, which are either transferred to a synchronised recipient immediately or cryopreserved for later use.

Donor insemination involves in-vivo fertilisation, meaning that fertilisation of the ovum takes place within the woman's body. As such, it does not necessarily require medical intervention, and for many years the technique has allowed otherwise infertile couples to build a family. From the late 1970's,[54] in-vitro fertilisation provided a breakthrough in treatment for infertility, and expanded the use of donated gametes in fertility treatment. By moving the process of fertilisation outside the woman's body, donated sperm and eggs[55] could be used to achieve pregnancy in a female recipient.

1.4 In Vitro Fertilisation (IVF) and Donor Gametes in IVF

Although donor insemination and traditional surrogacy are still in use, a new frontier in treatment for infertility opened in 1978, following the birth of Louise Brown in Manchester, who was the first baby to be born after being conceived through in vitro fertilisation (IVF).[56]

While the first IVF baby was born in England, Australian researchers were the first to report an IVF pregnancy two years earlier[57] and Melbourne-based researchers were

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51 This is the preservation of human sperm, ova and embryos by storing them at very low temperatures.

52 The first human pregnancies involving frozen sperm were reported in 1954, and two years later, the first human births resulting from artificial insemination of cryopreserved semen were reported: Raymond Bunge, William Keettel and Jerome Sherman, 'Clinical Use of Frozen Semen: Report of Four Cases ' (1954) 5(6) *Fertility & Sterility* 520; Jerome Sherman, 'Clinical use of frozen human semen' (1976) 8 *Transplant Procreation* 165.

53 See e.g. David Edgar and Debra Cook, 'A critical appraisal of cryopreservation (slow cooling versus vitrification) of human oocytes and embryos.' (2012) 18(5) *Human Reproduction Update* 536.

54 Patrick Steptoe and Robert Edwards, 'Birth after the Reimplantation of a Human Embryo' (1978) 312(8085) *The Lancet* 366.

55 John Leeton, Alan Trounson and Carl Wood, above n3.

56 Patrick Steptoe and Robert Edwards (1978) above n 54.

57 Patrick Steptoe and Robert Edwards, 'Reimplantation of a Human Embryo with subsequent Tubal Pregnancy' (1976) 307(7965) *The Lancet* 880.

involved in the development of assisted reproductive technologies throughout the late 1960's and 1970's. Not long after Louise Brown's birth, the Queen Victoria Medical Centre offered a clinical In Vitro Fertilisation program (later renamed Monash IVF), and the first Australian IVF baby (the third in the world) was delivered in Melbourne on 23 June 1980.

Although assisted reproduction was not new, IVF was an entirely novel way of treating infertility and achieving pregnancy.[58] Prior to IVF, pregnancy could only be achieved by a healthy female egg being produced, and fertilised by healthy male sperm, in-vivo (inside the female body). IVF instead allowed a female egg to be fertilised by male sperm in-vitro, the resulting cell cultured until it reached embryo (~ 3-days post-fertilisation) or blastocyst (~5 days post-fertilisation) stage, and then implanted directly into the woman's uterus.[59]

At a basic biological level, achieving pregnancy through IVF sounds simple, and it is a relatively common procedure today.[60] However, initial attempts at IVF were not often successful, for two main reasons. First, successful IVF requires a large number of eggs, which were not readily available given that women generally produce a single viable egg each ovulation cycle. Secondly, implantation of the fertilised egg into the woman's uterus needed to be perfectly timed to the woman's natural ovulation cycle, which was extremely difficult to predict, [61] and furthermore required that the woman have a regular ovulation cycle, which many IVF candidates do not. However, from 1976 to 1980, Australian researchers investigated the use of artificial hormones to control the ovulation cycle of women using IVF treatment,[62] and noted a significantly higher rate of pregnancy when using what is now known as the Fertility

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58 Peter Singer and Deane Wells, *The Reproductive Revolution: New Ways of Making Babies* (University Press, 1984).

59 Alan DeCherney '*In Vitro* Fertilisation and Embryo Transfer: A Brief Overview' (1986) 59 *The Yale Journal of Biology and Medicine* 409, 411.

60 See Yueping Wang et al, 'Assisted Reproductive Technology in Australia and New Zealand 2009' (Australian Institute of Health and Welfare National Perinatal Statistics Unit, 2011) for a detailed analysis of IVF in Australia and New Zealand.

61 Jean Cohen et al, 'The early days of IVF outside the UK' (2005) 11(5) *Human Reproduction Update* 439, 441.

62 J Talbot et al, 'Gonadotropin stimulation for oocyte recovery and in vitro fertilisation in infertile women' (1976) 16(2) *Australia and New Zealand Journal of Obstetrics and Gynaecology* 111; Alex Lopata et al, 'In vitro fertilisation of preovulatory oocytes and embryo transfer in infertile patients treated with clomiphene and HCG' (1978) 30(27) *Fertility & Sterility* 27.

Drug Schedule.[63] In addition to controlling timing for embryo implantation, the Fertility Drug Schedule is used to invoke ovarian hyperstimulation to increase the number of eggs available for collection and fertilisation.[64] From the mid-1980's, success rates for IVF treatment have been fairly constant, at around 25% live births per cycle, until the age of 34 years, when there is a steep decline,[65] primarily because of declining egg quality.[66]

Several alternative techniques to classic *in vitro* fertilization (whereby the embryo is transferred directly into the uterus) have been introduced over time. Gamete intrafallopian transfer (GIFT)[67] and zygote intrafallopian transfer (ZIFT)[68] are among the most popular. In these techniques, eggs and sperm or fertilized eggs are transferred into the fallopian tube, respectively. However, these techniques do not appear to demonstrate any benefit over classic IVF.[69]

Today, ARTs, including IVF, are widely available in Australia and New Zealand[70] and, despite opposition from some religious groups,[71] and, in the past, some

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63 Alan Trounsen et al, 'Pregnancies in the human by fertilisation in vitro and embryo transfer in the controlled ovulatory cycle' (1981) 212 *Science* 681.

64 This treatment is not without risks. See e.g. Carolina Nastri et al, 'Ovarian hyperstimulation syndrome: pathophysiology and prevention' (2010) 27(2-3) *Journal of Assisted Reproduction and Genetics* 121; Talha Al-Shawaf et al, 'Safety of drugs used in assisted reproduction techniques' (2005) 28(6) *Drug Safety* 513; Kamal Ahuja, 'Minimising Risk in anonymous egg donation' (2003) 7(5) *Reproductive BioMedicine Online* 504.

65 Society for Assisted Reproductive Technology and the American Society for Reproductive Medicine 'Assisted Reproductive Technology in the United States and Canada: 1995 Results Generated from the American Society for Reproductive Medicine/Society for Assisted Reproductive Technology Registry' (1998) 69(3) *Fertility & Sterility* 393, 395.

66 For a detailed explanation of the causes for reduced fertility in aged women, see e.g. Jie Qiaoa et al, 'The root of reduced fertility in aged women and possible therapeutic options: Current status and future perspectives' (2014) 38 *Modular Aspects of Medicine* 54.

67 Gamete intrafallopian transfer involves puncturing the female fallopian tube with a thin needle and directly introducing sperm around the time of ovulation, to maximise chances of in-vivo conception in cases of male sub-fertility.

68 Zygote intrafallopian transfer involves a similar technique to GIFT, except conception takes place in-vitro and a cultured zygote is introduced to the fallopian tube.

69 M Fluker, Christo Zouves and M Bebbington, 'A prospective randomised comparison of zygote intra-fallopian transfer and in vitro fertilization-embryo transfer for non-tubal factor infertility' (1993) 60 *Fertility and Sterility* 515, 519; Herman Tournaye, 'Tubal embryo transfer improves pregnancy rate?' (1997) 12 *Human Reproduction* 626, 626–627.

70 There are 37 fertility centres in Australia and New Zealand, operating 77 fertility clinics in Australia and 7 fertility clinics in New Zealand; Yueping Wang et al (2011) see above n 60, 2.

71 For a Catholic perspective see generally Pope Benedict XVI, 'Congregation for the Doctrine of the Faith: Instruction Dignitas Personae on Certain Bioethical Questions' (Vatican instruction released 12 December 2008 in Rome and Warsaw).

feminists,[72] infertile couples are increasingly turning to fertility service providers to assist them to reproduce.[73] This increased uptake of fertility services may be partially attributable to decreasing cost of treatment[74] (In Australia, for example, there was a 72% increase in IVF cycles from 2003-2008, when changes to Medicare funding significantly reduced the cost of IVF treatment[75]), but there is also a social trend towards delayed childbearing in women[76] and changing social views about who may obtain access to fertility treatment.[77]

1.5 Donor Gametes in IVF

While assisted reproductive technologies can assist heterosexual couples to overcome sub-fertility and some physical conditions that prevent otherwise "natural" conception (generally blockages in the male and/or female reproductive tract and female hormonal imbalance), they also provide a means of introducing donor reproductive material to replace missing or damaged reproductive material from the couple or

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72 See for example the Australian-based group FINRRAGE 'Feminist International Network of Resistance to Reproductive and Genetic Engineering' (http://www.finrrage.org) and the international group 'Hands Off our Ovaries" (http://handsoffourovaries.com) who oppose a range of reproductive treatments on the basis that they are harmful to women; I note that the FINRRAGE group has been largely inactive from 2007.

73 For example, there were 70,541 Assisted Reproductive Technology (ART) treatments cycles reported in Australia and New Zealand in 2009, which represents a 13.9% increase in the number of ART cycles undertaken in 2008 and a 48.0% increase in the number of cycles undertaken in 2005; Yueping Wang et al (2011) see above n 60, vi.

74 Georgina Chambers et al, 'The impact of consumer affordability on access to assisted reproductive technologies and embryo transfer practices: an international analysis' (2014) 101(1) *Fertility & Sterility* 191.

75 Georgina Chambers et al, 'A reduction in public funding for fertility treatment - an econometric analysis of access to treatment and savings to government' (2012) 12 *BMC Health Services Research*, 142; However, I note that there was a decline in the number of IVF cycles undertaken in 2010 when the Medicare funding was reduced; see Georgina Chambers et al (2014), above n 74; Julie Medew, 'IVF cuts result in 1500 fewer babies', *The Age* 26 October 2011.

76 There is a marked decline in female fertility from around 34 years. See generally: Society for Assisted Reproductive Technology and The American Society for Reproductive Medicine, above n 65, 389–398; Practice Committee of the American Society for Reproductive Medicine 'Ageing and infertility in women' (2004) 82 (Sup 1) *Fertility & Sterility* 102; Egbert de Velde & Peter Pearson 'The variability of female reproductive ageing' (2002) 8 *Human Reproduction Update* 141; Roger Gosden & Anthony Rutherford 'Delayed child-bearing' [editorial] (1995) 311 *British Medical Journal* 1585; Lubna Pal & Nanette Santoro 'Age-related decline in fertility' (2003) 32 *Endocrinology Metabolism Clinics of North America,* 669; ESHRE Capri Workshop Group 'Fertility and Ageing' (2005) 11 *Human Reproduction Update*, 261.

77 See e.g. *McBain v State of Victoria* [2000] FCA 1009 (28 July 2000) in which the Federal Court considered whether section 8(2) of the *Fertility Treatment Act 1995 (*Vic), which restricted the application of 'treatment procedures' (ie. artificial insemination and fertilisation procedures) to women who are married or in defacto relationships with a man, was inconsistent with s.22 of the *Sex Discrimination Act 1984* (Cth). Justice Sundberg held that section 8(2) was inconsistent and therefore inoperative by reason of section109 of the Constitution.

individual seeking treatment. In this way, IVF treatment can use donor sperm or eggs to achieve pregnancy by artificial means in females who can not produce (or do not wish to use[78]) their own eggs, by using donor eggs, and couples who can not (or do not wish to) use their own sperm and/or eggs, by using donor gametes. Additionally, IVF treatments using donor eggs and sperm are associated with higher pregnancy and live birth rates than treatments using individuals' own gametes[79] where those couples are having ART treatment. IVF and associated reproductive technologies have therefore created a new and strong demand for donor oocytes and embryos, as well as a wider scope for use of donor sperm.

1.6 Donor Spermatozoa

In cases of male infertility, fertilization itself is the major obstacle to achieving pregnancy, and this failure to fertilise can usually be quickly identified when couples seek treatment or advice for infertility. Although the cause of infertility may be readily ascribed to the male partner, identifying the exact reason and providing efficacious treatment is not always straight forward. Because many men suffer either idiopathic infertility or from conditions for which treatment outcomes are poor, few (less than 20%) men with reproductive failure have specifically identifiable conditions for which a proven effective treatment is available.[80]

Donor sperm are required to achieve pregnancy in a number of circumstances: where the male partner's infertility cannot be overcome or treated, where he does not wish to use his own sperm for fertilisation,[81] or where there is no male partner. Today, donor

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78 For example, a woman might wish to avoid using her own oocytes, if she is at risk of passing on an inherited disease, she is of advanced maternal age, or if she is acting as a gestational surrogate.

79 S Antinori et al, 'Pregnancy: Oocyte donation in menopausal women' (1993) 8(9) *Human Reproduction* 1487–1490; M Sauer, R Paulson and R Lobo, 'Pregnancy in women over 50 or more years: outcome of 22 consecutive established pregnancies from oocyte donation' (1995) 64 *Fertility and Sterility*, 111; HA Abdala et al, 'Obstetric outcome in 232 ovum donation pregnancies' (1998) 105 *British Journal of Obstetrics and Gynaecology*, 332; SF Marcus, 'Embryo donation' in PR Brinsden (ed), *A textbook of in vitro fertilization and assisted reproduction* 2nd ed, (Parthenon Press ,1999) 222–333.

80 S Bhasin, DM De Kretser and H Baker, 'Clinical review 64: pathophysiology and natural history of male infertility' (1994) 79 *Journal of Clinical Endocrinology and Metabolism*, 1525.

81 For example, a man might wish to avoid using his own gametes if he is at risk of passing on an inherited disease.

sperm may be used either for vaginal or intrauterine insemination (IUI),[82] conventional IVF (with or without donor eggs) or intracytoplasmic sperm injection (ICSI)[83] in conjunction with IVF.[84]

In Australia, donated semen is analysed for sperm quality, both before and after cryopreservation. The donor's blood is tested for blood type, Rhesus factor, and karyotype,[85] as well as for a number of infectious and genetic diseases, including hepatitis B & C, human immunodeficiency virus (HIV types 1 & 2), human T-cell lymphotropic virus, syphilis, cystic fibrosis, and thalassemia. The donor's urine is also tested for several sexually transmitted infections, including chlamydia and gonorrhea. If the donor's sperm is of a high quality and free from disease, it is frozen for six months (180 days)[86] in quarantine, so that further blood testing can confirm Hepatitis and HIV-free status. Although pregnancy rates using frozen sperm are lower than those with fresh sperm,[87] use of unquarantined sperm is not acceptable clinical practice in Australia.

Australian sperm donors who are recruited through fertility clinics are compensated for their time and inconvenience, but may only be reimbursed for reasonable costs.[88] Although sperm are available from donors in relatively large quantities,[89] and obtainable without invasive treatment, state legislation and professional Guidelines

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82 The objective of intrauterine insemination is to bypass the filtering effect of the cervical mucus by placing thousands of motile sperm directly into the uterus by means of a catheter

83 Intra-cytoplasmic sperm injection is when a single sperm is injected directly into an oocyte in-vitro.

84 World Health Organisation, '*Current Practices and Controversies in Assisted Reproduction'* (World Health Organisation, 2002), 83.

85 Number and appearance of chromosomes.

86 The 180 days quarantine period usually coincides with a mandatory 6 month cooling off period for gamete donors, introduced by the Fertility Society of Australia Reproductive Technology Accreditation Committee (RTAC) in 2006: <http://www.rtc.org.au/clinics/docs/Cooling_Off_Period_for_Counselling_for_Known_Egg_Donation.pdf.>

87 Yong-Seog Park et al, 'Influence of motility on the outcome of in vitro fertilization/intracytoplasmic sperm injection with fresh vs. frozen testicular sperm from men with obstructive azoospermia' (2003) 80(3) *Fertility and Sterility,* 526.

88 For a discussion of what sums are paid to donors in Australia, see Senate Legal and Constitutional Affairs References Committee, *'Donor Conception Practices in Australia'* (Senate Printing Unit, 2011), 54-56: For example, Monash IVF detailed compensation for sperm donors totalling up to $1800 for ten successful donations.

89 For example, a minimum of 400 spermatozoa per ejaculate has been reported; D. Schwartz, et al., 'Within-subject variability of human semen in regard to sperm count, volume, total number of spermatozoa and length of abstinence' (1979) 57 *Journal of Reproductive Fertility* 57(2), 392.

restrict the number of families that may receive sperm from a single donor.[90] In the UK and Australia, there has been some concern that the number of sperm donors is decreasing below numbers needed to sustain current donor-conception programs,[91] and that this is linked to the removal of donor anonymity.[92] However, these reports and assertions have been challenged by researchers who have demonstrated that the removal of anonymity has not, in fact, prevented clinics from recruiting oocyte and sperm donors,[93] and that a decline in both the number of donor-conceived offspring born and in gamete donor recruitment preceded the change in law.[94]

1.7 Egg Donation

Egg donation is a relatively new method of overcoming infertility, and demand is exclusively tied to the use of donor oocytes in IVF and, more recently, GIFT. Initially, the primary indication for egg donation was premature ovarian failure, defined as hypergonadotrophic hpogonadism occurring before 40 years (premature menopause).[95] The uses of egg donation have now expanded to treat a range of reproductive disorders, including ovarian failure, recurrent IVF cycle failure, and poor

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90 In Victoria, donated gametes may not be used to produce more than 10 families; s29 *Assisted Reproductive Treatment Act 2008* (Vic); 5 families in NSW under section 27(1) of the *Assisted Reproductive Technology Act 2007* (NSW). In Queensland, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory, the *NHMRC Guidelines* provide that 'clinics must take reasonable steps to reduce the numbers of genetic relatives created through donor gamete programs' to protect donor-conceived offspring, and donors from having too many genetic siblings or too many offspring, respectively; Australian Government National Health and Medical Research Council (NHMRC Guidelines), above n 25, guideline 6.3; s 8(2)(a) of the *Assisted Reproductive Treatment Regulations 2010* (SA) require fertility service providers to comply with the *NHMRC Guidelines* unless otherwise provided for by SA legislation.

91 British Fertility Society, 'Working party on sperm services in the UK: Report and Recommendations' (2008) 11(3) *Human Fertility* 147; Alan Pacey, 'Sperm Donor Recruitment in the UK' (2008) 12 *The Obstetrician & Gynaecologist* 43, 47-48.

92 Guido Pennings, 'How to kill gamete donation: retrospective legislation and donor anonymity' (2012) 27(10) *Human Reproduction* 2881.

93 Sonia Allan, 'Donor identification 'kills gamete donation'? A response' (2012a) 2 *Human Reproduction* 2; U Shukla et al, 'Sperm donor recruitment, attitudes and provider practices—5 years after the removal of donor anonymity' (2013) 28(3) *Human Reproduction* 676; Eric Blyth, 'The UK's gamete donor 'crisis' - a critical analysis' (2008) 28(1) *Critical Social Policy* 74; 80-82; Ken Daniels and Othon Lalos, 'The Swedish Insemination Act and the Availability of Donors' (1995) 10 *Human Reproduction* 1871; Carol Nader, 'Donors Double after IVF Plea', *The Age* 9 March 2005, reporting a doubling of donors in Victoria following a high profile recruitment campaign launched by Monash IVF, cited in Eric Blyth, above, 93.

94 Eric Blyth, above n 93, 79-81.

95 World Health Organisation, *'Medical, Ethical and Social Aspects of Assisted Reproduction: Report of a meeting on Medical, Ethical and Social Aspects of Assisted Reproduction held at WHO Headquarters in Geneva, Switzerland 17–21 September 2001'* (World Health Organisation, 2002), 172.

response to conventional ovarian hyperstimulation. Some of these problems are age related and older women, in particular, benefit from the use of donor eggs from a younger woman to overcome age-related secondary infertility.[96] Donated eggs may also be used where a patient does not wish to use her own eggs because of a known risk of transmitting inherited genetic abnormalities, such as chromosomal translocations, autosomal dominant or X-linked disorders. However, as Preimplantation Genetic Diagnosis[97] techniques improve, fewer patients are relying on egg donation for this reason.

Egg donation as a treatment for infertility was first reported in 1984.[98] Originally egg donations were made by infertile women undergoing IVF treatment themselves, who donated excess eggs. However, this practice has significantly declined due to the widespread availability of embryo freezing. Although many infertility clinics operate egg donor recruitment programmes, the procedure required to obtain eggs is far more complex and invasive than that required to obtain sperm, and recruitment levels are low. Couples and women waiting for donor eggs may experience long delays in undergoing fertility treatment,[99] with at least one Australian fertility service provider advising that patients seeking oocyte donation 'are encouraged to seek treatment overseas where they have a more realistic chance of treatment'.[100] Many couples undergoing fertility treatment with donated eggs rely upon a known and fertile donor, such as a sister or close friend, who is willing to undergo treatment and donate her eggs.[101]

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96 See e.g. S Antinori et al, above n 79; M Sauer, R Paulson and R Lobo, above n 79; HA Abdala et al, above n 79; SF Marcus, above n 79.

97 Preimplantation Genetic Diagnosis (PIGD) is a laboratory technique that allows embryos to be tested for specific genetic disease or chromosomal abnormalities, and affected embryos discarded, prior to implantation; see Sarah Franklin and Celia Roberts, *Born and Made: An Ethnography of Preimplantation Genetic Diagnosis* (Princeton University Press, 2006).

98 John Leeton, Alan Trounson and Carl Wood, above n 3

99 The Nuffield Council on Bioethics reported in 2011 that 90 percent of UK clinics were unable to meet the demand for donated eggs, and that potential recipients of donated gametes were likely to wait over a year for suitable gametes to be available, with some abandoning treatment in this time; The Nuffield Council on Bioethics *'Human Bodies: donation for medicine and research*' (Nuffield Council on Bioethics, 2011).

100 Canberra Fertility Centre, Submission 48, p 4, cited in Senate Legal and Constitutional Affairs References Committee, above n 88.

101 See, Effy Vayena and Susan Golombok, 'Challenges in Intra-family donation' in Martin Richards, Guido Pennings and John Appleby (eds), *Reproductive Donation: Practice, Policy and Bioethics* (Cambridge University Press, 2012) 168; Narelle Warren and Jenny Blood, 'Who Donates? Why Donate? An Exploration of the Characteristics and Motivations of Known Egg Donors: the Victoria, Australia Experience,' (2003) 10(3) *Journal of Fertility Counseling* 20.

Egg donors are generally required to be under the age of 35 years, to reduce the risk of aneuploidy[102] and increase the chance of achieving pregnancy.[103] Proven fertility is preferable.[104] As with sperm donors, all egg donors undergo thorough psychological and physical assessment before donating. Egg donors' blood and urine are tested for the same genetic and infectious diseases as sperm donors.[105] To obtain eggs for donation, the donor takes hormonal medication to induce controlled ovarian hyperstimulation, as with conventional IVF.[106] If hyperovulation is successful, and a sufficient number of eggs have been produced by the donor, a minor operation (ultrasound-guided transvaginal oocyte recovery) is performed with intravenous sedation and analgesia. The donor eggs are then usually inseminated *in vitro* with the sperm of the partner of the recipient (or donor sperm), and the fertilized eggs are either transferred to the hormonally synchronized recipient within 48-72 hours or cryopreserved for transfer at a later date.

Egg donors may be required to commit to several months of monitoring, strict medication compliance (including likely unpleasant and potentially dangerous side-effects) and invasive procedures before their role is fulfilled. In addition, they must submit their details to a donor register and be available for contact by the recipients and any donor-conceived offspring[107]. Although recruited donors are reimbursed for reasonable costs associated with donating (for example, travel expenses), that people donate eggs without payment may be seen to reflect altruistic motivation.

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102 Aneuploidy is a condition in which the individual has an extra or missing chromosome. The condition often, but not always, results in spontaneous termination of the pregnancy. Downs Syndrome, for example, results from a Trisomy of Chromosome 21, and is compatible with live birth.

103 Mark Sauer and Suzanne Kavic, 'Oocyte and embryo donation 2006: reviewing two decades of innovation and controversy' (2005) 12(2) *Reproductive BioMedicine Online* 153, 157; Matthew Cohen, Steven Lindheim and Mark Sauer, 'Donor Age is paramount to success in oocyte donation' (1999) 14(11) *Human Reproduction* 2755.

104 B Faber et al, 'The impact of an egg donor's age and her prior fertility on recipient pregnancy outcome.' (1997) 68(2) *Fertility & Sterility* 370.

105 See pages 26-27.

106 See Part 1 - Background: Gamete donation in assisted reproductive treatment, *In Vitro Fertilisation (IVF) and Donor Gametes in IVF*, page 20.

107 All Australian States require gamete donors to provide identifying and contact details to a register, and consent to being contacted by the recipient(s) of their donation and any resulting children. For example, in Victoria, there is a Central Register of all births using donor eggs or sperm, held at the Registrar for Births, Deaths and Marriages. The Central Register contains identifying information about the child, the recipient of the donor sperm, and the donor, pursuant to *Assisted Reproductive Treatment Act* 2008 (Vic). For a detailed discussion on the legislative framework in Australia and New Zealand, see Chapter 6 – State Legislation and Professional Guidelines to Regulate Gamete Donation and Donor Conception, page 77.

1.8 Conclusion: Gamete Donation in Assisted Reproductive Technology

Over time, the uses for donated gametes in assisted reproductive technologies have developed. The introduction of effective cryopreservation techniques in the 1950s made the process of donor insemination more convenient and efficient for donors, recipients and medical practitioners. However, the most significant advance in donor conception was the development of IVF techniques. IVF created a use and demand for donated oocytes, and broadened the uses of donated semen beyond artificial insemination.

Notably, an industry has developed to support increasing use of IVF, and other assisted reproductive technologies, including donor insemination. Today, 'donor conception' may involve techniques as simple as at-home insemination, or as complex as IVF using customised drug schedules, donated oocytes and sperm and utilising ICSI.

In addition to providing assisted reproductive treatment using donor gametes, assisted reproductive treatment providers have been responsible for recruiting donors, and gathering information and maintaining records of donor conception procedures. In states that have operational compulsory donor registers, clinics now are responsible for forwarding these records to the relevant authority. In states and territories without operational compulsory registers, the clinics are responsible for maintaining records and disseminating information to parties when requested, and in compliance with relevant legislation and professional guidelines. As I also discuss in the next part, individual practitioners and the donor conception industry as a whole have in the past been complicit in practices of secrecy and anonymity in gamete donation. In the later parts of my thesis, I also note that fertility service providers remain amongst the most vocal opponents to full retrospective release of information to donor-conceived offspring.

PART 2 DONOR ANONYMOUS: PAST

"Like Bird's Eye Peas": The Sperm Banking Industry

What kind of worm
Would chill his sperm
And, like a demon
Save his semen,
Refrigerated,
Labelled, dated
'Til time is free
For progeny?
What human weed
Would freeze his seed,
Packaged, please
Like Bird's Eye Peas,
So the Junior League
To avoid fatigue,
Can spawn its fetus
Without coitus?[108]

In Part 2, I explain and critically analyse practices of gamete donation and donor conception in the period from the turn of the nineteenth century to 1984.[109] Part 2 is divided into four chapters, including a summary chapter. I begin with the history of donor conception (1800-1984), and a critical analysis of the practices of secrecy and anonymity, which were intended to maintain the privacy of the parties to donor-conception. Notably, throughout this period, consideration of donor-conceived offspring beyond infancy and childhood is absent. I then turn to an analysis of the legal relationships (or lack thereof) that existed between donors, recipients and donor-conceived offspring in this first period, when parties to gamete donation relied upon secrecy and anonymity to protect themselves from each other by preventing identification and contact. I first place the discussion in a liberal socio-political context, and then go on to explain the interaction between privacy and autonomy. Specifically, I identify privacy as a precondition to the liberal concept of autonomy, which allowed the parties to pursue their goal of family formation as they saw fit.

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108 L. Fred Ayvazian, 'Seminal Gelation' (1968) 279(8) *The New England Journal of Medicine* 436.

109 This period represents the time when donor-assisted conception began to be documented in the literature, and the introduction of legislation to govern the practice; Addison Hard, above, n 2; *Infertility (Medical Procedures) Act 1984* (Vic).

CHAPTER 2:

PRIVACY AND SECRECY IN GAMETE DONATION

2.1 Introduction: Donor Anonymous

Before the 1900's, artificial insemination (including both artificial insemination by husband or donor) was described as a clandestine practice in England.[110] Early accounts of artificial insemination are difficult to find, because moral concerns about the legitimacy of the treatment prevented public and professional discussion.[111] In particular, instrumental substitution for sexual intercourse and masturbation were perceived as morally suspect and unnatural activities.[112] Reports of artificial insemination by doctors in the 1860s were not well received by Anglo-American society, where the moral and ethical implications of artificial insemination ignited public outrage. As early as 1897, the Catholic Church formally opposed any form of artificial impregnation.[113] Although the practice of artificial insemination was apparently generally accepted in Continental Europe from the late 1880s,[114] it remained controversial in the United States and Australia right up to at least the 1970s.[115]

There was a poor reception to artificial insemination of sperm from a husband to his wife, while the use of donor sperm faced open hostility in Anglo-American jurisdictions.[116] In addition to concerns about instrumental insemination and masturbation, the use of a sperm donor introduced a perceived element of adultery, raised serious legal concerns about legitimacy and inheritance,[117] and exposed social

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110 See Sonia Allan, 'Donor Conception, Secrecy, and the Search for Information' (2012c) 19 *Journal of Law and Medicine* 631, 632-634;

111 Gary Clarke, 'A.R.T and History, 1678-1978' (2006) 21(7) *Human Reproduction* 1645, 1649; but see Clair Folsome, above n 33.

112 Sonia Allan (2012c), above n 110, 632; Department of Health and Social Security (*Warnock Committee Report*) above n 14, 18;

113 Glanville Williams, '*The Sanctity of Life and the Criminal Law'* (Knopf, New York, 1966), 129 cited in Kara Swanson, see n 33, 603.

114 Gary Clarke, above n 111, 1649.

115 Ibid.

116 Kara Swanson, above n 33, 603.

117 John Spiegel, 'Seed of Doubt' (1955-1956) 17 *University of Pittsburg Law Review* 659, 665-672.

stigma surrounding male infertility.[118] The separation of biological from social paternity was counter to centuries of effort by the Church and State to establish clear lines of paternity through the institution of marriage,[119] and possibly provoked specific anxieties about cuckolding in patrilineal society, whereby a man could be deceived into claiming another man's child as his own.[120] Therefore, artificial insemination by donor was generally seen by the Anglo-American public as perverse and unnatural, and there was significant concern about the 'experimental' nature of donor-conceived offspring:

> … whose "fathers" were test tubes[121] and whose mothers were experimental laboratories, but who are nevertheless human beings indistinguishable and unmarked.[122]

These concerns, however, did not end the practice of artificial insemination and artificial insemination by donor. Instead, they reinforced participants' perceived need for absolute secrecy about the treatment and the use of anonymous sperm donors.[123]

Because of this insistence on donor anonymity, no relationship could be established between gamete donors, recipients and donor-conceived offspring during this time. Pervasive feelings of shame and negative social attitudes created a strong desire to maintain privacy and created clear, closed boundaries separating donors from recipients and offspring.

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118 R. T. Seashore, (1938) 21 'Artificial Impregnation' *Minnesota Medicine,* 641, 643.

119 For example, section 5(1) of the *Marriage Act 1961* (Cth) defines 'Marriage' as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.

120 Kara Swanson, see n 33, 603.

121 Although the term 'test tube baby' is generally believed to (disparagingly) describe babies conceived via IVF procedures. The term was used much earlier to (disparagingly) describe offspring conceived via artificial insemination, at least as early as the 1920s; see e.g. Hermann Roeder, 'Die Künstlich Zeugung (Befruchtung) im Tierreich' (1921) 7 *Monographien Über die Zeugung Beim Menschen*, Translated as Hermann Roeder, *Test Tube Babies: A History of Artificial Impregnation of Human Beings* (Panurge Press, 1934). Other terms, such as 'semi-adopted' were also used to describe donor-conceived offspring; see J Schock, above n 33.

122 J Schock, above n33, 272.

123 Maggie Kirkman, 'Saviours & satyrs: ambivalence in narrative meanings of sperm provision' (2004) 6(4) *Culture, Health & Sexuality* 319, 320.

2.2 History of Donor Assisted Conception and Development of Medico-Legal Issues

Although it is not clear exactly when artificial insemination was first used by medical practitioners as a cure for infertility, the first accounts of artificial insemination performed by doctors appeared from the late 18th century. Dr John Hunter is generally credited with performing the first documented artificial insemination procedure around 1790, although Dr Hunter had, apparently, been successfully advising patients on methods of at-home artificial insemination from as early as 1776.[124] The first clearly documented and published account of successful artificial insemination was performed in France by Dr Girault in 1838, who reported a series of twelve successful artificial insemination procedures over a period of thirty years.[125] In 1866, shortly before Dr Girault's paper was published, American gynaecologist Dr James Sims published a book on sterility, which included a chapter on the practice of artificial insemination.[126] In France, Sims' book 'stimulated a more open discussion in medical circles where [artificial insemination] had been practiced with discretion for years'.[127] It was, however, not as well received elsewhere as the practice was seen to constitute a 'social peril' and an affront to the dignity of marriage.[128]

Despite public condemnation of donor insemination using a husband's sperm to impregnate his wife, doctors not only continued offering the procedure to infertile patients, but they made use of donated sperm where the husband's infertility could not be overcome by artificial insemination. The first reported case of successful donor conception occurred in 1884, when Professor William Pencoast of Philadelphia artificially inseminated the wife of a sterile patient. According to a report of the procedure, which was not published until 1909,[129] Pencoast obtained the donor from his own classroom by asking his medical students to vote who was the "best-looking". Without informing the husband of his plan, Pencoast then asked the wife to return

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124 Gary Clarke, above n 111, 1649; Kara Swanson, above n 33, 596.
125 Gary Clarke, above n 111, 1649.
126 Ibid.
127 Ibid.
128 Bateman Noveas, 'The Medical Management of Donor Insemination' in Ken Daniels and Erica Haimes (eds), *Donor Insemination: International Social Science Perspectives* (Cambridge University Press, Cambridge, 1998) p 110, cited in Sonia Allan (2012c), above n 110, 632.
129 Addison Hard, above n 2.

under the pretence of conducting another examination, anaesthetised her, and carried out the insemination procedure in view of his medical students. After the wife became pregnant Pencoast advised the husband of the procedure and, although the husband was pleased, he requested that the truth be kept from his wife.[130] The wife apparently delivered a healthy boy and was never told about the unusual conception.

It is likely that donor conception continued to be practised by a small number of doctors as a private service to sterile patients.[131] Records were not maintained and, because only fresh sperm could be used,[132] all parties needed to be in close proximity at the time of the procedure.

Artificial insemination (including donor-insemination) retained a low profile until the late 1940s and 1950s, when it became a medico-legal issue.[133] Legal uncertainty as to the status of recipients, donors and donor-conceived offspring became a pressing issue for three reasons. First, after years of trial and error, doctors were able to achieve high rates of conception using artificial insemination: second, the post-World War II focus on domesticity and parenthood led to increased patient requests for the procedure and an increased number of doctors willing to perform the procedure and third, as a consequence of the first two reasons, there was an increasing number of children conceived from artificial and donor-assisted conception.[134]

Moral and legal concerns about donor-assisted conception arose because of uncertainty as to whether the technique constituted a form of adultery, whereby it could provide evidence to support divorce proceedings[135] and render the donor-conceived offspring illegitimate,[136] or whether it constituted some other type of

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130 Ibid.

131 See e.g. Unknown Author, 'Childlessness in SA. Use of Artificial Insemination', *The Advertiser* (Adelaide), 25 July 1946 cited in Damien Adams and Caroline Lorbach, above n 5, 707.

132 The successful use of cryopreserved sperm to achieve pregnancy was first reported in 1953; Raymond Bunge, William Keettel and Jerome Sherman, above n 52, cited in Sonia Allan (2012c) above n 110, 634.

133 Kara Swanson, above n 33, 594.

134 Ibid, 609-611.

135 Prior to the passing of the *Family Law Act 1975* (Cth), grounds for divorce needed to be proved in order for a petition to be successful; see e.g. *Matrimonial Causes Act (Cth)* 1899; *Matrimonial Causes Act (Cth)* 1959; *Matrimonial Causes Act (Cth)* 1971.

136 The *Warnock Committee* concluded that, under existing UK law 'A child born as a result of [donor insemination] is illegitimate, and so is liable to suffer all the disadvantages associated with that status. In theory the husband of the woman who bears a [donor-conceived] child has no parental rights and duties in law with regard to that child; these in principle lie with the donor, who could be made liable to pay maintenance, and who could apply to a court for access

offence.[137] In 1948, the Archbishop of Canterbury published a report on donor conception and was highly critical of the practice, stating that it would injure the 'essential nature and structure of the family, which is the community of parents and children begotten by them',[138] and recommending that the practice should be made a criminal offence.[139]

Around the same time, Pope Pius XII declared donor insemination a sin and akin to adultery.[140] Although there is no case law to suggest that donor conception was legally considered adultery in Australia or that the resulting child was considered illegitimate, 1950s and '60s case law from the United States and the UK were at odds. While several United States cases stated that donor conception constituted adultery[141] and resulting children were illegitimate,[142] regardless of the husband's consent, English courts were more sympathetic. In the case of *MacLennan v MacLennan*,[143] the court determined that even "artificial insemination by a donor without the consent of the husband is not adultery"[144] because it does not involve a 'carnal connection'.[145]

Over time, attitudes towards sperm donation and donor conception relaxed and, in 1968 the then UK Minister for Health decided that donor conception should be available within the NHS if recommended on medical grounds.[146] This decision was

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or custody.'; Department of Health and Social Security, *(Warnock Committee Report*), above n 14, 20.

137 Several seventeenth and eighteenth century English cases suggest that it may be a criminal conspiracy to intentionally hold a man liable for the maintenance of a child who is not his own; *R v Armstrong* (1677) 1 Ventr 204; *R v Timberley* (1662) 1 Sid 63; *R v Best* (1705) 1 Salk 174; *R v Kinnersley* (1719) 1 Stra 193, cited in Sir Robert Samuel Wright, *The Law of Criminal Conspiracies and Agreements: [1873]* (Cornell University Press, 2009), 21.

138 Church of England '*Artificial Human Insemination: the report of a Commission appointed by His Grace The Archbishop of Canterbury'* (London SPCK, 1948), 51.

139 Ibid. No action was taken by the UK Parliament to criminalise donor conception.

140 Pope Pius XII "Christian Norms of Morality" (September 29, 1949) in Kevin O'Rourke and Philip Boyle *Medical Ethics Sources of Catholic Teachings* (Georgetown University Press, 3rd ed, 1999) 66.

141 *Doornbos v Doornbos* 23 USLW 2308 (Ill Sup Ct 1954); but see *Strnad v. Strnad* 78 NY.2d 390 (NY Sup Ct 1948), where the court likened the AID child to one who gains legitimacy through his mother's later marriage, 391.

142 *Gursky v Gursky* 242 NY 2d 406 (NY Sup Ct 1963). The court stated: "[A] child so conceived is not a child born in wedlock and is therefore illegitimate", 411.

143 *MacLennan v MacLennan* 1958 S.C. 105; 1958 S.L.T. 12.

144 Ibid.

145 Although Lord Wheaten did acknowledge that the actions of Mrs McLennan "constitute[d] … a grievous marital offence against [her] non-consenting husband…"; Ibid.

146 Department of Health and Social Security, *(Warnock Committee Report*), above n 14, 28.

subsequently supported by the British Medical Association.[147] In 1973 Dr Struan Robertson published details of donor conception treatment of over 114 patients at the Women's Hospital in Sydney, which resulted in 60 pregnancies over a five-year period,[148] and the publication was followed by the establishment of several (in)fertility clinics within Australian public teaching hospitals throughout the 1970s. However, despite increasing acceptance of donor conception, the parties were still legally and physically separated from one another.

2.3 Privacy in Gamete Donation

In this early period, donor conception was defined by practices of anonymity and secrecy, intended to support a high degree of privacy. In reviewing the literature on early donor-conception practices and prevailing social attitudes during the period between the turn of the nineteenth century to 1984, two practical reasons for favouring strict privacy present themselves. First, donor conception practices were considered to fall within the private domain of the family and were therefore not subject to state control or public accountability and, second, there was thought to be a real risk of psychological and legal harm to the parties if they were known to each other or their participation in donor conception became public knowledge. For example, in 1984, the *Warnock Committee* recommended that:

> … our general view is that anonymity protects all parties not only from legal complications but also from emotional difficulties. We recommend that as a matter of good practice any third party donating gametes for infertility treatment should be unknown to the couple before, during and after the treatment, and equally the third party should not know the identity of the couple being helped.[149]

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147 British Medical Association, 'Annual Report of the Council. Appendix V: Report of the Panel on Human Artificial Insemination (Chairman: Sir John Peel)' (1973) 11 (7 April 1973) *British Medical Journal Supplement*, 3.

148 Struan Robertson, 'Donor Insemination — A Substitute for the Infertile Male (1973) *Australian and New Zealand Journal of Obstetrics and Gynaecology 13(4), 224.*

149 Department of Health and Social Security *(Warnock Committee Report*) above n 14, 15.

But what does it mean to say that donor conception was considered private, and what function did privacy fill in the past practice of gamete donation?

There are many definitions of privacy, but all have similar characteristics in that they include elements of control of personal information and exercise of free will.[150] In the context of gamete donation, and for purposes of describing the relationships between parties to gamete donation, concepts of individual privacy are appropriate. Individual privacy is divided into three dimensions by Beate Rössler: *decisional* privacy,[151] *informational* privacy,[152] *and local* privacy.[153] Briefly put, *decisional* privacy ensures that persons can decide their own actions in social relations, including rejecting social relations; *informational* privacy allows persons to control what others know about them; and *local* privacy allows persons to maintain control of their environment and domestic sphere, i.e. 'the right to be let alone'.[154] Although Rössler's work does not directly link privacy to gamete donation, her focus on bioethics and feminism[155] makes her a relevant authority. Anita Allan slightly expands Rössler's categories into domains of informational privacy, physical privacy, associational privacy, proprietary privacy and decisional privacy.[156].

2.4 Donor Conception Within the 'Private Domain' of the Family

Boundaries between many private and public domains were once more clearly defined than they are now.[157] These boundaries were especially well-defined in the distinction between the domestic private realm of the home and the political realm of public life.[158] This strong demarcation directly reflected the liberal ideals of society, which are discussed in detail below, and exemplified by Lord Wolfenden's remark in his Committee report into homosexual offences and prostitution:

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150 See Sissela Bok, above n 4.

151 Beate Rössler, *The Value of Privacy* (Rupert Glasgow trans, Polity Press, 2005), 79-110.

152 Ibid 111-141.

153 Ibid 168.

154 Samuel Warren & Louis Brandeis 'The Right to Privacy' (1890) *Harvard Law Review* 193, 193.

155 Beate Rössler, 'Gender and Privacy: A Critique of the Liberal Tradition' in Beate Rössler (ed), *Privacies: Philosophical Evaluations* (Stanford: Stanford University Press, 2004), 52.

156 Anita Allen 'Privacy' in Hugh LaFollette (ed.), *The Practical Handbook of Practical Ethics*, (Oxford: Oxford University Press, 2003) 485; Anita Allan, 'Coercing Privacy' (1999) 40(3) *William and Mary Law Review* 723, 723-724.

157 Brian Harrison, 'The Public and the Private in Modern Britain' in Peter Burke, Brian Harrison and Paul Slack. (eds), *Civil Histories: Essays Presented to Sir Keith Thomas* (Oxford University Press, 2000) 338.

158 Beate Rössler, above n 151, 19.

> "… It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour … [T]here must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'.[159]

At this point, it is sufficient to say that in the past many actions performed within the home that may have attracted legal sanction if performed in public were considered 'private matters' and not subject to state control. For example, rape in marriage was only expressly fully criminalised[160] in the 1980s,[161] and there existed strong opposition to state intrusion into family life, which was not seen to attract 'public interest' grounds for intervention.[162]

The protection of parties' local privacy was considered vital for intimacy within marriage, and other aspects of personal life.[163] Couples and donors involved in gamete donation in the past would have highly valued the dimension of local privacy in this intimate sphere that combined elements of sex, reproduction and family formation, and this is supported by comments made in the report of the Feversham Committee on Human Artificial Insemination,[164] which stated that criminal prohibition of the practice would 'be considered to be an unjustifiable encroachment on the freedom of

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159 Committee on Homosexual Offences and Prostitution, *'Report of the Committee on Homosexual Offences and Prostitution*' (Her Majesty's Stationery Office, 1957) (*The Wolfenden Report*), 24.

160 It must be noted that South Australian legislature passed controversial reforms in 1976 that made rape in marriage a criminal offence, but only when there were 'aggravating circumstances'; *Criminal Law Consolidation Act Amendment Act 1976* (SA) s4, 12. For a contemporary account, see also Duncan Chappell and Peter Sallmann, 'Rape in Marriage Legislation in SA: Anatomy of a Reform' (1982) 14 *Australian Journal of Forensic Sciences* 51.

161 *Crimes (Amendment) Ordinance (No 5) 1985* (ACT) s92R; *Crimes (Sexual Assault) Amendment Act 1981* (NSW) s 61A(4); *Criminal Code Act 1983* (NT) s192(1); *Criminal Code, Evidence Act and other Acts Amendment Act 1989* (QLD) s31; *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas) s185(1); *Crimes (Amendment) Act 1985* (Vic) s 62(2); *Acts Amendment (Sexual Assaults) Act 1985* (WA) s325. Although in *PGA v R* (2012) 245 CLR 355*,* a majority in the High Court of Australia found that the common law defence to rape in marriage had 'fallen away' by 1935 as a result of statutory reforms allowing access to divorce and property rights for married women.

162 For a discussion of the fraught interaction between 'domestic violence' and criminal law, see Nicola Lacey, Celia Wells and Oliver Quick, *Reconstructing Criminal Law: Text and materials* (Cambridge University Press, 4 ed, 2010) 645-653.

163 See e.g. Simon Szreter and Kate Fisher, *Sex Before the Sexual Revolution: Intimate Life in England 1918-1963* (Cambridge University Press, 2010)

164 Home Office and Scottish Home Department *Report of the Committee on Human Artificial Insemination*, Cmnd 1105 (London, HMSO, 1960) (*The Feversham Committee report*); discussed in detail in Chapter 5 – Political Interest in Donor Conception, *The Feversham Committee Report* page 66.

the individual in a sphere of behaviour where the law does not normally intrude'.[165] Although the practice of donor conception was 'not the law's business', there was still strong public disapproval for the practice, which was perceived as immoral, harmful, and fraught with risk.

2.5 The Threat of Psychological and Social Harm

A number of socially informed motives led recipients of donated gametes to maintain strict informational privacy and keep details of the use of donor gametes from the donor-conceived offspring and other adults. Primarily, the well-being of the donor-conceived offspring was cited as a reason for maintaining secrecy,[166] with fears that the child could be rejected by other family members,[167] become confused or develop an insecure attachment to the social (non-biological) father. There was a belief that there was little point in telling if helpful information about the donor was not available, and concern that the child may be ostracised by others.[168] Other reasons for secrecy included a desire to protect the social father who might view the lack of genetic link to the child as a threat to developing a secure bond and might wish knowledge of his infertility to be suppressed,[169] and a desire to protect the 'normal' appearance of the family.[170]

In the past, there was concern that a woman may be labelled an adulterer and ostracised by her social group if she admitted to using donated gametes to conceive, that her husband's pride would be damaged by public knowledge of his sterility (and therefore impugned masculinity)[171] and that for a donor-conceived offspring who found out that s/he was donor-conceived 'the damage to its psychological make-up would be disastrous. An inferiority complex would be set-up … and the child's

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165 Ibid, 237.
166 Ken Daniels and Karyn Taylor, above n 6, 157.
167 Robyn Rowland, above n 17, 393.
168 Ken Daniels and Karyn Taylor, above n 6, 157
169 Robyn Rowland, above n 17, 393.
170 Victoria Grace, Ken Daniels and Wayne Gillett, 'The donor, the father, and the imaginary constitution of the family: Parents' constructions in the case of donor insemination' (2008) 66 *Social Science & Medicine* 301, 302. Ken Daniels and Karyn Taylor, above n 6, 158.
171 Francis Seymore and Alfred Koerner, 'Medicolegal Aspects of Artificial Insemination' (1936) 107(19) *Journal of the American Medical Association* 1531, 1533.

maladjustment to society would result'.[172] In 1943, one doctor described the social risks of disclosure to the women involved in the following manner:

> [T]he woman, made pregnant by donor insemination, who even whispers out of turn, on a single occasion, becomes a medical curiosity. She is envied … pitied … shunned by her relatives and perhaps unfortunately by her own child.[173]

In addition, the dominant cultural narrative of family life was firmly based on the idea of a married heterosexual couple who live together with their 'own' (two) genetic children.[174] This model of a 'proper' family reached its peak in the 1950s and 1960s when marriage rates soared[175] and any deviation from this moral standard was open to criticism, exclusion or even legal intervention.[176]

2.6 The Threat of Legal Harm

The strong emphasis on informational privacy in artificial insemination by donor, manifested by practices of secrecy and anonymity, also served to protect the adult parties – the donor, recipients and doctor – from legal complications. Specifically, there were concerns that both recipients and donors, who may wish to keep their involvement secret, might be subject to blackmail if the parties were known to each other.[177] In addition, adultery could form the basis for divorce proceedings,[178] the donor-conceived offspring's legal paternity was uncertain and could form the basis of a claim against the donor for financial support or a share of his estate,[179] and doctors' might be open to allegations of malpractice for any number of reasons.[180] According to some medical practitioners, practices of secrecy and anonymity were seen as the best means of

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172 Ibid, 1533.
173 Clair Folsome, above n 33, 923-924.
174 Petra Nordqvist and Carol Smart, *Relative Strangers: Family Life, Genes and Donor Conception,* Palgrave Macmillan Studies in Family and Intimate Life (Palgrave Macmillan, 2014), 11-12.
175 Graham Allan and Graham Crow, *Families, Households, and Society,* Sociology for a changing world (Palgrave, 2001), cited in Petra Nordqvist and Carol Smart, above n 174, 11.
176 Petra Nordqvist and Carol Smart, above n 174, 12.
177 Kara Swanson, above n 33, 619.
178 Ibid, 617-619.
179 Victoria Grace, Ken Daniels and Wayne Gillett, above n 170, 302.
180 Kara Swanson, above n 33, 618-619

> … avoiding some of the complications that may arise and so to prevent them from casting a shadow of unhappiness over the child we have helped create, whose sole excuse for being is to bring happiness to an otherwise unhappy marriage.[181]

Many of the legal concerns were remedied by legislation enacted in Australia from the mid-1970s, which aimed to provide legal certainty to the status of donor-conceived offspring and children born as a result of other ARTs.[182] Generally, a legal position was established whereby the gamete donor was declared not to be the legal parent (i.e. he had no parental rights or responsibilities towards the child) and the husband of the woman undergoing treatment was declared the father (subject to his consent).[183] Nevertheless, changes to the law did not necessarily mean changed social attitudes towards infertility, notions of masculinity and virility, and family formation.

2.7 The Tyranny of the Gift

Gamete donation can be understood as a gift from the body of one person to another. Like donated blood products, tissues, and organs, gametes are a life-giving gift, given in response to the human needs of another. However, gametes are special because they are not life-giving in the sense that they keep others alive, but rather, they can facilitate the creation of a new life.[184] If donation results in the birth of donor-conceived offspring, an enduring moral relationship may be forged between the donor, recipient and donor-conceived offspring, involving long-range obligations on the part of both recipients and the donor.[185] Gamete donation irretrievably links the donor to the recipient(s) and donor-conceived offspring in a way that other gifts (except, perhaps, living organ transplants) do not.

Receiving a gift arguably creates a moral obligation in the receiver to give back something in return, and the more significant the gift, the greater the obligation to

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181 Francis Seymore and Alfred Koerner, above n 171, 1534.

182 *Status of Children Act 1974* (Vic); *Family Relationship Act 1975* (SA); *Status of Children Act 1996* (NSW); *Artificial Conception Act 1985* (WA); *Parentage Act 2004* (ACT); *Status of Children Act* (NT); *Status of Children Act 1974* (Tas).

183 Ibid.

184 Cynthia Cohen, above n 5, 94.

185 Ibid.

reciprocate.[186] Given the significance of the gift provided by gamete donors —the opportunity to create a family — and the fact that the gift is essentially priceless and can never be repaid by recipients, it may create an enormous debt of gratitude in recipients. What has been called the 'tyranny of the gift'[187] may leave recipients vulnerable to control or manipulation by the giver.[188]

Before the introduction of legislation in the late 1980s, the 'tyranny of the gift' between gamete donors and recipients was countered in two main ways. Firstly, the gift relationship was commercialised by paying donors which, in essence, rendered the gift not a gift. Secondly, donors and recipients were kept at arms-length by the practices of privacy and anonymity, which allowed doctors who supplied donated gametes to control tightly the exchange of information by guaranteeing donors' anonymity, refusing to provide information about the outcome(s) of the donation, and only releasing to the recipient non-identifying information about the donor.[189] In this way, the donor was disarmed and, arguably, rendered a 'non-person'.[190]

In Australia, insistence on secrecy and donor anonymity continued throughout the 1970s and 1980s and significant measures were taken to preserve the parties' informational privacy. These measures included advising parents never to mention the offspring's conception to anyone (including the offspring),[191] physically matching the donor to the sterile parent (including blood type),[192] and reportedly, mixing the sperm from more than one donor in order further to confuse paternity.[193]

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186 Ken Daniels and Gillian Lewis, 'Donor Insemination: The Gifting and Selling of Semen' (1996) 11 *Social Science & Medicine* 1521, 1527.

187 Marcel Mauss, *The gift: the form and reason for exchange in archaic societies* (W Halls trans, Routledge, 1990).

188 For further discussion on the way gifts are used to structure society and control others see e.g. Thomas Murray, 'Gifts of the Body and the Needs of Strangers' (1987) 17(2) *Hastings Center Report*; Erik Parens and Lori Knowles, 'Special Supplement: Reprogenetics and Public Policy: Reflections and Recommendations' (2003) 33(4) *The Hastings Center Report* 30, 30-34.

189 Ken Daniels and Karyn Taylor, above n 6, 155.

190 Marek Glezerman, above n 9, 185. Victoria Grace, Ken Daniels and Wayne Gillett, above n 170, 306-307.

191 Ken Daniels, 'Donor gametes: Anonymous or identified?' (2007) 21(1) *Best Practice & Research Clinical Obstetrics and Gynaecology* 113; H Baker, above n 80; Damian Riggs and Brett Scholz, above n 8.

192 Ken Daniels and Karyn Taylor, above n 6, 156.

193 Damien Adams and Caroline Lorbach, above n 5, 709.

2.8 Conclusion: Privacy and Secrecy in Gamete Donation

In gamete donation, anonymity and secrecy were once believed to be crucial to maintaining parties' decisional, informational and local privacy[194] in what was considered a distinctly private matter. The practices of anonymity and privacy also protected the parties from real and perceived social and personal risks that may have arisen if the parties were identifiable to each other or to society as participants to gamete donation. This was especially true before legislation was passed in Australia to formalise the status of children born from donor conception.[195]

Throughout this first era of donor conception, the parties' motivations were primarily characterised by fear: practices of secrecy and confidentiality allowed the adult parties to maintain strict separation and thus protect themselves from real and perceived threats. However, the development of these practices was primarily driven by the paternalistic concerns of the medical practitioners who provided unregulated donor insemination treatments.[196] Because the practice was so secretive, the points of view of donors and recipients are rarely considered. Of note, donor-conceived offspring were generally only contemplated as children and in a paternalistic sense and, consequently, their voices are largely absent from the record and from consideration.[197]

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194 All of these privacy interests may be breached if identifying information about parties to gamete donation is released to each other; See Beate Rössler, above n 151.

195 *Status of Children Act 1974* (Vic); *Family Relationship Act 1975* (SA); *Status of Children Act 1996* (NSW); *Artificial Conception Act 1985* (WA); *Parentage Act 2004* (ACT); *Status of Children Act* (NT); *Status of Children Act 1974* (Tas).

196 Erica Haimes, 'The making of 'the DI child': changing representations of people conceived through donor insemination' in Ken Daniels and Erica Haimes (eds), above n 128, 53–75.

197 Ken Daniels and Karyn Taylor, above n 6, 159.

CHAPTER 3:

CONCEIVING RIGHTS AS RELATIONSHIPS

3.1 Conceiving Rights in Relationships: Privacy Rights Protecting Liberal Autonomy in the Context of Donor Conception

My thesis is that the relationships between parties to gamete donation are best described and understood in terms of legal relationships shaped by legal rights. This is not to say that relationships *should* always be explained solely in terms of legal rights.[198] Indeed, many interpersonal relationships appear removed from the law in their daily workings. Nevertheless, the law works surreptitiously in all relationships, shaping them in important ways,[199] but often only becoming conspicuous when the relationship alters or breaks down.[200] I also acknowledge that 'rights' themselves are loosely and ambiguously defined.[201] People refer to 'rights' in order to identify serious harms and infringements, to make claims for intervention and assistance, and against exercises of government power.[202] Despite the potential for confusion, the language of rights has undeniable rhetorical power and, as Nedelsky notes:

> The battle over the use of the term has been decisively won in its favour. … [T]he best thing to do is to engage with the meaning of rights, to shift it in a relational direction.[203]

Accordingly, while I accept that the language of law and rights may be a blunt instrument for describing relationships, it is a language that allows for a disciplined, analytical and formal analysis of the underlying structure of relationships.

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198 John Hardwig argues strongly that talk of 'rights' is inappropriate in the context of personal relationships, especially women's personal relationships; John Hardwig, 'Should Women Think in Terms of Rights?' in Cass Sunstein (ed), *Feminism & Political Theory* (University of Chicago Press, 1982) 53

199 Jennifer Nedelsky, (2011) above n 36, 65.

200 Marriage provides a good example: through statute, the law explicitly provides a formal structure to both create and dissolve a marriage (the relationship is altered or breaks down). The law may also act surreptitiously at the very heart of well-functioning marriages too by, for example, allowing only heterosexual couples the right to marry, by providing certain evidentiary protections for married persons, and allowing no-fault divorce.

201 Brian Bix, *Jurisprudence Theory and Context* (Sweet & Maxwell, 5th ed, 2009) 131.

202 Jennifer Nedelsky (1990) above n 35, 73.

203 Ibid 73.

In the past, insistence on donor anonymity and absolute secrecy as to the use of donated gametes meant that no relationship could be established between gamete donors, recipients and donor-conceived offspring. In addition, the interests of adult donor-conceived offspring were not considered at all. As I have previously described, pervasive feelings of shame, parties' desire to maintain privacy in personal aspects of their lives, personal and legal vulnerability, and paternalistic attitudes of the medical community, all created a strong desire for privacy. However, privacy and the related concept of autonomy[204] do not operate in a vacuum. Instead, they are grounded in a distinctly liberal socio-political framework. In what follows, I outline the type of liberalism that anchored the relationships between parties to gamete donation in the past, including the liberal conception of autonomy that operated to keep the parties at a legal and physical distance from one another.

3.2 A Framework of Liberal Society/Liberalism

At the core of liberalism is the distinction between public and private domains. This separation is fundamental to the liberal imperative of protecting the individual's autonomy from unwarranted interference by the State and society in general.[205] Generally speaking, the private domain is the realm of individual decision making about sex, reproduction, marriage, and family, and the public domain is the realm of political decision-making. The liberal tradition has its roots in antiquity: the ancient Greeks made a distinction between the 'public' domain of the *polis* city-state, and the 'private' domain of the *oikos,* or household.[206] Similarly, the Romans distinguished *res publicae* (concerns of the community), from *res privatae,* (concerns of individuals and families).[207] For the Greeks and Romans, the public domain of collective governance was occupied by free men with property whose economic status conveyed

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204 I will discuss autonomy as a theoretical concept in more detail below (*Autonomy in a liberal society*, page 59), but generally speaking, most formulations of autonomy involve an element of personal control: 'a person is autonomous if she can ask herself what sort of person she wants to be, how she wants to live, and if she can then live this way'; Beate Rössler, above n 151, 17.

205 Ibid 10, 11.

206 Hannah Arendt, *The Human Condition,* Charles R Walgreen Foundation Lectures (University of Chicago Press, 1958) 22-78.

207 Jurgen Habermas, *The structural transformation of the public sphere: an inquiry into a category of bourgeois society* (Thomas Burger and Frederick Lawrence. trans, Polity Press, 1989), 3-4 (describing Greek and Roman conceptions of public and private).

citizenship.[208] By contrast, the private realm of the household was occupied by wives, children, slaves and servants, who were subordinate to a male head of household.[209] This classical division between public and private domains endures to an extent in the modern Western liberal tradition.[210]

Classical liberalism, schematically presented, has four basic tenets: liberty, equality, neutrality of the state, and democracy.[211] As for the first tenet, all liberal theories are organised around the concept of individual civil liberties that ultimately allow people to live their lives in accordance with, and in the pursuit of, their own idea of the good. At a basic level, these individual rights have been accepted as a constant, even as the reason for asserting them has changed over time.[212] The concept of liberty is often equated with, and recognised by the lay-person, as negative civil liberties which serve to protect the individual from inadmissible intrusions by the state and society. In this sense, strong privacy practices acted in the past to protect parties to gamete donation from interference from each other, and from the state.

The principle of equality demands that all persons are treated as equals. There is some dispute amongst liberal theorists as to whether equality or liberty is the basis for liberalism. Ronald Dworkin characterised equality as the fundamental principle of liberalism – 'liberalism based on equality',[213] while other theorists, principally John Rawls, saw individual liberty as the foundation of liberalism, and characterise

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208 Hannah Arendt, above n 206, 27-78.

209 Anita Allen, 'Coercing Privacy' (1999) 40(3) *William and Mary Law Review* 723, 725.

210 The gendered nature of this division has been criticised by feminist writers. See e.g. Catharine McKinnon who criticises the development of reproductive control legislation under the umbrella of Privacy Law, stating: 'The problem is that while the private has been a refuge for some, it has been a hellhole for others, often at the same time. In a gendered light, the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability'; Catharine MacKinnon 'Reflections on Sex Equality Under Law' (1991) 100 *Yale Law Journal* 1281, 1311.

211 Beate Rössler, above n 151, 10.

212 The purpose of individual civil liberties was articulated differently, depending on the social context within which the theorist was working. For example, Hobbes was influenced by war and religion, while Locke theorised with a view to explaining concepts of property and liberty, and Mill concerned himself with liberty from social control. See e.g. David Bromwich and George Kateb (eds), *On Liberty: John Stuart Mill* (Yale University Press, 2003), 80; John Locke (1632-1704), *Second Treatise of Civil Government* (The University of Adelaide Library eBook, 2008) 5;

213 Ronald Dworkin, 'What is Equality: Part 1 - Equality of Welfare' (1981) 10(3) *Philosophy and Public Affairs*; Ronald Dworkin, 'What is Equality? - Part 2: Equality of Resources' (1981) 10(4) *Philosophy and Public Affairs* 283.

equality as a means of securing and justifying liberty.[214] Either way, the concepts of liberty and equality interact within 'liberalism'. Jeremy Waldron suggests that:

> [A] commitment to equal freedom is not a compromise between freedom and equality. What "equality" does in that formula is to pin down the form of our commitment to freedom; and what "freedom" does is to indicate what it is that we are concerned to equalize.[215]

The third principle of liberalism is neutrality of the state, which seeks to secure the liberal ideal of clearly distinguished public and private domains. At the outset, a distinction can be made between procedural neutrality, which is achievable, and neutrality of aims, which is more problematic.[216] Aspirations of a truly neutral state cannot be realised because, by its very nature, the liberal state is hostile towards anti-liberal ideas and the goals of the liberal state support the collective goals of the powerful majority. Nevertheless, neutrality of the state can be achieved in the 'soft' sense of *procedural neutrality*. In the past, there was no specific legislation to govern donor conception practices, and so the State generally maintained neutrality in relation to private arrangements between parties to gamete donation.

The final principle of liberalism, democracy, protects the right of political liberty through political participation. Regardless of the democratic procedures followed, or precise calculation of representation, individual liberty and political liberty are intimately connected, and both are promoted by the liberal principle of democracy.[217]

3.3 Liberalism with Respect to Children

Principles of classical liberalism (excepting democracy) were reflected in donor conception practices prior to the late 1980s, whereby the liberty of the adult parties was protected by anonymity and secrecy, and the practice was considered beyond the control of the government. However, although the interests of gamete donors and recipients were protected in a liberal manner, donor-conceived offspring, as children,

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214 For example, John Rawls talks about the 'equal worth of liberty'; John Rawls, *A Theory of Justice* (Belknap Press, 2nd ed, 1971), 53.

215 Jeremy Waldron, *Liberal Rights: Collected Papers,* Cambridge Studies in Philosophy and Public Policy (Cambridge University Press, 1993), 428.

216 Chandran Kukathas (ed), *John Rawls: Principles of Justice I* (Taylor & Francis, 2003), 168.

217 Beate Rössler, above n 151*,* 12.

were considered incapable of reason and therefore, were not entitled to individual liberty or equal respect in the same way as the adult parties.[218] John Stuart Mill's position on the matter of children's agency is well known. Immediately after articulating his famous Harm Principle,[219] Mill continued:

> It is perhaps hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children ... Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury ... Liberty, as a principle, has no application to any state of things anterior to the time when mankind has become capable of being improved by free and equal discussion.[220]

John Locke similarly observed that children were an exception to his proposition that all men are in a 'natural state of equality',[221] stating that:

> Children, I confess, are not born in this full state of equality, though they are born to it. Their parents have a sort of rule and jurisdiction over them, when they come into the world, and for some time after; but it is but a temporary one … [A]ge and reason as they grow up, loosen [these bonds] till at length they drop quite off, and leave a man at his own free disposal.[222]

H. L. A. Hart, too, was explicit in stating that the principle of equal rights to freedom does not extend to animals or children. To do so would degrade what it means to hold 'a right'.[223]

I believe that the above attitudes, sustained over three centuries, are informative as to exactly whose liberty was considered important in the past and, therefore, worth protecting. Given that the liberty of children was not considered relevant, it was

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218 David Archard, *Children: Rights and Childhood* (Routledge, 1993), 7.

219 Mills' Harm Principle states that the actions of individuals may only be justifiably limited to the extent necessary to prevent harm to other individuals. In *On Liberty*, Mill states that 'The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'; cited in David Bromwich and George Kateb (eds), above n 212, 80.

220 Ibid 81.

221 John Locke, above n 212.

222 Ibid 55.

223 HLA Hart, 'Are There Any Natural Rights?' (1955) 64(3) *The Philosophical Review* 75, 181.

socially acceptable to keep children in ignorance of the nature of their conception and deny them access to information about their donor. Furthermore, it appears that this reasoning was extended to adult donor-conceived offspring, as if they retained the 'no-rights' status into which they were born.

I have briefly presented a schematic outline of egalitarian liberalism, sufficient to set the scene for a more detailed discussion of the concepts of privacy and autonomy, which structured the (non-) relationships between parties to gamete donation in the past. The concept of liberalism presented is deliberately limited in scope, and excludes more extreme conceptions of liberalism, such as that advocated by Robert Nozick,[224] whose relatively libertarian position greatly favours the principle of liberty over equality. Nonetheless, I have set the political context for a discussion of the strong individual privacy rights that pervaded donor conception practices up to the 1980s. This background also highlights the hypocrisy of denying the rights of donor-conceived offspring.

3.4 Privacy Rights Protecting Liberal Autonomy in the Context of Donor Conception

As we have seen, donor conception combined elements of sex, childrearing and family formation and was thought to belong within the private domain of the family.[225] In the past, practices of anonymity and secrecy protected the decisional, informational, and local privacy[226] of parties to gamete donation. Below, I consider the reasons for recognising and protecting privacy.

The reason why we value privacy, and wish to protect it, is subject to debate within the legal, philosophical and political literature. However, while it is a fascinating field of inquiry,[227] theories of privacy are not the primary focus of this thesis, and so I have selected certain elements of this debate that allow me to demonstrate a logical link between privacy and autonomy. For the purposes of this thesis, I consider three explanations for valuing privacy, for which I borrow the terms *reductive*, *intrinsic* and

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224 See Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974).

225 This is confirmed by the absence of Federal or State legislation to govern the practice of donor conception, or the status of donor-conceived offspring prior to 1984.

226 See Beate Rössler, above n 151.

227 For a recent overview see Australian Law Reform Commission, above n 12, Ch 2: Guiding principles.

functional from Rössler.[228] Generally speaking, reductive explanations reject the assertion that there is a unified meaning or interest behind the various uses of the term 'private'. Reductive explanations insist that the value of privacy lies in one or more other 'higher' values, interests, rights or moral concepts, such as rights over the person or property rights.[229] Intrinsic and functional explanations regard the value of privacy as either inherent or grounded in a practical purpose.[230] Intrinsic and functional explanations put forward the view that privacy is valuable for its own sake.

From a liberal perspective, the link between privacy rights and autonomy is explicit: privacy rights are a necessary condition of individual autonomy.[231] In other words, privacy rights have a *functional* value, because having control over our decisional, informational and local privacy permits and protects an autonomous life by giving us the freedom to choose to live as we wish.

In the period before dedicated legislation was passed, donors, recipients and fertility service providers generally placed great value on maintaining the parties' privacy. This functional explanation is grounded in the connection between privacy and autonomy; that a violation of any of the privacy dimensions discussed above (decisional, informational, or local privacy) would entail a concurrent violation of personal autonomy. A functional explanation leads to the conclusion that, in the past, significant weight was given to protecting gamete donors' and recipients' privacy rights, because doing so would protect their autonomy. Below, I discuss what is meant by a liberal concept of 'autonomy' in the context of gamete donation, and explore why autonomy is of fundamental value to parties of gamete donation, and to us all.

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228 Ibid 67.

229 Rössler is highly critical of reductive explanations of privacy, arguing that such explanations are 'not genuinely plausible'; See Beate Rössler, above n 151, 68.

230 Ibid, 68-69.

231 See e.g. Robert B Halborg, 'Principles of liberty and the right to privacy' (1986) 5(2) *Law and Philosophy*, 184, 184-188.

3.5 Autonomy in a Liberal Society

Scholarly discourse on the concept of autonomy is vast[232] and inconclusive.[233] It is beyond the scope of this thesis to explore the full content of the literature. Instead, I will consider the concept of autonomy as it related to donor conception as practised in a Western liberal society. My reason for exploring the concept of autonomy is to gain a better understanding of how legal rights (or lack thereof) structured the relationships between parties to gamete donation throughout most of the history of gamete donation and why privacy played such a prominent role.

The concept of autonomy as *freedom to choose for ourselves* is a cornerstone of liberal theory developed by Immanuel Kant[234] and John Stuart Mill. Mill stated that 'The only freedom which deserves the name, is that of pursuing our own good in our own way',[235] meaning that the freedom to strive after our own good requires both freedom and the self-determination to identify our *own* good. Individual autonomy includes not only freedom, but also the element of self-determination. Or, as John Harris succinctly puts it, 'autonomy … enables the individual to make her life her own'.[236]

I suggest that, in a liberal socio-political context, privacy might have been so important to parties to gamete donation because it protected their liberal understanding of autonomy. The 'good life' these adult parties were striving to secure

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232 See e.g. Richard Lindley, *Autonomy* (McMillan, 1986); Gerard Dworkin, *The Theory and Practice of Autonomy,* Cambridge Studies in Philosophy (Cambridge University Press, 1988); J Schneewind, 'The use of Autonomy in Ethical Theory ' in Thomas Heller, Morton Sosna and David Wellberry. (eds), *Reconstructing Individualism: Autonomy, Individualism and the Self in Western Theory* (Stanford University Press, 1986); Thomas Hill Jr, 'The Importance of Autonomy' in *Autonomy and Self-Respect* (Cambridge University Press, 1991).

233 Gerard Dworkin stated, with respect to defining autonomy 'about the only feature held constant from one author to another is that autonomy is a feature of persons and that it is a desirable quality to have'; Gerard Dworkin, above n 232.

234 Kant's ethics are based on the presumption that humans are creatures of reason, capable of making reasoned choices, and that their actions should be respected; Lawrence Hinman, *Ethics: A pluralistic approach to moral theory* (Harcourt Brace College Publishers, 1994), 198.

235 David Bromwich and George Kateb (eds), above n 212*,* 83.

236 John Harris 'Consent and End of Life Decisions' (2003) 29 *Journal of Medical Ethics* 10, 10. Similarly, Joseph Raz speaks of the autonomous individual as 'the author of her own life'; see Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986).

was a private family life,[237] and the achievement of this goal was linked to prevailing public attitudes against donor conception. As Joseph Raz observes, the value we place on autonomy must be understood with reference to our society and culture:

> The value of personal autonomy is a fact of life. Since we live in a society whose social forms are to a considerable extent based on individual choice, and since our options are limited by what is available in our society, we can prosper in it only if we can be successfully autonomous.'[238]

Hence, the type of autonomy vested in parties to gamete donation can only be understood in its cultural context. In the past, that cultural context was the sort of liberal society that required strong separation between public and private, secured by privacy rights as a means of protecting the individual from interference by others. For parties to gamete donation, who had real and perceived fears lest their involvement in donor conception be known, rights to decisional, informational and local privacy may have allowed each individual the freedom to choose how they would create and define their family. They were therefore fitting for their times.

3.6 Conclusion: Privacy Rights Protecting Liberal Autonomy in the Context of Donor Conception

Up to the late 1980s, donor conception was defined by practices of anonymity and secrecy intended to create strong barriers between the parties and prevent them from forming relationships. In order to understand why these practices were typical of past donor conception practices, I have considered the dominant cultural and socio-political climate in which the parties were operating.

Above, I briefly explained the liberal philosophical thinking that influenced the development of emphasis on strong privacy that structured the relationships between parties to gamete donation in the past. Crucially, I also demonstrated a functional relationship between privacy and autonomy: that the value of upholding individuals' decisional, informational and local privacy is that privacy is a prerequisite to the liberal ideal of autonomy.

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237 For a fascinating insight into privacy and intimacy within marriage from the time period 1918 to 1963 see Simon Szreter and Kate Fisher, above n 163.

238 Joseph Raz, above n 236, 394.

The ascription of strong privacy rights to parties to gamete donation in the past, and the shoring up that privacy with practices of anonymity and secrecy, can therefore be understood as a means of promoting a liberal concept of autonomy.

3.7 Summary of Part 2

In this second Part of my thesis, entitled Donor Anonymous: Past, I considered practices of gamete donation and donor conception in the period from around the turn of the nineteenth century to 1984.[239] I established a historical starting-point from which to trace, and critically analyse, the development of legal regulation of these practices.

I argued that the practices of anonymity and secrecy, which defined donor conception throughout this period, may have been considered crucial to maintaining the parties' privacy, and protecting them from real social and personal risk that may have arisen if the parties were identifiable to each other or to society as participants in gamete donation. I then considered the nature of the legal relationships between donors, recipients and donor-conceived offspring in the past, within a liberal socio-political framework. I showed that the parties' relationships were defined by strong privacy rights that effectively barred them from establishing any functional relationship after the donation had been made, even if the parties had wanted to. Furthermore, I suggested that there was a perceived functional relationship between privacy and autonomy. The value of upholding individuals' decisional, informational and local privacy was grounded in a belief that privacy is a prerequisite to liberal autonomy.

Crucially, this practice of donor conception throughout this period was defined by paternalistic practices and motivated by (real and perceived) fear. Medical practitioners held a great deal of power over recipients, and may have been motivated as much by benevolent paternalism as by self-interest (as many donors were medical students).[240] Prior to the 1980's, the interests of donor-conceived offspring were not considered in the formulation of practices of donor-conception, beyond their

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239 This period represents the time when donor-assisted conception began to be documented in the literature, and the introduction of legislation to govern the practice; Addison Hard, above n 2; *Infertility (Medical Procedures) Act 1984* (Vic).

240 Ken Daniels, 'The semen providers' in Ken Daniels and Erica Haimes (eds), above n 128, 76; Ken Daniels and Gillian Lewis, above n 186, 1531.

immediate needs as babies and children. Throughout this period, the voices of adult donor-conceived offspring are conspicuously absent.

In the next Part, I focus on present practices of gamete donation, from 1984 to the present day. Current practices are exemplified by the development of interdependent relationships between donors, recipients and donor-conceived offspring, which have been brought about by shifting social attitudes and the gradual introduction of state legislation and professional *Guidelines* to regulate assisted reproductive treatments, including the use of donated gametes. In contrast to the past, these legislative changes have prompted a move away from practices of secrecy and anonymity in gamete donation, and thus have paved the way for interpersonal relationships between parties to gamete donation to develop, without undermining individual autonomy

PART 3: FROM SECRECY TO OPENNESS: PRESENT

In the previous Part, I considered past practices of gamete donation, which were grounded in classical liberal socio-political theory and defined by a commitment to privacy that was intended to protect the individual autonomy of gamete donors and recipients. These strong informational and local privacy rights were characterised by practices of secrecy and anonymity, whereby the parties were unknown to each other and it was recommended that gamete donation should not be discussed outside of the clinical relationship with the treating doctor.[241] In the past, before legislation was passed to formalise the status of children born from donor conception[242] and regulate the use of ART,[243] the parties had no interpersonal relationship with each other before or after the donation was made.

In this Part, I focus on the development of interpersonal relationships between donors, recipients and donor-conceived offspring, which I attribute to a gradual shift in public attitudes, increased awareness of issues facing parties to gamete donation, and the introduction of state legislation and professional *Guidelines* to regulate assisted reproductive treatments, including the use of donated gametes.

I begin by considering the role of secrecy in gamete donation, and the breakdown of strict practices of anonymity and secrecy from the 1980s onwards. I go on to consider how the demise of anonymous donation and reduced secrecy concerns, in some Australian jurisdictions, were linked to a significant shift in social attitudes towards assisted reproductive treatments, including donor conception from the 1980s. In particular, biomedical developments and increased social acceptance led to a willingness to consider assisted reproductive treatments at a policy and political level. Following on from this, I explain the subsequent and significant legislative changes in

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241 Kara Swanson, above n 33, 611; Royal College of Obstetricians and Gynaecologists, above n 10.

242 *Status of Children Act 1974* (Vic); *Family Relationship Act 1975* (SA); *Status of Children Act 1996* (NSW); *Artificial Conception Act 1985* (WA); *Parentage Act 2004* (ACT); *Status of Children Act* (NT); *Status of Children Act 1974* (Tas).

243 *Infertility (Medical Procedures) Act 1984* (Vic); *Assisted Reproductive Treatment Act 1988* (SA); *Human Reproductive Technology Act 1991* (WA); *Assisted Reproductive Technology Act 2007* (NSW).

Australia from 1984[244] that facilitated a move away from practices of secrecy and anonymity in gamete donation, and thus opened the way for interdependent relationships between parties to gamete donation to develop.

In order to characterise properly and critically analyse the evolving and complex relationships between parties to gamete donation during this current period (1984-present), I situate the parties within a broader socio-political context. Importantly, the introduction of legislation and guidelines to regulate donor conception took place within wider socio-political changes, whereby accepted boundaries between public and private domains were shifting, and the State began to regulate previously private spheres of the family and the home. In response, the new legislation created and defined legal relationships between parties to gamete donation, and facilitated the exchange of information between parties, where previous practices of secrecy and anonymity had erected impenetrable boundaries.

In discussing the way legal relationships between the parties came to be structured by legal rights within a broader socio-political context, I contrast the concepts of liberal autonomy, and relational autonomy. Relational theories tend to be critical of liberal theory and, I argue, provide a better means of analysing and criticising *current* legal relationships between the parties. Relational theories consider 'rights *as* relationships'.[245] That is to say, they maintain that each individual is constituted by the relationships they are a party to, and it is the purpose of rights to structure these relationships. Instead of viewing the parties as free-standing individuals in potential conflict, relational theories view them as parties to an interdependent relationship. From this it tends to follow that relationships are the best means to achieving autonomy, rather than separateness.

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244 The first legislation to regulate the use of assisted reproductive technology in Australia commenced in Victoria in 1984; *Infertility (Medical Procedures) Act 1984* (Vic).

245 The idea of rights as relationships was first articulated by Jennifer Nedelsky. See Jennifer Nedelsky (1993a) above n 36; Jennifer Nedelsky (1990) above n 35.

CHAPTER 4:

SECRECY IN GAMETE DONATION

4.1 Setting the Scene: Secrecy and Anonymity in Gamete Donation

In the past, secrecy and anonymity played a pivotal role in the practice of gamete donation. In addition to legal concerns, which were largely addressed by the introduction of legislation in the 1970s and 1980s,[246] the perceived need for secrecy was rooted in socially-conditioned feelings of denial and shame in relation to male infertility,[247] and public intolerance of the practice of gamete donation.

Until relatively recently, donations made to fertility clinics were anonymous and recipients were discouraged from discussing with anyone, including their donor-conceived offspring, the nature of the conception.[248] In 1987, the UK Royal College of Obstetricians and Gynaecologists advised patients receiving donor insemination that:

> unless you reveal [donor insemination] to your child, there is no reason for him or her to ever know that he or she was conceived by donor insemination.[249]

Although social attitudes have shifted and recipients are now advised to disclose to donor-conceived offspring the facts of their conception, [250] many still choose not to do

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246 *Status of Children Act 1974* (Vic); *Family Relationship Act 1975* (SA); *Status of Children Act 1996* (NSW); *Artificial Conception Act 1985* (WA); *Parentage Act 2004* (ACT); *Status of Children Act* (NT); *Status of Children Act 1974* (Tas).

247 Petra Thorne and Ken Daniels, 'A group-work approach in family building by donor insemination: empowering the marginalized' (2003) 6(1) *Human Fertility* 46, 46.

248 Ken Daniels and Gillian Lewis, above n 186; H Baker, above n 80; Damian Riggs and Brett Scholz, above n 8.

249 Royal College of Obstetricians and Gynaecologists, above n 10.

250 See e.g. Victorian Assisted Reproductive Treatment Authority *Time to Tell* brochure and resources available online: www.varta.org.au; Part 6.1 of the NHMRC *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2004* states that "[p]ersons conceived using ART procedures are entitled to know their genetic parents. Clinics must not use donated gametes in reproductive procedures unless the donor has consented to the release of identifying information about himself or herself to the persons conceived using his or her gametes. Clinics must not mix gametes in a way that confuses the genetic parentage of the persons who are born."; National Health and Medical Research Council, see n 25.

so.[251] Some recipients of donated gametes are anxious that disclosure may only serve to confuse donor-conceived offspring,[252] or concerned that disclosure will cause donor-conceived offspring to reject the parent who is not biologically connected to them.[253] Other parents do not disclose because they simply do not think it necessary to do so, or do not 'see the point'.[254] For families created by donor-conception, maintaining secrecy may come at a significant cost.

4.2 Effect of Secrecy on the Parties

For families that subscribe to secrecy, and do not disclose to the donor-conceived offspring that they are donor-conceived, some research has suggested that there may be insidious and damaging effects on the family relationships and, consequently, on the child.[255] For parents who use donor insemination to achieve pregnancy, feelings of stigmatisation may lead them to deny the use of donor sperm and view the treatment as a shameful secret,[256] and this is only reinforced by a paternalistic approach that marginalises and disempowers these families further.[257]

However, the secret has the potential to marginalise the family from society as its members strive to conform to social norms and expectations.[258] For the family, the keeping of secrets may cause tension,[259] distancing, and jeopardising communication between family members. In particular, keeping the use of donor gametes a secret may create a psychological barrier between those who know (parents, friends, and other family members) and those who do not know (the donor-conceived

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251 See Chapter 10 - Knowing That They are Donor-conceived, page 135 for further discussion.

252 D Greenfeld and S Klock, 'Disclosure decisions among known and anonymous oocyte donation recipients' (2004) 81(6) *Fertility & Sterility* 1565.

253 Lucy Frith, Neroli Sawyer and Wendy Kramer, 'Forming a family with sperm donation: a survey of 244 non-biological parents' (2012) 24(7) *Reproductive Biomedicine Online* 709; Fiona MacCallum and Susan Golombok, 'Embryo donation families: mothers' decisions regarding disclosure of donor conception' (2007) 22(11) *Human Reproduction* 2888; Ken Daniels, Victoria Grace and Warren Gillett, 'Factors associated with parents' decisions to tell their adult offspring about the offspring's donor conception' (2011) 26(10) *Human Reproduction* 2783.

254 Susan Golombok et al, 'Social versus biological parenting: family functioning and the socioemotional development of children conceived by egg or sperm donation' (1999) 40(4) *Journal of Child Psychology and Psychiatry* 519, 525.

255 Ken Daniels and Karyn Taylor, above n 6, 159-162.

256 Ken Daniels, above n 192.

257 Ronald Bailey, 'Warning: bioethics may be hazardous to your health: the moralists attack on medical progress and patient freedom' (1999) 31 *Reason* 24

258 Petra Thorne and Ken Daniels, above n 247, 47.

259 Annette Baran and Reuben Panor, *Lethal Secrets: The Psychology of Donor Insemination: Problems and Solutions* (Amistad, 2nd ed, 1993).

offspring).[260] This is recent knowledge; reporting in 1984, the Warnock Committee noted that

> 'the sense that a secret exists may undermine the whole network of family relationships. [Donor-conceived] children may feel obscurely that they are being deceived by their parents, that they are in some way different from their peers, and that the men whom they regard as their fathers are not their real fathers'.[261]

In their study of the experiences of sixteen donor-conceived offspring who found out about their conception as adults, Turner and Coyle[262] reported that some had 'always' felt that they did not fit in with their families because of different physical characteristics or talents, while others had long been aware that information about them was being withheld from them, although they did not exactly know what it was.[263] Turner and Coyle identified five psychological themes associated with donor-conceived offspring who found out the nature of their conception as adults. These included first, mistrust for their parents and a sense that their life up to the point of disclosure was a lie; second, damaging effects on family and parental marital relationships;[264] third, the desire to make biological connections with their donor; fourth, undertaking a search for details of their donor and, fifth, a desire but perceived inability to talk about their biological origins with significant others.[265] Although many of the donor-conceived offspring interviewed by Turner and Coyle had negative reactions to the disclosure, some felt positively about it and the disclosure was a source of improved self-esteem. For example, one donor-conceived offspring stated:

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260 Effy Vayena and Susan Golombok, above n 101, 294.

261 Department of Health and Social Security *(Warnock Committee Report*), above n 14, 21.

262 Amanda Turner and Adrien Coyle, 'What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications for counselling and psychotherapy' (2000) 15(9) *Human Reproduction* 2041; I acknowledge criticisms made by Scheib, Riordan and Rubin that the sample size was low and participants were recruited by DI support groups, but Turner and Coyle's paper remains one of the few detailing the experiences of donor-conceived offspring who found out about their conception as adults; Joanna Scheib, Maura Riordan and Susan Rubin, 'Choosing Identity-release sperm donors: The patient's perspective 13-18 years later' (2003) 18(5) *Human Reproduction* 1115.

263 Amanda Turner and Adrien Coyle, ibid, 2045; see also Annette Baran and Reuben Panor, above n 259.

264 One respondent stated that '…A major part of the problem was his shame about being infertile. I was a walking symbol of his infertility. I became a battle ground for my parents' conflicts'; Amanda Turner and Adrien Coyle, above n 262, 2046.

265 Ibid, 2044-2048.

My initial reaction was to laugh. I thought it was hysterical. The man I thought was my dad was such a creep that it was nice to know I wasn't genetically related to him. I guess it changed my view of my identity. It changed it in a positive way. Instead of being the child of this terrible man [her social father], I was probably the daughter of a doctor [the donor].[266]

[266] Ibid, 2045.

CHAPTER 5:

POLITICAL INTEREST IN DONOR CONCEPTION

5.1 Shifting Social Attitudes and Political Interest in Gamete Donation and Donor Conception

From the early 1980s, assisted reproductive treatments including donor conception found a place in social and political discussion in Australia and other common-law countries, including New Zealand[267] and England.[268] In particular, breakthroughs in reproductive medicine, increasing acceptance and uptake of assisted reproductive treatments and inclusion of fertility treatment in the Medicare schedule, has made assisted reproductive treatment a topic of public interest.[269] As a topic of public interest, regulation of assisted reproductive treatments, including donor conception, has been considered in several inquiries and committee reports. [270] Such reports have generally resulted in the drafting of new or amending legislation.

5.2 Political Interest in Gamete Donation and Donor Conception

From 1960, a number of political committees and working parties considered and reported on the regulation of assisted reproductive treatments, including donor insemination. A review of the resulting committee reports reveals a significant shift from the 1960s to the 1980s in social attitudes towards the practice of donor conception. In this chapter, I focus on three key committee reports that considered the practice and proposed regulation of donor insemination, and ultimately led to the introduction of legislation to regulate donor conception in the United Kingdom and Australia. I identify the 1960 *Feversham Committee Report*[271] from the United Kingdom as representative of past attitudes towards donor conception, and contrast

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267 See e.g. *Status of Children Amendment Act 1987* (NZ) s4-7, 10-11.

268 I discuss a number of United Kingdom political reports below.

269 See e.g. Gabor Kovacs et al, above n 29.

270 Home Office and Scottish Home Department *(Feversham Committee Report*) above n 164; Department of Health and Social Security (*Warnock Committee Report*) above n 14; Committee to consider the Social, Ethical and Legal issues Arising from In Vitro Fertilization, 'Report on Donor Gametes in IVF' (Parliament of Victoria, 1983) (*Waller Committee Report*); *Infertility (Medical Procedures) Act 1984* (Vic); *Assisted Reproductive Treatment Act 1988* (SA); *Human Reproductive Technology Act 1991* (WA); *Assisted Reproductive Technology Act 2007* (NSW).

271 Home Office and Scottish Home Department (*Feversham Committee report*), above n 164.

that report to the United Kingdom *Warnock Committee Report* and Victorian *Waller Committee Report*,[272] both completed in the mid- 1980s and representative of changing attitudes towards donor conception.

5.2.1 The Feversham Committee Report

The Scottish case of *MacLennan v. MacLennan*[273] brought the issue of donor conception to public consciousness in the United Kingdom, and was the catalyst for a United Kingdom Parliamentary enquiry into donor conception. The *McLennan* case involved an application for divorce by Mr McLennan, citing adultery. Mr and Mrs McLennan had been married in1952, but the marriage was not a success and they separated shortly thereafter. Mrs McLennan then moved to the USA where she gave birth to a baby girl in 1955. The otherwise straightforward case became sensational when Mrs McLennan defended the claim of adultery, stating that she had conceived the child through donor insemination. Controversially, the Court of Session ruled that artificial insemination by donor was not adulterous and therefore was not cause for divorce.[274]

Following the *McLennan* decision, the UK Parliament established the Committee on Human Artificial Insemination, chaired by the Earl of Feversham. The remit of the Committee was to:

> … enquire into the existing practice of human artificial insemination and its legal consequences and to consider whether, taking account of the interests of individuals involved and of society as a whole, any change in the law is necessary or desirable.[275]

Overall, the Committee considered that artificial insemination of a woman with her husband's sperm was, as a last resort, an acceptable form of treatment for some couples, but believed that the practice of donor insemination was opposed by the majority of both society and the medical profession. The Committee was of the view

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272 Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization (*Waller Committee Report*), above n 270.

273 *MacLennan v. MacLennan* (1958) S.L.T. 12.

274 *MacLennan v. MacLennan* (1958) S.L.T. 12. However, Mrs McLennan was unable to satisfy the court that the baby had been donor-conceived, and Mr McLennan was granted the divorce.

275 Home Office and Scottish Home Department (*Feversham Committee report*), above n 164, 1.

that donor insemination was an undesirable practice and to be strongly discouraged, but concluded:

> … it would be in accord with the wishes and with the interests of society as a whole that those who desire to administer and receive [donor insemination] should be free to do so without interference by the law.[276]

The Committee was clearly of the view that donor insemination should cease altogether, and in principle they would have liked to have seen it prohibited. However, they accepted that prohibition was unlikely to be effective, and this, coupled with strong views on the relationship between morality and the criminal law, which were clearly articulated in the Wolfenden Report,[277] led them to the conclusion that donor insemination should not be prohibited by law. The Committee stated:

> We think that the question whether [donor insemination] should in all circumstances be a criminal offence must depend on (1) whether the practice could be effectively prohibited and (2) whether its extent and social consequences are such as to justify the creation of such an offence.[278]

The Committee considered that donor insemination presented a danger to all the parties involved (recipients, donors, donor-conceived offspring, and treating doctors) and also posed a danger to society at large by weakening the institution of marriage (they believed that it may lead to indifference concerning marriage vows),[279] by deceiving children, and 'by substituting an anonymous and mechanical procedure for an intimate personal relationship'.[280] However, the Committee did not consider legal prohibition or regulation to be either possible or desirable. First, the Committee considered that criminal prohibition would be difficult to enforce, and would 'be considered to be an unjustified encroachment on the freedom of the individual in a sphere of behaviour where the law does not normally intrude'.[281] Legal regulation was also considered undesirable because 'any proposal to regulate [donor

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276 Ibid 147.

277 Committee on Homosexual Offences and Prostitution (*The Wolfenden Report*), above n 159, 24; see page 35 for an account of the relationship between morality and the criminal law expressed in the Wolfenden Report.

278 Home Office and Scottish Home Department (*Feversham Committee report*), above n 164, 148.

279 Ibid, 214.

280 Ibid, 218.

281 Ibid, 237.

insemination] by excluding certain cases as unsuitable implies that other cases are suitable for [donor insemination] … we do not ourselves consider that [donor conception] is a desirable course in any circumstances'.[282] Accordingly, the Committee recommended against legislation that would legitimise the donor-conceived child of a married couple.[283] The Committee did, however, specifically address the issue in *MacLennan* by recommending that acceptance by a woman of donor insemination without her husband's consent should be made a new ground for divorce or judicial separation.[284]

Immediately following publication, the Feversham Committee report was heavily criticised on a number of grounds, including overrepresentation of religious organisations and under-representation of the legal profession in the written and oral evidence it considered,[285] failure to consider relevant literature and critically evaluate evidence in its decision making,[286] and failure to report on the actual terms of enquiry.[287] In addition, it was said that the Committee tended to pathologize recipients and donors, and to view the practice of donor insemination with deep suspicion. Without any supporting evidence, the Committee concluded that sperm donation 'is an activity which might be expected to attract more than the usual proportion of psychopaths'.[288] It suggested that the kind of man who is 'prepared to give semen to a woman whose mental and physical background is unknown to him, and who is

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282 Ibid, 261. However, the Committee clearly regarded some applications of donor insemination to be worse than others. For example, the Committee considered that insemination of a single woman '… should never be undertaken if there is not in the home a husband who is prepared to exercise the responsibilities of fatherhood from the beginning. It is manifestly unfair to the child to impose on him the additional handicap of having no one to look to as his father'; Ibid, 113.

283 In addition to providing official recognition of the practice of donor conception, the Committee was concerned that legitimacy for donor-conceived offspring would interfere with hereditary succession. The Committee noted that 'succession through blood descent is an important element in family life and as such it is at the basis of society'; Ibid,163.

284 Ibid, 117; see contra *MacLennan v. MacLennan* (1958) S.L.T. 12.

285 G W Bartholomew, 'The Report of the Feversham Committee - A Sterile Solution' (1960) 2 *University of Malaya Law Review* 201, 202-203.

286 Ibid, 204-206; Bartholomew was particularly scathing in his assessment of the Feversham Committee's reasoning, noting '[T]he Committee state what they think, but not the grounds upon which they think it. The whole argument is couched in vague meaningless generalities. This sort of recommendation by intuition gets a little irritating after a while: one has a right to expect something a little more solid from a departmental committee —this is reasoning on the level of a mothers' meeting'; Ibid, 217.

287 Bartholomew draws attention to '… the spectacle of a Committee set up to enquire whether any change in the law is either necessary or desirable recommending against a change on the grounds that it would involve a change'; Ibid, 220.

288 Home Office and Scottish Home Department (*Feversham Committee report*), above n 164, 59. Ken Daniels and Karyn Taylor, above n 6, 156.

prepared to father children who will be born into a completely unknown environment … is a man whose ethical standards are so unusual as to be of doubtful value from a eugenic point of view.'[289]

Whilst it is true that the Feversham Committee Report does not withstand close initial scrutiny, it is nevertheless an historical sign of the times when donor conception was viewed by society with deep suspicion and disapproval.

5.2.2 The Warnock Committee Report

The United Kingdom *Committee of Inquiry into Human Fertilisation and Embryology*[290] was convened in July 1982, in response to the ethical and scientific debates generated by the birth of Louise Brown, the first IVF baby, in 1978. The remit of the Warnock Committee was to:

> consider recent and potential developments in medicine and science related to human fertilisation and embryology; to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments; and to make recommendations.[291]

The Warnock Committee considered a range of submissions and existing literature on the subject of artificial insemination in order to fully consider the terms of its enquiry. In the end, the Warnock Committee made 64 specific recommendations, and articulated key principles to govern the regulation of assisted reproductive technology, many of which are reflected in the legislation governing human fertilisation and embryology in the United Kingdom and Australia today. These key principles include the special status of the embryo outside the human body; the requirement for patients and donors to be offered counselling, and for them to provide informed consent before treatment is given or donations made; the need to consider the welfare of any child to be born as a result of fertility treatment and the right of donor-conceived offspring to gain access to information about their genetic parents.

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289 Dr Hector Maclennan, Verbatim Report of Oral Evidence, 10 February 1959, Office and Scottish Home Department (*Feversham Committee report*), above n 164.

290 Department of Health and Social Security *(Warnock Committee Report*), above n 14.

291 Ibid, 4.

In making their recommendations, the members of the Warnock Committee adopted the following stance:

> What is common (and this too we have discovered from the evidence) is that people generally want some principles or other to govern the development and use of the new techniques. There must be some barriers that are not to be crossed, some limits fixed, beyond which people must not be allowed to go. Nor is such a wish for containment a mere whim or fancy. The very existence of morality depends on it. A society which had no inhibiting limits, especially in the areas with which we have been concerned, questions of birth and death, of the setting up of families, and the valuing of human life, would be a society without moral scruples. And this nobody wants.[292]

The Warnock Committee was operating in a different society from the one that provided the setting for the Feversham Committee's report, and this may explain some of the differences in the conclusions drawn and willingness to propose legal regulation of donor insemination. In particular, the Warnock Committee approached donor insemination as an established social practice, which was not the case in 1960 and, as such, the Warnock Committee appreciated that it would be almost impossible to prohibit the practice although it could be controlled through regulation. The second major difference between the Warnock and Feversham Committee reports was the role of the 'family' in 1984 compared to 1960. The Feversham Committee had presented the 'family' as an institution concerned with the regulation of sexual behaviour, the ordered devolution of inheritance, and identity through blood ties.[293] However, by the mid-1980s, the nature of the family had changed. By the time the Warnock Committee was convened, the family was generally seen as a forum for individual fulfilment, serving as the basic unit of child rearing, whereby contributions made by a parent of each sex were seen as essential to good child-rearing.[294]

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292 Ibid, 2.

293 In rejecting a proposal for legitimising donor-conceived offspring, the Feversham Committee noted that 'it might be a serious encroachment on the rights of other members of the husband's family and would interfere with the principle of hereditary succession while is at the basis of our society'; quoted in G W Bartholomew, above n 285.

294 Robert Lee and Derek Morgan, *Birthrights: Law and Ethics at the Beginnings of Life* (Routledge, 3rd ed, 2004), 124.

In contrast to the Feversham Committee, the Warnock Committee did not reject the notion of donor insemination as a means of family-building for infertile couples. While acknowledging that donor insemination was not acceptable to all members of society, the Committee concluded that the practice of donor insemination 'will continue to grow' and 'should no longer be in a legal vacuum but should be subject to certain conditions and safeguards, and receive the protection of the law'.[295] Furthermore, the Warnock Committee expressed dissatisfaction with the existing practices of secrecy and anonymity, stating that 'while it is wrong to deceive children about their origins, we regard this as an argument against current attitudes, not against [donor insemination] in itself'.[296]

To this end, the Committee recommended that donor insemination should only be practised by licensed fertility service providers,[297] and supported recommendations made by the English Law Commission that the law should be reformed to remove all legal disadvantages of illegitimacy so far as they affect illegitimate children. Specifically, the latter recommendation required a change to legislation to allow a donor-conceived offspring to be legally treated as the legitimate child of his or her mother and her husband where they have both consented to the treatment.[298] Furthermore, the Committee recommended that the law should be changed to permit the existing (illegal) practice whereby the husband of the woman receiving donor-insemination was registered as the father of donor-conceived offspring on the register of births,[299] and vice-versa in the case of egg donation.[300] Finally, the Committee sought to clarify the legal position of gamete donors by formally legislating to the effect that gamete donors have no parental rights or duties in relation to donor-conceived offspring.[301]

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295 Department of Health and Social Security *(Warnock Committee Report)*, above n 14, 22.
296 Ibid, 21.
297 Ibid, 22.
298 Ibid, 22-23.
299 The Committee also recommended 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'; Ibid, 26.
300 Ibid, 37.
301 Ibid, 25, 37.

Although the Warnock Committee concluded that there was a need to maintain absolute donor anonymity, [302] it expressed a strong desire to discourage secrecy between parents and their donor-conceived offspring.[303] The Committee stated:

> We believe that people should be encouraged to be open about this form of treatment. Such openness may be easier in consequence both of the legal changes we have recommended, and of the increase in provision which we hope to see. Together these should make [donor insemination] more acceptable as a means of relieving male infertility. But a change in attitude towards male infertility is also required. [304]

Accordingly, the Committee recommended that legislation should be prospectively amended to allow donor-conceived-offspring to gain access to basic information about their donor's ethnic origin and genetic health on reaching the age of eighteen.[305]

The Warnock Committee Report urged legislative and social change in relation to donor insemination, and many of the recommendations put forward by the Committee were adopted in the white paper *Human Fertilisation and Embryology: A Framework for Legislation* in 1987, and subsequent *Human Fertilisation and Embryology Act 1990.* Yet, despite representing a more modern approach to donor conception than the Feversham Committee report, the Warnock Committee Report can be observed to contain the common assumption that the two-parent heterosexual family is the basic unit of society, and to frame its proposals for regulation accordingly.

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302 Ibid, 25.

303 This goal is somewhat contradicted by the Committee's recommendation that the non-genetic marriage partner should be permitted to be registered as the mother or father on the register of births. However this criticism is tempered by the Committee's additional suggestion that the phrase 'by donation' could follow the non-genetic parent's name on the register of births.

304 Department of Health and Social Security *(Warnock Committee Report*), above n 14, 28.

305 Ibid, 24-25. The committee admitted that 'one consequence of this provision would be that [donor-conceived offspring], even if informed about the circumstances of their conception would never be entitled to know the identity of their genetic fathers'; Ibid, 25.

5.2.3 The Waller Committee report

In May 1982, the Victorian Government established the Committee to Consider the Social, Ethical and Legal Issues Arising From In Vitro Fertilization, chaired by Professor Louis Waller (the 'Waller Committee'). The Waller Committee's mandate was:

> To consider whether the process of in vitro fertilization (IVF) should be conducted in Victoria and, if so, the procedures and guidelines that should be implemented in respect of such processes in legislative form or otherwise.[306]

The Waller Committee released two reports on the subject of IVF. The first Interim Report was issued in September 1982, and only considered what the Committee described as the 'most common IVF situation' – where a husband and wife were seeking fertility treatment using their own gametes.[307] The Waller Committee recommended that this type of IVF treatment should be allowed, and that legislation should be enacted to authorise hospitals as centres in which IVF programs of this type could be conducted.[308]

The Waller Committee's second report is more relevant to this thesis. In it, the Committee considered the use of donor gametes in IVF and in donor insemination.[309] The Committee approached the issue of donor insemination with the understanding that 'the practice of [donor conception] as part of the management of infertility has become established in the Victorian community'[310] and, accordingly recommended that the use of donor gametes should be permitted in Victoria.[311]

Like the Warnock Committee, the Waller Committee opposed secrecy between recipients and their donor-conceived offspring as to their donor-conceived status, noting the growing view that 'honesty and integrity are crucial to the creation of

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306 Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, Parliament of Victoria, *Interim report* (1982) 2.

307 Ibid, 26-27.

308 Ibid, 35-36.

309 It also considered, and approved, the use of donor embryos in IVF. Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization (*Waller Committee Report*), above n 270, 38-41.

310 Ibid, 9.

311 Ibid, 10, 12.

happy families'.[312] In particular, the Committee considered that donor-conceived offspring had a right to non-identifying information about their donor,[313] and recommended that detailed information about gamete donors should be maintained by the Health Commission and hospitals conducting IVF programs.[314] In relation to identifying information, the Waller Committee went much further than the Warnock Committee, by noting that legislation had been passed in a number of jurisdictions providing for adopted children to discover some information about their backgrounds[315] and suggesting that over time community attitudes to providing identifying information to donor-conceived offspring may also change:

> … view[s] and attitudes of the Victorian community on this subject may well develop, and develop rapidly in light of further experience in adoption, [donor insemination], and other forms of genetic variations in parenting.[316]

To this end, the Committee recommended that recorded information about donors and pregnancies should be kept and preserved by the Health Commission and hospitals conducting IVF programs so that it would remain possible in the future for identifying information to be provided to donor-conceived offspring.

Finally, the Committee reaffirmed previous recommendations that the legal status of donor-conceived offspring should be equal to that of legitimate children, if the husband (de facto or de jure) of the woman receiving treatment consented to the treatment,[317] and vice versa for egg donors.[318]

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312 Ibid, 26.

313 The Committee recommended that the gamete donors' 'genealogical background, medical history, and personal characteristics may be transmitted to the recipients of the gametes, any child or children born as a result of the donation and, if necessary, any medical practitioner treating such child or children'. Ibid, 20.

314 The Committee recommended that '… his or her genealogical background, medical history, and personal characteristics may be transmitted to the recipients of the gametes, any child or children born as a result of the donation and, if necessary, any medical practitioner treating such child or children'. Ibid, 20.

314 Ibid, 26.

315 Ibid 28.

316 Ibid, 28. The committee also noted that donors should be advised that 'there can be no guarantee of permanent, complete anonymity', perhaps anticipating the possibility of retrospective release of information about donors to donor-conceived offspring; Ibid, 20

317 Ibid, 33.

318 Ibid, 36.

A draft bill was prepared based on many of the recommendations in the Waller Committee's reports, and the resulting *Infertility (Medical Procedures) Act 1984* (Vic)[319] was the first legislation in the world to regulate assisted reproductive treatment.

5.3 Conclusion: Political Interest in Donor Conception

The findings and recommendations of the *Feversham Committee report* of 1960, and the *Warnock Committee* and *Waller Committee reports* of 1984 and 1983, respectively, reflect a significant shift in social attitudes towards donor insemination. While the *Feversham* report was informed by strong social disapproval of the practice and recommended against legal regulation for fear that it may legitimise the 'destructive' practice of donor insemination, this hard-line had softened by the mid-1980s. Both the *Warnock* and *Waller* reports approached donor insemination as an acceptable and growing practice to circumvent male-factor infertility, and recommended that legislation should be passed to regulate the practice and legitimise donor-conceived offspring. Although both committees encouraged openness and honesty between recipients and donor-conceived offspring, the *Waller Committee* rejected the need for donor anonymity and went so far as to suggest that documentation should be preserved so that it would be possible to release donors' identifying information to donor-conceived offspring in the future.

Following the release of the *Warnock* and *Waller Committee Reports*, both the UK and Victorian parliaments passed legislation to regulate the practice of donor insemination/donor conception. Next, I discuss the development of State legislation and professional Guidelines to regulate gamete donation in Australia, and legally define the interpersonal relationships between parties to gamete donation.

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[319] In force from 1 July 1988.

CHAPTER 6:

STATE LEGISLATION AND PROFESSIONAL GUIDELINES TO REGULATE GAMETE DONATION AND DONOR CONCEPTION

6.1 Shifting Social Attitudes as a Catalyst for Legislative Change

From the mid 1980s, there has been a gradual but distinct change in social attitudes towards gamete donation and donor conception. Although gamete donation and donor conception were once viewed with suspicion and founded on principles of secrecy and anonymity, over the past three decades there has been an increasing public acceptance of donor conception.[320] In line with this shift, donor anonymity has been ended (either legislatively or via professional guidelines)[321], recipients of donated gametes are now encouraged to be open and honest with children about the nature of their conception,[322] and resources have been developed in some jurisdictions to assist donors and donor-conceived individuals to obtain access to information about each other.[323]

For many decades, donor conception was not legally regulated and the legal status of donor-conceived offspring was uncertain. As discussed in Part 2, this situation left the parties vulnerable to legal and personal risk, which was mitigated by practices of secrecy and anonymity intended to separate the parties from each other. Under this

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320 See e.g. A Skoog Svanberg et al, 'Public opinion regarding oocyte donation in Sweden' (2003) 18(5) *Human Reproduction* 1107; V Bolton et al, 'A comparative study of attitudes towards donor insemination and egg donation in recipients, potential donors and the public' (1991) 12 *Journal of Psychosomatic Obstetrics & Gynaecology* 217; Nicky Hudson et al, '"Public" perceptions of gamete donation: A research review' (2009) 18 *Public Understanding of Science* 61, 65.

321 National Health and Medical Research Council, see n 24; *Assisted Reproductive Treatment Act 2008* (Vic); *Human Reproductive Technology Act 1991* (WA); *Assisted Reproductive Technology Act 2007* (NSW); *Assisted Reproductive Treatment Regulations 2010* (SA).

322 See e.g. Victorian Assisted Reproductive Treatment Authority, above n 250; Part 6.1 of the NHMRC *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2004* state that '[p]ersons conceived using ART procedures are entitled to know their genetic parents. Clinics must not use donated gametes in reproductive procedures unless the donor has consented to the release of identifying information about himself or herself to the persons conceived using his or her gametes. Clinics must not mix gametes in a way that confuses the genetic parentage of the persons who are born.' National Health and Medical Research Council, see n 25.

323 Compulsory and voluntary donor registries have been established in Victoria, New South Wales and Western Australia.

past model, there was no opportunity for any type of constructive relationship between the parties.

In contrast, from the mid 1980's, state legislation,[324] and then professional *Guidelines*[325] were introduced to regulate assisted reproductive treatments, including the use of donated gametes. In this Part, I discuss the introduction of legislation and professional Guidelines throughout Australia, which have opened the way for interpersonal relationships between parties to gamete donation to develop.

6.2 Early State Legislation in Victoria and South Australia

In response to the increasing mainstream acceptance and use of artificial insemination treatment (by spouse and donor) throughout the 1970s, the Australian Law Reform Commission's 1977 report into *Human Tissue Transplants*[326] recommended that:

> Legislation … should be considered in relation to the artificial insemination of human beings, and the consequences which may ensue from the acts of donating semen for reproductive purposes and the artificial implanting of semen in a woman…[327]

However, to the present day, the Commonwealth has done little to specifically regulate donor conception.[328] The likely reason for this is that the Commonwealth

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324 *Infertility (Medical Procedures) Act 1984* (Vic); *Assisted Reproductive Treatment Act 1988* (SA); *Human Reproductive Technology Act 1991* (WA); *Assisted Reproductive Technology Act 2007* (NSW).

325 National Health and Medical Research Council, see above n 25. The interaction between the Guidelines and State legislation is discussed below: Chapter 6 – Political interest in donor conception, 6.3 *Developing Relationships on their Own Terms: State Legislation and National Health and Medical Research Council Guidelines*, page 81.

326 Australian Law Reform Commission, *Human Tissue Transplants,* Report No 7 (1977); http://www.alrc.gov.au/report-7 accessed 16 February 2011.

327 Ibid. In anticipation of scientific development, the ALRC also noted that: 'developments are expected within the near future—possibly the next two or three years. The areas of interest begin with the fertilisation of human egg cells outside the human body'.

328 The only Commonwealth legislation indirectly relevant to donor conception practices is the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) and the *Research Involving Human Embryos Act 2002* (Cth), which primarily prohibit the cloning of human material for purposes of reproduction, and regulate the use of human embryos in research, to the extent that the Commonwealth has power to do so. Relevant to donor conception practices, section 21 of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) permits the payment of only 'reasonable expenses' to gamete donors. See also, *Prohibition of Human Cloning for Reproduction Act 2008* (Vic), *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW), *Prohibition of Human Cloning for Reproduction Act 2003* (SA), *Human Reproductive Technology Act 1991* (WA), *Research Involving Human Embryos and Prohibition*

does not have specific power under the Australian Constitution to legislate in relation to donor conception.[329] However, the States do have power to regulate in relation to medical practices, health records, registers of births, deaths and marriages, and birth certificates, and may explicitly refer these powers to the Commonwealth.[330] In this way, it may be possible for the Commonwealth to pass legislation in relation to donor conception. For example, the *Family Law Act 1975* (Cth), which explicitly regulates the parentage of persons born through the use of donated gametes and surrogacy arrangements,[331] is the result of a specific referral of power by the states, which is otherwise not covered by the marriage power[332] under the Australian Constitution.[333] All states have subsequently adopted similar legislation to determine the parentage of persons born from donated gametes.[334]

In the absence of Commonwealth legislation, the Australian States of Victoria,[335] South Australia,[336] Western Australia[337] and New South Wales,[338] have passed

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of Human Cloning for Reproduction Act 2003 (Qld), *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (Tas), and *Human Cloning and Embryo Research Act 2004* (ACT).

329 This issue has never been thoroughly explored; the Attorney-General's Department rejected a request from a Senate Committee to provide advice in relation to the capacity of the Commonwealth to legislate in the area of donor conception. See Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, above n 88, 92. In response to the Senate Committee report, the Australian Government stated that 'The Australian Government does not have constitutional power to legislate comprehensively in this area to ensure that legislation is nationally consistent'; 'Government Response to the Senate Legal and Constitutional Affairs References Committee Report: Donor Conception Practices in Australia' (Australian Government, 14 August 2012) 3. The Senate Committee did suggest (at 2.11-2.12) that the Commonwealth may be able to enact legislation under the external affairs power to give effect to international obligations under the *Convention on the Rights of the Child*, namely Article 3 (which requires states to ensure that the best interests of the child is the guiding principle in all actions taken in relation to children), Article 7.1 (which requires states to ensure that each child is registered after birth, has the right to a name, and to know and be cared for by his or her parents) and Article 8.1 (which requires states to respect the right of a child to preserve his or her identity, including their nationality, name, and family relations). However, the rights provided for in the *Convention* are general, and not specifically suited to regulate the practice of donor conception.

330 Section 51(xxxvii) *Australian Constitution*.

331 *Family Law Act 1975* (Cth) Div 1(D) section 60H.

332 Section 51 (xxi) *Australian Constitution*.

333 Senate Legal and Constitutional Affairs Reference Committee, above n 88, 92

334 *Parentage Act* 2004 (ACT) s18; s11(4)(5); *Status of Children Act* 1996 (NSW) s14; *Status of Children Act* 1978 (NT) s5F; *Status of Children Act* 1978 (QLD) Div 2; *Status of Children Act* 1974 (Tas) Pt 3 s10C; *Status of Children Act* 1974 *(Vic)* Pt 2,3; *Family Relationships Act* 1975 (SA) Pt 2A; *Artificial Conception Act* 1985 (WA) s6.

335 *Infertility (Medical Procedures) Act 1984* (Vic); *Infertility Treatment Act 1995* (Vic); *Assisted Reproductive Treatment Act 2008* (Vic).

336 *Assisted Reproductive Treatment Act 1988* (SA).

337 *Human Reproductive Technology Act 1991* (WA).

338 *Assisted Reproductive Technology Act 2007* (NSW).

legislation to regulate the practice of donor conception by health care providers. Of these states, Victoria has the longest established and most comprehensive regime, including criminal liability for persons who fail to comply.[339] Following recommendations made in the *Waller Committee report*,[340] the *Infertility (Medical Procedures) Act 1984* (Vic) was passed by the Victorian Parliament, and came into force on 1 July 1988. The *Infertility (Medical Procedures) Act 1984* (Vic) set out approved uses for donated gametes,[341] requirements for counseling[342] and consent,[343] withdrawal of donors' consent,[344] maintenance of records,[345] and prohibited certain actions and procedures.[346] Although this early legislation required fertility service providers to maintain records of each donation, it complied with past practices of secrecy and anonymity by prohibiting the release of identifying information to donors,[347] recipients[348] or donor-conceived offspring.[349] Around the same time, the South Australia Parliament passed the *Reproductive Technology Act 1988* (SA).[350] Although not as thorough as the Victorian legislation, the South Australia Act provides for formal regulation of donor conception procedures and development of a Code of Ethical Practice. In line with the Victorian Act, the *Reproductive Technology Act 1988* (SA) confirmed the prevailing practice of donor anonymity,[351] which may have been inconsistent with recognizing that the 'welfare of any child to be born in consequence of an artificial fertilization procedure must be treated as of paramount importance, and accepted as a fundamental principle, in the formulation of the code of ethical practice'.[352]

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339 *Infertility (Medical Procedures) Act 1984* (Vic).

340 For a more detailed discussion of the *Waller Committee Report,* see Chapter 5 – Political Interest in Donor Conception*, 5.2.3 The Waller Committee Report,* 73.

341 *Infertility (Medical Procedures) Act 1984* (Vic) sections 11-14, 16, 17.

342 *Infertility (Medical Procedures) Act 1984* (Vic) s11(3)(e), (5)(c); s12(3)(e), (5)(c),; s13(8)(b); s14(1)(a); s18.

343 *Infertility (Medical Procedures) Act 1984* (Vic) s11(3)(b),(4), (5)(a)(b); s12(3)(e), (4), (5)(a)(b); s13(3)(b)(f), (4), (5)(a)(b), (6)(a)(b), (8)(a).

344 *Infertility (Medical Procedures) Act 1984* (Vic) s 15.

345 Ibid Part III.

346 *Infertility (Medical Procedures) Act 1984* (Vic) s 25,26.

347 Ibid s20(2).

348 Ibid s20(1).

349 Ibid s23(3); see also s33(4) *Freedom of Information Act 1982* (Cth), exempting the Health Commission register from the *Freedom of Information Act.*

350 The South Australian Act largely followed recommendations made by the Working Party on In Vitro Fertilisation and Artificial Insemination by Donor: *Report of the Working Party on In Vitro Fertilisation and Artificial Insemination by Donor* (Parliament of South Australia, 1984).

351 *Reproductive Technology Act 1988* (SA) s18.

352 Ibid S10(2).

Although this first wave of State legislation in the mid/late 1980s signaled a legislative response to increasing public acceptance and use of assisted reproductive procedures using donated gametes, it did not facilitate any type of interpersonal relationship between donors, recipients and donor-conceived offspring. In fact, the *Infertility (Medical Procedures) Act 1984* (Vic) and *Reproductive Technology Act 1988* (SA) legally enforced the prevailing practices of secrecy[353] and anonymity that were intended to keep the parties separated, and prevent any type of information exchange post-donation.

6.3 Developing Relationships on their Own Terms: State Legislation and National Health and Medical Research Council Guidelines

Opportunity for interpersonal relationships between gamete donors, recipients and donor-conceived offspring became a reality when new and amended state legislation and professional *Guidelines* were introduced from 1995 to 2010. In particular, the legislation and *Guidelines* recommended against anonymous gamete donation, and established compulsory and voluntary registers of identity[354] in Victoria,[355] Western Australia,[356] and New South Wales[357] which may now facilitate the exchange of information. There is legislative provision for a register of donors to be established in South Australia, although one has yet to be established.[358] In conjunction with more accepting social attitudes towards gamete donation, these two mechanisms have

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353 Secrecy and anonymity are intimately linked: parents may believe that there is little point in disclosing to the donor-conceived offspring that he or she is donor-conceived if no information about the donor or donor-siblings is available; S Klock and D Greenfeld, 'Parent's knowledge about the donors and their attitudes towards disclosure in oocyte donation' (2004) 19 *Human Reproduction* 1575; Fiona MacCallum and Susan Golombok, above n 256.

354 As the titles suggest, compulsory registers retain and disseminate compulsorily-acquired information about gamete donors, recipients and donor-conceived offspring, while voluntary registers retain and disseminate information (both identifying and non-identifying) voluntarily provided by the parties.

355 *Infertility (Medical Procedures) Act 1984* (Vic) Part III; *Infertility Treatment Act 1995* (Vic) s75; *Infertility Treatment (Amendment) Act 2001* (Vic) Pt 7A established a voluntary register for all parties to donor-conception occurring before 1988 to enter and gain access to information.

356 *Human Reproductive Technology Act 1991 (WA)* s44(1), s45.

357 *Assisted Reproductive Treatment Act 2007 (NSW)* s37.

358 The *Assisted Reproductive Treatment Act 1988* (SA) provides at s15 that the 'Minister [of health] may keep a register of donors of human reproductive material … contain[ing] the names of the donor, the recipient of donated gametes or embryos and any child born as a result of the donation'. Until a register is established, fertility service providers are to act in the capacity of the Donor Conception Register by recording and keeping relevant information.

undermined the opportunity and necessity for anonymity and secrecy in gamete donation in future.

The welfare and interests of donor-conceived offspring were recognised in Australian State legislation from 1995, beginning with the *Infertility Treatment Act 1995* (Vic), which superseded the *Infertility (Medical Procedures) Act 1984* (Vic). The new Victorian Act not only specified that 'the welfare and interests of any person born or to be born as a result of a treatment procedure are paramount', but also recognised the interests of donor-conceived offspring by introducing a prospective right to identifying information about donors for recipients and adult donor-conceived offspring.[359] The *Infertility Treatment Act* retained the compulsory register established pursuant to the previous *Infertility (Medical Procedures) Act 1984* (Vic) and allowed adult donor-conceived offspring to gain access to identifying information about their donor if they were conceived using gametes donated after 1988, when the law came into effect. The *Infertility Treatment Act* also allowed recipients and donor-conceived offspring to voluntarily enter details onto the register, and provided for identifying information to be given to donors[360] and recipients[361] with consent.[362]

These changes were a result of a three-volume report, including draft legislation, from the Victorian Standing Review and Advisory Committee on Infertility. In addition to other recommendations for updated legislation, the Committee recommended that:

> Any person born as a result of the use of donated gametes may, upon reaching the age of 18, obtain identifying information about the gamete donor from the central register. This recommendation is based on the clear belief that the interests of such a person in discovering his or her genetic parent or parents should be accorded primacy.[363]

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359 *Infertility Treatment Act 1995* (Vic) s75.

360 Ibid s72, 77–78.

361 Ibid s71, 75.

362 The *Infertility Treatment (Amendment) Act* 2001 (Vic) Pt 7A established a voluntary register for all parties to donor-conception occurring before 1988 to enter and gain access to information.

363 Standing Review and Advisory Committee on Infertility, 'Report on matters related to the review of post-syngamy embryo donation - Part III: Recommendations for amendment of the *Infertility (Medical Procedures) Act 1984'* (Parliament of Victoria, 1991), 6. Interestingly, the committee was unclear on whether access to identifying information should be prospective or retrospective. In any case, the Act granted only prospective access to recipients and donor-conceived offspring.

For almost a decade, Victoria was the only Australian state that prohibited anonymous gamete donation. Although the Western Australian Parliament passed legislation in 1991 to implement a central register and regulate donor conception (and other assisted reproductive treatment) procedures, the *Human Reproductive Technology Act 1991* (WA) did not permit the release of identifying information from the State central register[364] to donor-conceived offspring or donors unless explicit consent was provided to do so.[365]

The period from 2004 to 2010, however, saw a flurry of regulatory activity in relation to donor conception from the National Health and Medical Council[366] and the States of Victoria,[367] Western Australia,[368] New South Wales[369] and South Australia.[370] The new *Guidelines* and legislation resulted both and end to anonymous gamete donation in all Australian States and territories, and further development of donor registers.[371] These changes acknowledge the interests of donor-conceived offspring in gaining access to information about their donors. For donor-conceived offspring who know they are donor-conceived, it is now possible in many states to obtain identifying information about their donor(s), and to exchange identifying and non-identifying information between other parties, including their donor and their half siblings. These legislative changes have opened the way for parties to be explicitly linked together in an interpersonal relationship.

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364 From April 1993, Western Australian fertility services providers have been required to maintain registers of identifying and non-identifying information for sperm, egg and embryo donors and offspring[364] and provide that information to the CEO of the Department of the Public Service of the State to be entered onto a compulsory register "the Register of Identity" *Human Reproductive Technology Act 1991* (WA) s44(1), s45.

365 Ibid s49(2)(d).

366 Australian Government National Health and Medical Research Council (*NHMRC Guidelines*), above n 25.

367 *Assisted Reproductive Treatment Act 2008* (Vic).

368 *Human Reproductive Technology Act 1991* (WA).

369 *Assisted Reproductive Technology Act 2007* (NSW).

370 *Assisted Reproductive Treatment Regulations 2010* (SA).

371 Legislation in all four States directs information to be stored on the compulsory registers that is substantially similar to that required under the NHMRC Guidelines. The Assisted *Reproductive Treatment Act 2007* (NSW) is representative, and requires ART providers to supply the following information to the compulsory register: the donor's full name, address, date and place of birth; the donor's ethnicity and physical characteristics; any medical history and genetic test results of the donor and the donor's family that are relevant to the future health of [recipients, donor-conceived offspring and their descendants]; the name of each ATR provider who has previously obtained a donated gamete from the donor and the state in which the gamete was obtained; and the sex and years of birth of any child born using gametes provided by the donor; *Assisted Reproductive Treatment Act 2007* (NSW) s37; *Assisted Reproductive Technology Regulation 2009* (NSW) s16(a), s12(2); Australian Government National Health and Medical Research Council (*NHMRC Guidelines*), above n 25, guidelines 6.10-6.12.

The Australian National Health and Medical Research Council (NHMRC) issued ethical guidelines for fertility service providers in 2004.[372] With respect to regulating donor conception, the *NHMRC Guidelines* do not allow anonymous gamete donation, and recommend that fertility service providers to meet a number of requirements, including maintaining clinical records,[373] and providing information to donor-conceived offspring about their donor and half-siblings.[374]

Queensland, Tasmania, the Australian Capital Territory and the Northern Territory do not have specific legislation governing assisted reproduction procedures, and so fertility services providers in those States are governed by the NHMRC Guidelines, which act as quasi-regulations because compliance with the *Guidelines* is a condition of accreditation by the Reproductive Technology Accreditation Committee (RTAC)[375] and licensing by the Fertility Society of Australia. In States with specific legislation, the *Guidelines* are given legal effect by making RTAC accreditation a requirement for fertility services providers to be granted a storage and/or practicing licence[376] (or exemption) under the legislative framework. In some cases, State legislation may impose duties on fertility services providers additional to the *Guideline* requirements.[377]

In addition to the NHMRC *Guidelines,* the Western Australian Parliament significantly amended the *Human Reproductive Technology Act 1991* (WA) in 2004, to prospectively allow identifying information about Western Australian donors to be released to donor-conceived offspring who had reached 16 years and completed approved counseling. Donor-conceived offspring (and their parents/guardians) could also choose to make their identifying information available to their donor and/or half-

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372 Australian Government National Health and Medical Research Council (*NHMRC Guidelines*) above n 25; Failure to attain RTAC accreditation has significant repercussions for fertility service providers, including inability to offer in-vitro fertilisation procedures, or obtain Medicare funding for patients.

373 Australian Government National Health and Medical Research Council (*NHMRC Guidelines*) above n 25, guideline 10.3.

374 Ibid guideline 6.1.

375 Fertility Society of Australia Reproductive Technology Accreditation Committee, RTAC Code of Compliance 2010, 8; Critical Criteria 1

376 *Human Reproductive Technology Act 1991* (WA) s33(2)(a); *Human Reproductive Technology Act 1991* (WA) s27; *Assisted Reproductive Treatment Act 1988* (SA) s6; *Assisted Reproductive Treatment Regulations 2010* (SA) s5, 6; *Assisted Reproductive Treatment Act 2008* (Vic) s74(1); s57(3)(b) *Assisted Reproductive Technology Act 2007* (NSW).

377 See e.g. *Human Reproductive Technology Act 1991* (WA) s45(1)(a)(ii), which requires fertility services providers to document the reasons why the donor and recipient were assessed as being eligible persons … [for] the procedure.

siblings after completing approved counseling.[378] The Director-General of the Department of Health also established a voluntary register for donors, donor-conceived offspring and their families in 2002, whereby donors and donor-conceived offspring who are not included in the compulsory register may provide and receive identifying and non-identifying information.

Four years later, Victoria introduced the *Assisted Reproductive Treatment Act 2008* (Vic) which allowed donor-conceived offspring to gain access to identifying information about their gamete donor/s from the central register, if they have the consent of their parents or a written assessment from a counselor stating that the donor-conceived person is sufficiently mature.[379] The new Victorian legislation retained compulsory and voluntary donor registers, and expanded the categories of people who could apply for access to information held on the State Central Register (descendants of donor-conceived offspring, in addition to donors, recipients and donor-conceived offspring),[380] and gain access to information held on the voluntary register (relatives and descendants of donor-conceived offspring and relatives of donors, in addition to donors, recipients and donor-conceived offspring).[381] In September 2014, the Victorian Parliament passed the *Assisted Reproductive Treatment Further Amendment Act 2014*, to come into force on or by 29 June 2015.[382] The *Assisted Reproductive Treatment Further Amendment Act 2014* provides for the formation of a comprehensive central register, by requiring all registered ART providers to give to the Registrar all particulars of pre-1988 donor treatment procedures, which will then be entered onto the Central Register.[383] As was previously the case, information about pre- 31 December 1997 donors may only be disclosed to other parties with consent.[384] The new Act expressly allows donor-conceived offspring (and their parents) to directly seek non-identifying information

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378 Ibid s49(2a)(2c)(2d).

379 *Assisted Reproductive Treatment Act 2008* (Vic) s 59(A)(B).

380 Ibid s56, 59.

381 Ibid s71.

382 *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) s2.

383 Ibid s5, 8; Information may also be provided by natural persons, who are protected from criminal or civil liability, in anticipation that some records may be held by individual (or retired) medical practitioners; *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) s6; Explanatory Memorandum, *Assisted Reproductive Treatment Further Amendment Bill 2013* (Vic), 3.

384 *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) s11.

about donor-siblings,[385] and explicitly provides for a donor-linking service provided by VARTA.[386] The *Assisted Reproductive Treatment Further Amendment Act 2014* explicitly allows ART providers to disclose medical information[387]to donors, recipients and donor-conceived offspring, and donor-siblings in circumstances where disclosure is necessary to save a person's life or to warn about a genetic or hereditary condition that may be harmful to the person or their descendants.[388]

In New South Wales, the *Assisted Reproductive Technology Act 2007* (NSW) and related regulations[389] commenced on 1 January 2010, providing for the regulation of donor conception and other assisted reproductive procedures. The Act prohibits anonymous gamete donation[390] and establishes a prospective central register of identifying and non-identifying information relating to gamete donations,[391] maintained by the Director General of the Department of Health.[392] The compulsory register also doubles as a voluntary register for donations and births occurring before 2010, so that donors and offspring may choose to provide identifying and non-identifying information.[393] Donors (and their adult children), recipients and donor-conceived individuals may apply to the Director-General for information held on the central register.[394] Donor-conceived offspring and their guardians may receive identifying and non-identifying information relating to their donor[395] and donors and other children of the donor may be advised of the sex and year of birth of each child born using the donor's gametes.[396]

South Australia is the State to have most recently passed legislation[397] to prohibit anonymous gamete donation[398] and allow for the establishment of a donor register[399]

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385 Ibid s12.
386 Ibid s21.
387 Medical information is defined as '[information about] an individual that is or could be predictive of the health (at any time) of the individual or any descendants of the individual'; Ibid s16.
388 Ibid s16.
389 *Assisted Reproductive Technology Regulations 2009 (*NSW).
390 *Assisted Reproductive Technology Act 2007* (NSW) s 37(1).
391 Ibid s37
392 Ibid s32A.
393 Ibid s15.
394 Ibid s16.
395 Ibid s16 (a)(c).
396 Ibid s16 (b)(d).
397 *Assisted Reproductive Treatment Act 1988* (SA).
398 The South Australian Act indirectly removed donor anonymity by requiring clinics to conform with the NHMRC Guidelines, which prohibit clinics from using anonymously donated gametes;

for the storage of identifying and non-identifying information between donors, recipients and donor-conceived individuals. The South Australian government has also expressed an intention to establish a voluntary register for donations made prior to 2010, although this has not yet been actioned.

Fees to gain access to information held on compulsory registers vary from state to state. In NSW, each application for information must be accompanied by a $50 fee[400] and in Victoria a fee of 5.18 fee units applies[401] (which equates to $66.51 from 1 July 2013 to 30 June 2014[402]). There is presently no official fee in SA because a State register is yet to be established, and although the *Human Reproductive Technology Act* 1991 (WA) states that a 'prescribed fee' shall be paid before information from the compulsory register is released.[403] No fee is prescribed in the Legislation, Regulations[404] of Directions.[405]

6.4 Conclusion - Introduction of State Legislation and Professional Guidelines

The introduction of State legislation and professional *Guidelines* to end anonymous donation of gametes and the development of compulsory and voluntary donor registers, in particular, were significant steps towards allowing parties to make contact with each other on their own terms, providing the means for interdependent relationships to develop. However, although these legislative reforms have facilitated an increasing flow of identifying and non-identifying information between parties to

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Assisted Reproductive Technology Treatment Regulations 2010 (SA) s8(2)(a); Clause 6.1 of the NHMRC Guidelines state that "[p]ersons conceived using ART procedures are entitled to know their genetic parents. Clinics must not use donated gametes in reproductive procedures unless the donor has consented to the release of identifying information about himself or herself to the persons conceived using his or her gametes. Clinics must not mix gametes in a way that confuses the genetic parentage of the persons who are born"; Australian Government National Health and Medical Research Council (*NHMRC Guidelines*), above n 25, guideline 6.1.

399 The South Australian Act, provides that the 'Minister [of health] may keep a register of donors of human reproductive material … contain[ing] the names of the donor, the recipient of donated gametes or embryos and any child born as a result of the donation'; *Assisted Reproductive Treatment Act 1988* (SA) s15. Until a register is established, fertility service providers are to act in the capacity of the Donor Conception Register by recording and keeping relevant information.

400 *Assisted Reproductive Technology Regulations 2009* (NSW) Cl 17.

401 *Assisted Reproductive Treatment Regulations 2009* (Vic) Reg16.

402 *Victoria Gazette* 16 (18 April 2013).

403 *Human Reproductive Technology Act 1991* (WA) S46.

404 *Human Reproductive Technology (Licences and Registers) Regulations 1993* (WA).

405 *Human Reproductive Technology Act 1991 or Directions* (WA) (30 November 2004).

gamete donation, there is still significant room for improvement. For instance, there is no requirement for recipients to disclose to donor-conceived offspring that they are donor-conceived and that information about their donor is available, nor are donors ever required to update the information held on the register about themselves. I will turn to these issues and examine them in detail in Part four. For now, it is enough to note that, while there has been a significant shift in social attitudes towards gamete donation, and a considerable legislative and regulatory response, there is still some way to go before the interests of parties to gamete donation (especially donor-conceived offspring) are appropriately supported.

CHAPTER 7:
BECOMING RELATIONAL PARTIES –
RELATIONAL THEORIES OF AUTONOMY, LAW AND RIGHTS

7.1 Towards Relational Parties

Although liberal legal theories were useful to explain the legal relationships between parties to gamete donation of the past, the demise of donor anonymity and strong privacy between the parties signalled a significant shift in social attitudes. Accordingly, the aspects of society which pertain to donor conception can no longer be underpinned by liberal legal theories. This shift is reflected in State legislation and NHMRC *Guidelines* that now regulate the practice of gamete donation and donor conception. Specifically, the concept of privacy is not what it once was, particularly in the realm of privacy within the family (so-called local privacy[406]). There is a trajectory of change away from strict liberal concepts of privacy as synonymous with boundaries between parties, and towards a post-liberal focus on privacy within relationships.

Below, I will seek to demonstrate that contemporary expectations of individual privacy require us to set aside the liberal social construct that held sway in the past, and replace it with a relational social construct. I argue that a relational approach allows individuals to maintain (and even increase) their individual autonomy despite a shift away from autonomy-as-boundaries.

7.2 Social Change: from Liberal to Post-Liberal Privacy and Autonomy

As discussed in Part two, significant weight was once given to protecting gamete donors' and recipients' privacy rights, because this was thought to protect their autonomy. In the past, strong informational and local privacy rights supported by practices of anonymity and secrecy were considered essential to protect donors and promote a liberal concept of autonomy that demanded strong separation between the

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406 Beate Rössler, above n 151, 142-168.

public and private spheres. In the past, too, the duties owed by each party to the other did not require analysis, because the duty was to simply do nothing.

However, the liberal understanding of how privacy rights act to protect autonomy does not accord with changing public attitudes towards gamete donation, and contemporary State legislation and professional *Guidelines*. In particular, the liberal rhetoric of protective boundaries between parties is at odds with current moves towards interpersonal relationships and information flow between parties to gamete donation. Nevertheless, privacy continues to exist in the relationships between parties to gamete donation, even though the old liberal explanation is no longer sufficient. A new understanding of the relationship between privacy and autonomy is needed if we are to continue to recognise privacy rights as fundamental to protecting autonomy.

7.3 Post-Liberal Society, Privacy and Autonomy

Concepts of autonomy, as discussed in Part two of this thesis, are steeped in cultural meaning. In the past, the cultural context was a liberal society that conceptualised privacy as a means of protecting the individual from unjustified interference from others. Privacy was thus seen as a means of promoting individual autonomy by marking out a private sphere, within which the individual could find the freedom to achieve his or her own good. The metaphor of the 'bounded self'[407] has been put forward by Nedelsky to characterise the condition of individuals when boundaries are presumed to be essential to autonomy. In the context of gamete donation, strict separation between public and private spheres was thought to protect the parties from social and personal harm, allowing them the freedom to choose how they would create and define their families.

However, this liberal understanding of privacy has been attacked. Julie Cohen has described it as 'reactive and ultimately inessential … the liberal self who is the subject of privacy theory and privacy policymaking does not exist".[408] According to Cohen, we have entered a post-liberal society. Cohen's research in the area of privacy challenges liberal assumptions about the self and autonomy that underpin current legal policy in the United States of America, and contextualises the idea of privacy

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407 See Jennifer Nedelsky (1990) see above n 35.

408 Julie Cohen 'What Privacy is For' (2013) 126 *Harvard Law Review* 1904, 1905.

and selfhood within relationship networks.[409] Contemporary concepts of autonomy tend to recognise that the self who is the real subject of privacy law is socially constructed and, as I shall discuss further on, essentially relational. Thus understood, autonomy is not supported and encouraged by erecting barriers to interpersonal relationships, but by using privacy (and other rights) as dynamic tools to shape the kind of interpersonal relationships that promote individual choices.

According to Cohen, the current (American) social context is post-liberal: it appropriates the positive aspects of liberalism and combines these with a more flexible, adaptable and relational world-view. This is not to claim that the present society is opposed to liberalism — it is certainly not *illiberal* — but has simply moved on from the abstract and unworkable liberal ideal of firm borders between persons, while retaining and building upon its virtues such as a commitment to self-actualisation, clear reasoning, and critical thought and judgement.[410]

The defining feature of post-liberal society is a palpable softening of the hard boundaries between private and public. This may be due to a range of factors, including technological innovation, the influence of feminism, increasing secularism and multiculturalism, or other causes. I have previously described the gradual introduction of Australian State legislation and professional *Guidelines* to regulate the previously private practices of donor insemination and donor conception. However, the shift from a liberal to post-liberal society has arguably been much more generalised. For example, the growing use of social media, cloud computing, public surveillance, and predictive analytics, in addition to greater legislative regulation of previously private spheres, has changed the boundaries between public and private. That is not to say that the boundaries have been broken down, but rather that there is increased flexibility or 'play' between the boundaries.[411] Within a post-liberal context, this 'softening' of boundaries need not be judged as either positive or negative (this judgement will invariably depend on context), but can instead be approached in relational terms. As Nedelsky explains:

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409 See e.g. Julie Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press, 2012); Julie Cohen (2013) ibid.

410 Ibid.

411 Julie Cohen calls this post-liberal change 'boundary management': Julie Cohen (2012), above n 409

> … the metaphor of boundary is far less helpful than direct exploration of the relational dimension of how the circulation of information matters to people.[412]

But what does it mean to explore the 'relational dimension' of privacy, as Nedelsky suggests? Below, I put forward the view that relational theories of rights and autonomy can help us to understand the paradigm shift from 'hard' local and informational privacy rights that define fixed boundaries between parties, to 'flexible' privacy rights that define evolving relationships.

7.4 Relational Theories of Autonomy

According to relational theories of autonomy, our autonomy is constituted by the relationships we are party to. Instead of conceptualising privacy as a solid boundary between parties, relational theories recognise that there is flexibility or 'play' in the boundaries of privacy, and this better reflects the true nature of interpersonal relationships, which are in constant flux and context-specific. There is a significant, and growing, literature on relational theory.[413] It is not possible, nor is it my intention, to provide a review of the breadth and depth of relational theories. To do so would be a separate thesis in itself. Nevertheless, I do wish to engage with relational theory in order to provide background to my following discussion of relational theories of legal rights in the context of gamete donation.

Briefly stated, relational feminists reject the prevailing notion of liberal autonomy — that the best protection for autonomy is secured by separateness from others and the State. Instead, they view autonomy as a social phenomenon.[414] Nedelsky (and others) are critical of the 'dark roots' underpinning Anglo-American liberal autonomy, which

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412 Jennifer Nedelsky (1990) above n 35, 109.

413 See e.g. Catriona MacKenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press, 2000); Lauren Freeman, 'Reconsidering Relational Autonomy: A Feminist Approach to Selfhood and the Other in Thinking of Martin Heidegger' (2011) 54(4) *Inquiry: An Interdisciplinary Journal of Philosophy* 361; Marilyn Friedman, 'Relational Autonomy and Individuality' (2013) 63(2) *University of Toronto Law Journal* 327; Carol Deanow, 'Relational Development Through the Life Cycle: Capacities, Opportunities, Challenges and Obstacles' (2011) 26(2) *Affilia: Journal of Women and Social Work* 125.

414 Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7, 24-25.

derive from the protection of the landed few from the poor majority,[415] and not the protection of the individual from the State as it has come to be understood. The theory underpinning liberal autonomy is also criticised as exclusionary to women. For example, Kant conceptualised autonomy as an achievement of Enlightenment, which required 'all men to think for themselves',[416] but went on to assert that many people 'including the entire fair sex' are incapable of doing so.[417]

Relational theory developed from relational-cultural developmental theory, which was promulgated by feminist psychologists from the 1970s.[418] Relational-cultural developmental theory challenged traditional models of psychological development, which tend to treat the development of boys to men as normative, and emphasize themes of separation and individualism. Within this traditional model, the development of girls to women is often perceived as pathological or deficient, compared to the development of boys to men,[419] and relationships and interpersonal connections are relegated to the periphery, if they are considered at all.[420]

In response, feminist psychologists reframed ideas about normative development from a female perspective. Relational-cultural theory, as first developed by Jean Baker Miller, suggested that women have a psychological core which is organised around, and inseparable from, interpersonal relationships.[421] The theory uses the mother-child interaction as a model relationship to demonstrate that the self develops in the context of mutually empathetic relationships; in other words, that individual development

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415 Jennifer Nedelsky (1990) above n 35, 166-167.

416 Immanual Kant, *An Answer to the Question: 'What is Enlightenment',* Kant's Political Writings (H B Nisbet trans, Cambridge University Press, 1970), 54-55, cited in Lorraine Code, 'The Perversion of Autonomy and the Subjection of Women' in Catriona MacKenzie and Natalie Stoljar (eds), above n 413, 183.

417 Ibid.

418 Catriona MacKenzie provides a good description of the role of feminist psychologists, particularly Nancy Chodorow and Carol Gilligan, in challenging the patriarchal bias inherent in liberal concepts of autonomy; see Catriona MacKenzie, 'Imagining Oneself Otherwise' in Catriona MacKenzie and Natalie Stoljar (eds) above n 413, 124-150; see also Carol Gilligan, *In a Different Choice: Psychological Theory and Women's Development* (Harvard university Press, 1982) and Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (University of California Press, 1978); Alisdair MacIntyre, *After Virtue* (University of Notre Dame Press, 2nd ed, 1987), 220-221; Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 1982), 179; Jean Baker Miller, *Towards a New Psychology of Women* (Beacon Press, 1976).

419 Christina Robb, *This Changes Everything: The Relational Revolution in Psychology* (Picador, 2006).

420 Carol Deanow, above n 413, 125-126.

421 Jean Baker Miller, above n 418.

exists only in the context of relationships.[422] The interpersonal development that forms the 'end goal' of relational-cultural theory is seen as a broad psychological 'good' that can be developed through engaging in, and maintaining, mutually enhancing relationships.[423] This broad 'good' was later articulated as 'individual autonomy'.

The relational approach was first articulated as a feminist philosophy of autonomy in the 1980s, by using relational-cultural theory and its broad goal of interpersonal development as a springboard.[424] The term 'relational autonomy' is an umbrella term, describing a range of related theories with the common belief that liberal concepts of autonomy are inhospitable to women because they represent a masculine focus on self-sufficiency and self-realisation at the expense of human connection and interdependence.[425]

Relational autonomy may come in other guises too. For example, Evelyn Fox Keller developed the notions of 'dynamic autonomy' and 'static autonomy',[426] whereby dynamic autonomy is similar to relational autonomy: promoting an enhanced sense of self through interaction with others and pursuing agency within a world of 'interacting and interpersonal agents'.[427] Static autonomy, on the other hand, is similar to liberal autonomy in that it results in a sense of insecurity about the self and views others as a threat to the self, prompts fears of dependency and losing control and manifests as controlling behaviour seeking domination over others.[428]

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422 Carol Deanow, above n 413, 126.

423 Miller and Stiver identify five 'good things' that can be gained from mutually enhancing relationships and lead to enhanced interpersonal development. These include increased energy or zest, increased clarity about the self and the other, the increased ability to act in a relationship, increased self-worth, and the increased desire to be in relationships; see Jean Baker Miller and Irene Stiver, *The healing connection: How women form relationships in therapy and in life* (Beacon Press, 1997), Ch 3.

424 See e.g. Jennifer Nedelsky (1989), above n 414; Evelyn Fox Keller, *Reflections on Gender and Science* (Yale University Press, 1985).

425 See especially Marilyn Friedman, 'Autonomy, social disruption and women' in Catriona Mackenzie and Natalie Stoljar (eds), above n 413, 35; Marilyn Friedman, 'Autonomy and social relationships: Rethinking the feminist critique' in Diana Meyers (ed), *Feminists Rethink the Self* (Westview Press, 1997) 35, 55-58; Marilyn Friedman, *Autonomy, Gender, Politics* (Oxford University Press, 2003) Ch 4.

426 Evelyn Fox Keller, above n 424, Ch 5.

427 Ibid

428 Ibid

Diana Myers' theory of autonomy competency[429] suggests that autonomy is not an all-or-nothing concept, and that individuals who are subject to oppressive social circumstances may nonetheless be autonomous in some aspects of their lives although they may not be in others. Myers argues that autonomy is a competency, borne out of self-reflection, comprising a number of skills such as self-discovery, self-direction and self-definition. Autonomy involves the exercise of these skills to enable each individual to fully realise him- or herself. Myers' theory is explicitly relational; she argues that autonomy competency can only be developed in relation to others. Social context is important to the development of autonomy competency because it will influence the individual's ability to recognise and develop their skills of self-reflection. Self-realization is enormously influenced by social context – individuals are more likely to develop or emphasise aspects of themselves that are socially reinforced or meet social approval and incorporate these talents, skills and character-traits into their self-concept. Similarly, social context may limit exposure to, or encourage the development of, certain skills that make up autonomy competency. As MacKenzie and Stoljar explain, for Meyers, autonomy operates on a sliding scale, whereby one may achieve greater or lesser competency, depending on whether socialisation is supportive or oppressive towards self-realisation.[430]

Relational theories all provide an account of autonomy that is achieved in relation to others. They can help us to appreciate the paradigm shift from liberal 'hard' privacy rights and fixed boundaries between persons to post-liberal 'flexible' privacy rights that define evolving relationships, and explain why this shift has not resulted in decreased autonomy for the parties, which would be predicted by liberal theory.

7.5 Feminist Critiques of Liberal Autonomy

In the introduction to their edited collection of essays on relational autonomy, leading Australian philosophers Catriona MacKenzie and Natalie Stoljar identified five main feminist critiques of the liberal concept of autonomy.[431] Their intention was to consider feminist opposition to the liberal notion of individual autonomy, and build

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429 Diana Meyers, 'Personal Autonomy and the Paradox of Feminine Socialization' (1987) 84 *Journal of Philosophy* 619.

430 Catriona MacKenzie and Natalie Stoljar, above n 413,18.

431 Ibid, 3-31.

support for the concept of relational autonomy. MacKenzie and Stoljar group these critiques under the headings of symbolic-, metaphysical-, care-, postmodernist- and diversity critiques.[432] Below, I consider only symbolic and metaphysical critiques, as they are most relevant to my criticism of liberal autonomy, as applied to the relationships in donor conception.

Lorraine Code presents her own clearly articulated *symbolic* critique of traditional liberal autonomy. Code's critique is focussed on the root of the liberal concept of autonomy – the archetypal character of the 'autonomous man'.[433] Code criticises this abstract model of autonomy, which prescribes self-sufficiency, isolation and independence as necessary to achieving personal autonomy.[434] Specifically, Code is critical of the value given to independence over interdependence (and associated values such as caring, loyalty, and responsibility), the sterility and over-simplification of perceiving autonomous agents as 'atomistic rights-bearers' and the necessary conflict between the liberal view and alternative views based on cooperation and interdependence.[435] The *symbolic* critique features heavily in Nedelsky's criticism of liberal autonomy,[436] and is common to most relational theorists.

Metaphysical critiques of liberal autonomy go to the heart of feminist critique of the liberal concept of autonomy by questioning its very basis. Such critiques identify the basis of liberal autonomy as individualism,[437] which denies the reality that individuals are socially embedded and, at least to some extent, constituted by the social relationships to which they are parties.[438] Essentially, the metaphysical critique rejects the basis of liberal autonomy —the metaphysically separate individual — as

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432 Ibid, 5-12.

433 Lorraine Code, 'Second Persons' in *What Can She Know? Feminist Theory and the Construction of Knowledge* (Cornell University Press, 1991), cited in Catriona MacKenzie and Natalie Stoljar (eds), above n 413, 6-7.

434 Code explains that 'autonomous man is — and should be — self-sufficient, independent, and self-reliant, a self-realising individual who directs his efforts towards maximising his personal gains. His independence is under constant threat from other (equally self-serving) individuals: hence he devises rules to protect himself from intrusion. Talk of rights, rational self-interest, expedience, and efficiency permeates his moral, social, and political discourse. In short, there has been a gradual alignment of *autonomy* and *individualism*'; Lorraine Code, Ibid, 78.

435 Ibid, 6.

436 I discuss Nedelsky's developing theory of relational rights and autonomy in detail below, from page 98.

437 Jennifer Nedelsky defines liberalism in terms of individualism: 'by liberalism, I mean a tradition of political thought that, from a relational perspective, is too individualistic.'; Jennifer Nedelsky (1990) above n 35, 5.

438 Catriona MacKenzie and Natalie Stoljar, above n 413, 7.

fundamentally flawed. For example, Code[439] describes individual persons as shell-like 'second persons', who may only become autonomous in relation to others, and Annette Baier argues that the development of individual autonomy requires relationships of caring between the self and others. She develops Code's notion that individuals are 'second persons':

> '[P]ersons are essentially successors, heirs, to other persons who have formed and cared for them, and their personality is revealed both in their relations to others and in their response to their recognized genesis.'[440]

The metaphysical critique denies that complete individuals can exist independently of their relationships with others. This type of independent existence is incompatible with the feminist understanding that each individual's sense of self is constituted by her relationships to others. As Nedelsky points out, when taken to its logical conclusion, 'perfect liberal autonomy demands complete isolation from others', which is an unnatural human condition.[441]

While relational theories recognise the central role of individual autonomy, they also demand that we reconsider the nature and complexity of autonomous agents. Relational theories place autonomous agents within their social (relational) contexts, and recognise that their autonomy is constitutively interconnected and interdependent.[442] All five feminist critiques identified by MacKenzie and Stoljar weaken the liberal concept of autonomy, and lend support to the concept of relational autonomy. Together, they advance the key principle of relational theories of autonomy: that the relationships we are party to constitute *who we are*, and therefore, constitute our autonomy (for better or worse).[443]

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439 Lorraine Code, above n 433, 7.

440 Annette Baier, *Postures of the Mind: Essays on Mind and Morals* (University of Minnesota Press, 1985), 85.

441 Jennifer Nedelsky (1990) above n 35, 167.

442 Marilyn Friedman (2013), above n 416, 328.

443 It must be mentioned here that in addition to explicitly feminist conceptions of relational autonomy, non-feminist perspectives have been articulated. Feminist and non-feminist theories of relational autonomy all share an underlying conviction that persons are socially embedded and that our individual identities are formed within the context of social relationships and shaped by complex intersecting social dimensions. See e.g. J Schneewind, above n 232; Thomas Hill Jr, above n 232, 43–51; Gerard Dworkin, above n 232.

7.6 Rights as Relationships

Post-liberal concepts of privacy, and relational theories of autonomy, reject those aspects of traditional liberal theory which tend to treat the autonomous individual as independent, austere and socially disconnected. Together, they begin to explain how modern, flexible, and relationship-centric concepts of privacy still protect individual autonomy. Relational theories of legal rights use relational theory of autonomy as a springboard and go one step further, by explicitly articulating the links between legal rights, interpersonal relationships, and individual autonomy.

Below, I introduce relational theories of legal rights with a particular focus on Nedelsky's relational theory of self, autonomy and law. I then apply Nedelsky's theory to explain how legal rights can be understood to structure the relationships between parties to gamete donation. I specifically draw the reader's attention to the re-shaping of privacy rights (and thus relationships) from the late 1980s to the present day, and focus on the co-incidence between this re-shaping of relationships with rights and increased individual autonomy for the parties. I suggest that successive legislative and social changes have followed a trajectory that creates increasingly relational parties to gamete donation.

7.7 Relational Theories of Rights (and Duties)

Relational theories of rights typically reject the liberal view of rights, which tends to characterise rights as a means of establishing boundaries between individuals, and instead characterise legal rights as a means of establishing relationships between individuals. Presented starkly, the two views differ in their description of what rights *do* for rights-holders; liberal rights are seen as a means of securing autonomy by separating parties under liberal theory, while relational rights are seen as a means of facilitating autonomy by structuring interpersonal relationships.[444] This difference is rooted in each theory's understanding of how autonomy is achieved. For the liberal theorist, the autonomous individual tends to be free-standing and self-interested,[445] while for the relational theorist, the autonomous individual tends to be connected,

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444 Nedelsky states that 'what rights do and have always done is construct relationships – such as those of power, responsibility, trust, and obligation'; Jennifer Nedelsky (1990) above n 35, 236.

445 Ibid 42, 121.

multi-faceted and socially-constructed.[446] In addition, while the liberal approach to legal rights is limited to describing two-way relationships between parties, relational approaches are capable of describing complex and three-dimensional 'nested' relationships.[447]

While relational theories of rights do challenge traditional views of the role of rights in relationships, and require us to engage in a (potentially radical) shift in focus, they do not require a dramatic re-structuring of existing legal rights and relationships. The point made by Nedelsky is that the relational approach is immediately applicable because rights are *already* structuring relationships – we just need to adapt our point of view to appreciate how rights, relationships and autonomy fit together.[448]

A relational theory of rights provides an excellent way to describe the complex and changing dynamics between parties to gamete donation, from the past to the present, and into the future. They also direct us to consider how rights-holders and duty-holders interact with each other. However, relational theory is not simply descriptive; once the relationship dynamics are described, relational theory allows us to critique the legal rights that structure the relationships, on the basis of how well they support each party's autonomy. From a relational point of view, dysfunctional relationships are those that reduce autonomy (and other interests relevant to the parties), and functional relationships are those that promote autonomy (and other interests relevant to the parties). Because relational theory is prescriptive, it allows us to consider how existing rights are structuring dysfunctional relationships and how we could and should use rights to structure more functional relationships between individuals.

7.8 Nedelsky's Relational Theory of Self, Autonomy and Law

Although relational theories of rights are not necessarily new,[449] Nedelsky was the first to explicitly link relational autonomy to legal rights. From the late 1980s her

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446 Ibid 45-56.

447 Ibid 81-82.

448 Ibid 4.

449 In the early twentieth century, Wesley Hohfeld's *Fundamental Legal Conceptions* structured an explicit analysis of bilateral legal relations between two discrete parties, and precisely characterised dyad legal relationships in terms of rights and duties. While Hohfeld is not generally regarded as a relational theorist, his analysis does consider rights *as* relationships, and explicitly links rights to correlative duties; Wesley Hohfeld, 'Some Fundamental legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal*; I further note

relational theory of self, autonomy and law has been deepened and refined.[450] From the outset, I acknowledge that Nedelsky tends to reference US and Canadian sources, and therefore her point of view may be influenced by a more critical view of the State compared to the Australian tradition with its more welfare-oriented State. Nevertheless, the development of Nedelsky's relational theory of autonomy and law stands as an original and critical step in understanding the link between relational autonomy and legal rights.

7.9 Reconceiving Autonomy: Sources, Thoughts and Possibilities

In her first major article exploring relational theory and rights, Nedelsky identified the tension between the mainstream liberal concept of autonomy and the feminist agenda, with its critique of the individualistic premise of liberal theory.[451] She identified feminism as a particularly 'promising avenue for advancing the debate, not because it provides a fully articulated alternative to liberal theory, but because feminist concerns so effectively capture the problems such an alternative must address'.[452]

Nedelsky aligns herself with feminist relational theorists by critiquing the liberal vision of human beings as self-made and self-making men. This, she argues, ignores the reality that we come into being in a social context, and it is this social context which constitutes who we are.[453] Nedelsky's overriding concern about the link between law and the liberal concept of autonomy is exemplified in property law and philosophy. She describes the deeply ingrained mainstream belief that individual autonomy can be secured by erecting legal boundaries between the self and others as 'a perversion'.[454] Nedelsky views the liberal belief that individuals require isolation

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that Nedelsky has dismissed any link to Hohfeld's *Fundamental Legal Conceptions*, stating that 'I see my approach as distinct from Hohfeld's. [His] focus is conceptual: the reciprocal relations between the concepts of rights and duties. I am trying to draw attention to the ways rights structure human relations'; Jennifer Nedelsky (1990) above n 35, 77.

450 See e.g. Jennifer Nedelsky (1989), above n 414; Jennifer Nedelsky (1990) above n 35; Jennifer Nedelsky (1993a) above n 36, 8; Jennifer Nedelsky (2011), above n 36.

451 Jennifer Nedelsky (1989), above n 414, 7.

452 Ibid 7-8.

453 Ibid 7.

454 Nedelsky finds some confirmation of this view from John Greville Agard Pocock's analyses of the relationship between property and autonomy in 17th century liberal thought: "The point about freehold in this context is that it involves its proprietor as little as possible in dependence upon or *even in relations with other people* and so leaves him free for the full austerity of citizenship in the classical sense" (emphasis added). John Greville Agard Pocock, *Politics,*

and protection from others as 'pathological',[455] and as a barrier to truly understanding the nature of our autonomy. Identifying with feminist relational theorists, Nedelsky insists that the source of our autonomy is not isolation, but relationships with others. She believes that the most promising metaphor for autonomy is not property, but child-rearing, which 'encapsulates the emergence of autonomy through relationships with others'.[456] Nedelsky, however, makes it clear that the kinds of relationships that shape our autonomy are not limited to informal and intimate ones, and that relationships may both foster and undermine our autonomy. Indeed, throughout the article, she considers the issue of autonomy in the context of the American bureaucratic State.

Nedelsky takes issue with the American political tradition that locates freedom and autonomy within the private sphere, and sets it in opposition to the public sphere of state power. She does not endorse the idea that a defined boundary is needed between these spheres to divide individual autonomy from the legitimate scope of state power.[457] Within the American political tradition, Nedelsky explains that legal rights operate to carve out the bounded sphere of individual autonomy and define the limits of legitimate state (or collective) power that can be exercised against the individual. This, in turn creates a sharp private/public divide, whereby freedom and autonomy are linked to the individual, privacy and to market transactions, whilst coercion is linked to the State, public and political realms.[458]

However, Nedelsky argues that this apparently sharp public/private divide is fragile and the once strong link between property and autonomy has weakened over time, if it ever existed at all. We see evidence of this change every day: increasingly, socio-political issues are seen in terms of the collective rather than matters of individual responsibility, and it would be dangerous to rely on some inviolable boundary to maintain our sense of individual autonomy. The reality, according to Nedelsky, is that interdependence shapes the scope of collective action and control, and citizens are increasingly subject to governmental authority to license, regulate, and distribute

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Language and Time: Essays on Political Thought and History (Atheneum, 1971), 91, cited in Jennifer Nedelsky (1989), Ibid.

455 Jennifer Nedelsky (1989), above n 414, 8-9.

456 Ibid 11.

457 Ibid 15-16.

458 Ibid 17.

benefits. In this new context, the model for autonomy must be integration, not isolation. Nedelsky asserts that now 'the task is to make the interdependence of citizen and state conducive to, rather than destructive of, autonomy'. With regards to the link between property and autonomy, Nedelsky points out that:

> Property no longer provides people with the basis for independence and autonomy in the eighteenth-century sense. For the farmer who tilled his own land or the craftsman who owned his tools, property was a real source of independence … their property gave them a control over their livelihood … which was radically different to the modern wage earner, salaried professional or stockholders [whose income] embeds them in a network of relationships characterized by interdependence rather than independence … the idea of property is the basis for autonomy has lost most of it original meaning.[459]

In any case, the sense of freedom or autonomy linked to property is illusory, because property rights extend only so far as they are granted by, and respected by the State. Any perceived boundary of inviolability that relies upon owning property is a weak basis for founding one's autonomy.[460]

Nedelsky regards relational theory as the best means to understand autonomy, and to evaluate whether or not institutions, social practices and relationships foster individual autonomy. To illustrate the value of thinking in relational terms (as opposed to liberal terms), Nedelsky turns to administrative law. Administrative law mediates between governmental departments and citizens who are subject to their decisions, and so highlights 'flashpoints' between individuals and the state. In liberal terms, these are clashes whereby individuals assert that their boundaries have been breached by the state, which has exercised ultra-vires power. However, in relational terms, the question is not so much who is within 'their' rights, but rather whether the relationship between the individual and the state is structured in such a way that the individual's autonomy is fostered. Nedelsky's point is dramatically illustrated in the case of *Wyman v James*,[461] in which the Supreme Court held that a social worker did not require a warrant to enter a woman's home for purposes of conducting a "home-

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459 Ibid 19-20.
460 Ibid 22-23.
461 *Wyman v James* 400 U.S. 309 (1971).

visit", while the woman was receiving Aid for Families with Dependent Children. The majority (liberal) reasoning was that by accepting the state's offer of financial support, Ms James had declared her home the state's business and could not then claim an individual's traditional rights against state intrusion. In dissent, Justice Douglas objected to the state's ability to void fundamental individual rights when it distributes largesse, but even this argument still presumes a sharply divided public/private model. Nedelsky believes that a better judgment would consider *how* exactly the relationship between Ms James and the state must have changed if an agent of the state were allowed to enter her property without the kind of good cause that is needed for a warrant, and a consideration of the hugely undermining effect such a change would have on her autonomy.[462]

In this introduction to her theory linking autonomy and law, Nedelsky plants the seed of her theory of self, autonomy and law as an alternative to the mainstream liberal system. Her ideas are compelling both generally, in terms of re-framing discussions about legal rights, and specifically, in terms of re-directing the focus of legal regulation away from an adversarial approach and towards a focus on the relationships between parties. Crucially, Nedelsky is persuasive that such changes need not diminish, though they will certainly change, individual autonomy.

7.10 Law, Boundaries and the Bounded Self

In her article 'Law, Boundaries and the Bounded Self',[463] Nedelsky builds on her previous work as she attacks the metaphor of 'boundaries' as a shorthand for complicated patterns of relationships and introduces her concept of the liberal individual as a 'bounded self':

> [T]he images the concept of boundary invites do not seem to me optimal, even as a shorthand. They focus the mind on barriers, rules, and separateness, perhaps even oppositional separateness. They do not direct attention to the nature of the relationship …. The image of bounded space as essential to autonomy reinforces the image of bounded selves.[464]

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462 Jennifer Nedelsky (1989), above n 414, 32.
463 Jennifer Nedelsky (1990) above n 35.
464 Ibid 175.

Nedelsky is highly critical of the metaphor of boundaries, particularly in relation to property. She points out that the rights attached to property (and their links to autonomy and security) are not inherent, but allocated to us by the State. In other words, property rights – such as the power to exclude – are only valuable because they are backed by the State. The only way to truly understand property rights, or any rights, is to shift our focus away from the boundaries they create and instead consider the relationships that structure them.[465] This may be difficult, both because the metaphor of boundaries is so pervasive in liberal thought, and because boundaries do, in fact, structure relationships. Nedelsky states:

> Boundaries structure relationships, but they structure them badly, in part because boundary imagery masks the existence of relationships and their centrality to concepts like property and privacy. When the dominant metaphors turn our attention away from relationships, we cannot give either the relationships or the legal concepts that mask them the critical scrutiny they require.[466]

Nedelsky rightly questions whether we are *essentially* bounded, and convincingly argues that we can do without the boundary metaphor, which seems so natural and self-evident to our liberal experience of selfhood. She suggests that Anglo-American constitutionalism rests on a base of fear of loss of control, of intrusion and the threat of the collective against the individual, and so naturally promotes an obsession with boundaries and separateness, which has pervaded all aspects of Anglo-American culture.

Finally, in this article, Nedelsky re-introduces a relational concept of autonomy as a capacity that may develop or be set back, depending on whether the relationships we are a party to are constructive or not. She identifies clearly that 'the central question for inquiries into autonomy (legal or otherwise) is then how to structure relationships so that they foster rather than undermine autonomy'.[467] While the boundary metaphor does not direct our attention to this important question, a relational approach does.

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[465] Ibid 177.
[466] Ibid 178.
[467] Ibid 168.

7.11 Reconceiving Rights and Relationships

Nedelsky next reintroduced and expanded on her relational concept of autonomy[468] and introduced the link between legal rights and autonomy. She explicitly rejected the liberal Anglo-American understanding of legal rights as a shield to preserve autonomy by protecting the individual from interference by the state and other individuals. In this article, she put forward the view that such an adversarial and individual-centric vision of autonomy was 'deeply misguided'.[469]

According to Nedelsky, positive interdependence and human interactions form the basis of autonomy by providing a supportive and empowering environment for decision-making. Rights then operate to structure the relations between individuals in a way that either fosters or hinders autonomy.[470] She notes that:

> Autonomy … is a capacity that requires ongoing relationships that help it flourish; it can wither or thrive throughout one' s adult life… The human interactions to be governed are not seen primarily in terms of the clashing of rights and interests, but in terms of the way patterns of relationship can develop and sustain both an enriching collective life and the scope for genuine individual autonomy.[471]

The link between relational autonomy and law, which Nedelsky made here, is crucial to my analysis of the relationships between parties to gamete donation. Indeed, I have put forward the view that the liberal Anglo-American understanding of legal rights, which is grounded in a presumption of adversarial relationships, is right now being superseded by a post-liberal socio-political culture which is shifting the focus of law away from the metaphor of boundaries and towards the metaphor of relationships.

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468 Ibid 168.

469 Jennifer Nedelsky (1993a) above n 36 8; see also Jennifer Nedelsky (1989), above n 414.

470 Jennifer Nedelsky 'Property in Potential Life? A Relational Approach to Choosing Legal Categories' (1993b) (2) *Canadian Journal of Law and Jurisprudence*, 343.

471 Jennifer Nedelsky (1993a) above n 36, 8.

7.12 Law's Relations: A Relational Theory of Self, Autonomy and Law

In her most recent, and most substantial, work on relational theory, Nedelsky sets out to explain her theory of self, autonomy and law in detail. She is largely successful in her ambitious endeavour, and the concepts discussed in the book are both recognisable (to those familiar with the development of Nedelsky's theory) and thought provoking.

Nedelsky revisits her previous analyses of the concepts of self, autonomy and rights that are at the core of liberalism, and unequivocally rejects the notion that the purpose of rights is to protect the freestanding, bounded and autonomous individual from outside interference. Instead, she offers a relational theory of rights that at once promotes the core liberal value of autonomy, and explains the interconnection between the self, autonomy and legal rights.

Nedelsky, of course, borrows from relational feminism in that she views interpersonal relationships as constitutive of who we are. But her theory is original in that she uses the lens of relational theory to view the concepts of self, autonomy and law as deeply and intrinsically connected. According to Nedelsky the 'self' is the socially-embedded individual shaped and formed through constitutive relationships with others, who experiences 'autonomy' as the capacity to interact creatively with the world and on one's own terms. 'Legal rights' structure relationships of power, trust, responsibility and care that strengthen or undermine individual's capacity for autonomy.

The network of relationships that Nedelsky identifies as constitutive are not confined to intimate relationships, nor limited to relationships entered into by choice.[472] They include 'relations between parents, friends, or lovers to relations between student and teacher, welfare recipient and caseworker, citizen and state, to being participants in a global economy, migrants in a world of gross economic inequality, inhabitants of a

[472] Nedelsky notes that relationships are 'constitutive, yet not determinative … otherwise there would be no true autonomy', Jennifer Nedelsky (2011) above n 36, 31.

world shaped by global warming'.[473] Each of these relationships are 'nested' in a way that shapes each individual differently.

It has always been Nedelsky's intention to put forward her theory of relational autonomy as a better means of shaping scholarship, public policy and law, compared to liberal concepts of autonomy.[474] She pursues her agenda in *Law's Relations* by effectively applying her relational approach to several contentious areas of social and legal policy: first to understand the matter more completely and second to frame satisfactory legal responses.[475] As a feminist, Nedelsky is understandably drawn to policies and law that contribute to women's inequality, but this does not diminish the strength or application of her analysis. To make her point, she powerfully contrasts two Canadian legal approaches to the regulation of violence primarily perpetrated against women. On one hand, she praises amendments to Canadian sexual assault law, which shifted the burden of proof from the victim (requiring the prosecution to prove that the perpetrator had subjective intent to force sexual intercourse upon an unwilling person), to the [alleged] perpetrator (requiring the perpetrator to prove that he took reasonable steps to ascertain that the [alleged victim] was consenting to sexual contact at the time it occurred). Nedelsky views this amendment as a victory for a relational approach, which 'always directs attention to context and consequences'.[476] On the other hand, she is critical of policy responses to domestic violence which entail a liberal, reactionary approach to the problem. At the present time, social policy emphasises everyone's right to freedom from physical assault and the law allows the state to arrest and punish offenders. However, while acknowledging that state intervention is an appropriate response to domestic violence, a relational approach would go further by recognising the social and economic structures that allow violence within relationships.

Through the development of her relational theory of self, autonomy and law, Nedelsky successfully demonstrates that, compared to liberal autonomy, her relational analysis produces more nuanced and satisfactory outcomes for parties involved in all legal relationships. It is my intention to apply Nedelsky's theory to the practice of

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473 Ibid 31.
474 Ibid 4, 7.
475 Ibid 67
476 Ibid 220-221.

gamete donation to explain the policy and legal changes that have already occurred, and trace the trajectory of change so that I might predict future policy and legal developments.

7.13 Applying Nedelsky's Relational Analysis to Gamete Donation

Nedelsky's relational approach can be applied to any existing legal framework. Her argument is not that rights ought to structure relationships, but that they already do, and that a relational analysis can be brought to bear on legal decision-making and theorising about core legal values such as autonomy, security, dignity, equality and liberty.[477] Nedelsky focuses her work on autonomy, but recognises that her development of a relational approach to autonomy 'is meant to model the way any value can be examined from a relational perspective'.[478] By applying a relational analysis we can critically evaluate existing laws according to the extent to which they help to structure constructive relationships (i.e. they promote core values), or generate dysfunctional relationships (i.e. they hinder core values). Nedelsky states that:

> The individual self is, then, constituted in an ongoing, dynamic way by the relationships through which each person interacts with others… Autonomy, for example, comes into being (or is harmed) through relationships with parents, teachers, and employers. And law, including rights, is one of the chief mechanisms … for shaping the relationships that foster or undermine values such as autonomy.[479]

Nedelsky's relational theory offers an original insight into the function of legal rights in structuring the relationships between parties to gamete donation. As Nedelsky notes, '[r]ights structure relations of power, trust, responsibility and care',[480] and the complex relations between gamete donors, recipients and donor-conceived offspring involve all of these things. Through the lens of relational theory we can consider the parties' rights in terms of the type of relationship fostered, and critically analyse the

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477 Ibid 41. Although, Nedesky admits that 'health is a powerful factor in how people experience themselves', she does not identify health as a core value in her work. Other theorists working in the field of economics have recognised it as a core value, and I see it as a core value, too. See Jennifer Nedelsky (2011) Ibid 17; Robert Skidelsky and Edward Skidelsky, *How much is enough? The love of money and the case for the good life* (Allen Lane, 2012), 150-179.

478 Ibid, 41.

479 Ibid, 3.

480 Jennifer Nedelsky (1993a), above n 36, 12

current law to the extent to which it promotes (or fails to promote) values important to the parties. Furthermore, Nedelsky's theory allows us to manipulate the form and strength of the 'rights' structuring the relationships in theory and 'try on' different relationship structures to test whether more functional and mutually satisfactory relationships can be put in place to better serve the parties in future.

7.14 Relational Theory of Legal Rights Applied to the Practice of Gamete Donation and Information Sharing

In the context of gamete donation, a fundamental flaw in liberal theories of rights is that they presume that parties to gamete donation are potentially in conflict, and may harm each other's interests unless they are constrained by rights. This presumption is incorrect in most cases, and undermines the ability of liberal theories to explain and justify legal rights. Adult parties to gamete donation – recipients and donors – are generally in a reciprocal (although unequal) relationship,[481] working towards the common goal of family-building, and are generally fully informed of their rights and duties before entering into the relationship. As discussed in Part 2, in these types of gift relationships, unreciprocated obligation is much more likely to be a problem rather than conflict, and negative gift-dynamics cannot be resolved by arming the parties with rights to use against one another. The interests of donor-conceived offspring may be in conflict with the interests of recipients and donors, but this is not necessarily the case. In situations where conflict does arise, it could be reduced or resolved by using rights to modify the relationships and encourage communication between the parties, rather than attempting to use rights as a dividing mechanism to 'carve out' each party's entitlement against the other.

I am not the first to suggest that traditional liberal rights theory does not accord with the modern reality of gamete donation. While considering issues in donor-conception, the liberal understanding of rights was criticised and ultimately rejected by the United Kingdom Nuffield Council of Bioethics, which stated that

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[481] See Chapter 2 – Privacy and Secrecy in Gamete Donation, 2.7 *The tyranny of the gift*, page 43, for a discussion of the Gift Relationship between parties to gamete donation.

> [t]he language of 'rights', which tends to start with conclusions, seemed too adversarial, not permitting the more nuanced approach needed in dealing with the complex interdependent networks of relationships of family and kin'. [482]

While the Nuffield Council of Bioethics was correct in its assertion that the relationships between parties to gamete donation are complex and require a nuanced approach, the decision to reject legal rights outright is throwing the baby out with the bathwater: it is not *rights* themselves that must be rejected, but the prevailing liberal theory of rights that must be challenged.

This challenge leads us to a relational theory of rights, which can be used first to describe more accurately the relationships between parties to gamete donation as the relationships are structured by legal rights and, second, to structure an analysis of how effectively the current relationships operate, by pinpointing how law is or is not structuring the kind of relationships that promote the parties' autonomy.

7.15 Contextualising the Trajectory of Change from Bounded Selves to Relational Parties

As we saw above, changing social attitudes and technological developments have served as catalysts for significant changes in legal regulation of gamete donation and donor insemination.[483] The trajectory of change has been away from liberal concepts of strong privacy rights and boundaries, towards flexible privacy defined in the context of relationships. Parties to gamete donation have become more interpersonal and relational and this is reflected and supported in the legislation and professional guidelines that currently regulate donor conception practices.

In terms of relational theory, clear legal relationships between the parties have been established, at least in relation to legal parentage and status of children, and some level of interpersonal relationship is supported by the transmission of identifying and non-identifying information between the parties. In many ways, the autonomy of the parties has been enhanced by these changes, which have allowed them to obtain

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482 Nuffield Council on Bioethics, *'Donor conception: ethical aspects of information sharing',* (Nuffield Council on Bioethics, April 2013).

483 See Chapter 5 – Political interest in donor conception, 5.1 *Shifting Social Attitudes and Political Interest in Gamete Donation and Donor Conception*, page 65.

information relevant to themselves and (for recipients and donors) understand more clearly the nature of the relationships they are entering into. This is in stark contrast to the situation in the past, where relationships between the parties were minimised as far as possible and viewed as dangerous to the parties' individual interests.

Nevertheless, most relationships between most parties to gamete donation are far from fully relational. Their legal relationships are improved but still dysfunctional in some important respects, which undermines the ability of the parties to maximise their autonomy. In particular, poor flow of information between the parties is symptomatic of poor relationships.

CHAPTER 8:

ILLUSTRATIVE CASE STUDIES

8.1 The case studies

In what follows, I introduce a series of illustrative case studies involving fictional but realistic scenarios that may arise in gamete donation. After introducing each case study, I apply a relational analysis to the issues raised in the case study first, to explain how relationships between the parties are currently structured by legal rights and second, to critically evaluate how well the existing relationships promote values important to the parties and whether the relationships could be legally re-structured to better serve the parties' interests.

8.2 Case Study 1: Donor-Conceived Offspring Who Are Not Told About Their Conception

> Amy and Brad conceive baby Cameron with the help of an unknown egg donor, after a long battle with infertility. They are concerned that some older family members may not accept Cameron into the family if they know that he is donor-conceived, and decide to keep the nature of Cameron's conception a secret, even from him, and move on with their new family life.

Despite a general expectation that donor-conceived offspring ought to know that they are donor-conceived,[484] legislation in South Australia and Western Australia is framed in such a way that it is neutral as to whether donor-conceived offspring should be told of the nature of their conception. This is in contrast to legislation in Victoria and New South Wales, which supports advising donor-conceived offspring that they are donor-conceived. In Victoria, section 17B of the *Births Deaths and Marriages Registration Act 1996* (Vic) specifically requires the Registrar of Births, Deaths and marriages to enter 'donor-conceived' against the registration entry of a donor-conceived offspring, and to attach an addendum to the birth certificate of those donor-conceived offspring

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484 Assisted Reproductive Treatment Act 2007 (NSW) s40; Nuffield Council on Bioethics, above n 482; see also Chapter 4 – Secrecy in Gamete Donation, 4.2 *Effect of secrecy on the parties*, page 59 which presents evidence that the parties are better off when the use of donor gametes is not a secret.

specifying that further information is available.[485] Notification is not as explicit in New South Wales,[486] but the *Assisted Reproductive Treatment Act 2007* (NSW) does allow the Director-General of the Department of Health to directly contact adult donor-conceived offspring to ask the person 'whether he or she wishes to consent to the disclosure of [identifying] information'.[487] Although the current New South Wales legislation does not go as far as the Victorian legislation to ensure that adult donor-conceived offspring know about the nature of their conception, it does provide some incentive for recipients of donated gametes to advise their children of their donor-conceived status, because otherwise the truth may be exposed by a government official.[488]

From a relational perspective, the current law (except in Victoria) tends to structure and support one-sided relationships in which recipients have complete control and absolute discretion over disclosing to donor-conceived offspring their personal information. This arrangement does not support the autonomy of donor-conceived offspring, and is therefore undesirable. However, an adversarial approach that focuses only on shifting power from recipients to donor-conceived offspring has its own shortcomings, especially in the case of children, who are in transition from dependent to independent autonomy.

A relational approach instead focuses on the relationships between donor-conceived offspring and their recipient parents. As stated above, donor-conceived children, like all children, exist in a state of dependent autonomy in that their autonomy relies upon positive relationships of dependency. In particular, donor-conceived offspring are dependent on their recipient parents for information as to the nature of their conception. If this information is not disclosed, the child's transition from dependent to independent autonomy may be hampered, and they may never achieve full autonomy in the sense that they have 'the ability and the freedom to make the choices

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485 *Births Deaths and Marriages Registration Act 1996* (Vic) s17B.

486 Reporting in 2013, the New South Wales Committee on Law and Safety recommend that New South Wales should adopt the Victorian system of attaching addendums to the birth certificates of donor-conceived offspring, although this has not yet been seriously considered for implementation; Committee on Law and Safety, 'Report on the Inquiry into Managing Information Related to Donor Conception' (2/55, Parliament of New South Wales Legislative Assembly, October 2013), 56.

487 *Assisted Reproductive Treatment Act 2007* (NSW), s40.

488 The Family Court has in one case ordered a recipient mother to inform her child of the factual identity of his donor as his 'biological father'; see *R and J and Anor* [2006] FamCA 1398.

that shape [their] lives'[489]. Further, there is ample evidence that failing to disclose to children that they are donor-conceived is destructive to family relationships[490] and for this reason, current advice is to disclose. However, many parents still do not inform their children about the mode of conception,[491] and legislation in most Australian jurisdictions still supports the formation and maintenance of relationships that are detrimental to the autonomy of donor-conceived offspring, and are destructive to the family relationships as a whole.

From a relational perspective, Victoria's amended *Births, Deaths and Marriages Act* offers some improvement to the status quo insofar as it limits the absolute discretion of recipients until such time as the donor-conceived offspring obtains a copy of his or her birth certificate. It structures a better relationship between the parties because, first, it sends a clear message that secrecy within donor-conceived families is undesirable and harmful to the family relationships and second, that harm to the autonomy of donor-conceived offspring may be limited in time. The New South Wales legislation is less desirable – although it generally accords with the view that secrecy within donor-conceived families is undesirable and harmful to relationships, the disclosure is inconsistent and does not reflect a clear policy against secrecy.

In addition to disclosing to donor-conceived offspring the fact that they are donor-conceived, offspring have an interest in gaining access to information about their donor that is of use to them, especially where there is not an open personal relationship between the parties.

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489 John Harris, above n 239, 10-11. I note that Harris' discussion focuses on autonomous decision-making in the context of consent to medical treatment. Nevertheless it is relevant in the sense that information is necessary for informed self-determination in all aspects of life and not only consent to medical treatment.

490 See Chapter 4 – Secrecy in Gamete Donation, 4.2 *Effect of secrecy on the parties,* page 61; Ronald Bailey, above n 257, 24; Petra Thorne and Ken Daniels, above n 247, 47; Annette Baran and Reuben Panor, above n 259; Effy Vayena and Susan Golombok above n 101, 294; Ken Daniels, Victoria Grace and Warren Gillett, above n 256, 2788; Amanda Turner and Adrien Coyle, above n 262.

491 Jennifer Readings et al, 'Secrecy, disclosure and everything in-between: decisions of parents of children conceived by donor insemination, egg donation and surrogacy' (2011) 11 *Reproductive BioMedicine Online* 485, 491; Ken Daniels, Victoria Grace and Warren Gillett, above n 256; Emma Lycett et al, 'Offspring created as a result of donor insemination: a study of family relationships, child adjustment, and disclosure' (2004) 82(1) *Fertility & Sterility* 172; Anna Rumball and Vivienne Adair, 'Telling the story: parents' scripts for donor offspring' (1999) 14 *Human Reproduction* 1392. However, some of the parents who reported that they had 'disclosed' to their children had discussed the use of fertility treatment but not the use of donated eggs or sperm; this issue is discussed in more detail at Chapter 10: Knowing That They are Donor-conceived, page 135-144.

8.3 Case Study 2: Outdated Information

Beth's parents have always been honest about the fact that she is donor-conceived, but she has had little interest in seeking information about her egg donor or whether she has any donor-siblings. Unfortunately, shortly after the birth of her first child and at the age of 22, she is diagnosed with breast cancer. While undergoing treatment, Beth takes a genetic test, which reveals that she has a BRCA-1 mutation.*

There is no history of breast or ovarian cancer on her father's side of the family, and it is likely that she inherited the mutation from her donor.

This news sparks in Beth a desire to learn more about her donor and, in particular, to check her health records. She contacts VARTA, but is frustrated to find that no information about her donor has been updated since the donation was made.

* BRCA-1 and BRCA-2 are common genetic mutations that greatly increase a woman's chance of developing breast, ovarian and other cancers (see e.g. D Thompson and D Easton, 'The Breast Cancer Linkage Consortium. Cancer incidence in BRCA1 mutation carriers' (2002) 94(18) *Journal of the National Cancer Institute* 1358).

Donors are required to provide identifying and non-identifying information — including personal and family medical history — at the time of making their donation, but there is no official mechanism for ensuring that the information is ever updated. State legislation in Victoria, Western Australia, New South Wales and South Australia is silent on the matter, while the *NHMRC Guidelines* place the onus on donors to keep clinics updated, and impose no legal obligation to do so:

> Clinics should tell gamete donors (or gamete providers for donated embryos) that it is their ethical responsibility to keep the clinic informed about any changes to their health that may be relevant to the persons born or the recipients of their donation...[492]

The status quo is unacceptable. It has been the experience of many donor-conceived individuals and recipients of donated gametes that donors often do not contact clinics

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[492] Australian Government National Health and Medical Research Council (*NHMRC Guidelines*), above n 25, guideline 10.3.2.

after their donation to update information held about them.[493] This can result in decades-old information being provided to recipients and donor-conceived individuals, and so deny them access to crucial genetic health information obtained by their donor post-donation. It has been reported that some recipients of donated gametes are acutely aware that information collected from gamete donors at the time of donation may quickly become outdated, and have sought early contact with their donor solely for purposes of ensuring access to updated information and contact details for the later benefit of their donor-conceived offspring.[494] For other donor-conceived offspring, state registers and the NHMRC Ethical Guidelines all set an age at which they may request identifying information about their donor.[495] In Western Australia this is set at 16,[496] while elsewhere it is 18.[497] This means that information is often at least 16 years old when donor-conceived offspring first gain access to it.

From a relational perspective, the current law does not structure the relationships between parties to gamete donation in a way that holds donors accountable for providing correct and current information to donor-conceived offspring. Currently, the relationship appears to cease the moment the donation is made and, as a result, the autonomy of donor-conceived offspring may be seriously undermined where identifying and/or non-identifying information about their donor is incomplete or inaccurate. How can Beth be said to have 'the ability and the freedom to make the choices that shape [her] li[fe]'[498] when she has no means of knowing whether her donor's family has a history of breast or ovarian cancer, or whether she may have donor-siblings who are affected?

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493 The Australian Senate Legal and Constitutional Affairs References Committee inquiry received a number of submissions relevant to this issue; above n 88, 35-36 [3.17].

494 Jenni Millbank et al, above n 49, 60.

495 Some jurisdictions with donor registers may allow earlier access — for example, in Victoria, donor offspring may gain access to donors' identifying information before the set age providing their parent or guardian has consented to this or a counsellor has provided advice to the Registrar that the person is sufficiently mature to understand the consequences of disclosure: see e.g. *Assisted Reproductive Treatment Act 2008* (Vic) s 59(a)(ii). However, there is no ability for recipient parents to initiate access. In Western Australia, a person with parental responsibility for a child may, after completing approved counselling, consent on their child's behalf at a younger age following amendments in 2004: *Human Reproductive Technology Act 1991* (WA) s 49(2c).

496 *Human Reproductive Technology Act 1991* (WA) s 49(2b).

497 Australian Government National Health and Medical Research Council (*NHMRC Guidelines*), above n 25, guideline 6.11*; Assisted Reproductive Technology Act 2007* (NSW) s 37(1), 4(1); *Assisted Reproductive Treatment Act 2008* (Vic) s 59(a)(i).

498 John Harris, above n 239, 10-11.

The relationships between the parties could be better structured to make use of the current trajectory of change away from bounded individuals and towards relational parties. Primarily, legislative change that furthers the parties' autonomy must support an ongoing relationship between the parties to gamete donation which may, or may not be personal. An ongoing legal requirement for donors to update their identifying and/or non-identifying information held on their state donor register need not be particularly onerous and does not undermine the donor's autonomy. For example, it is common to notify many persons and agencies when one moves house, and donors may seek advice from their treating practitioners if they are diagnosed with a possible hereditary illness. Updated and accurate information may significantly improve the autonomy of recipients and donor-conceived offspring who make use of it; genetic health information about a donor may inform the recipient's decision to use the gametes at all, or subject embryos to genetic testing. In addition, updated genetic health information from donors may assist the diagnosis, treatment or prevention of disease in donor-conceived offspring.

However, providing information to the parties will not necessarily enhance their autonomy, particularly if the information is unwanted or unwelcome. The parties' autonomy is best served by allowing them to make their own decision as to whether, and when, they wish to avail themselves of information held on the donor register. In particular, some individuals may wish to remain ignorant of the genetic health information (or any other information) available to them, and their wish should be respected for the most part. Occasionally, health information that relates to genetic relatives of an index patient may be of such significance in lessening or preventing a serious threat to life, health, or safety that involved health providers will have legislative permission to disclose the health information directly to genetic relatives, including donors or donor-conceived offspring.[499] Similar provisions exist in relation to other health information that may be disclosed without consent in order to lessen or prevent a serious threat to the life, health or safety of another individual.[500] In addition to the concerns of recipients and donor-conceived offspring to be provided with

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499 *16A Privacy Act 1988* (Cth) [as at 14 March 2014]; a 'permitted health situation' may exist to permit disclosure.

500 Ibid.

updated and accurate health information about gamete donors, donors' autonomy may also suffer where relevant information is not made available to them.

8.4 Case Study 3: Information Not Provided to Gamete Donors:

> Baby Cameron, conceived using donor sperm, was a small and weak infant and failed to meet developmental milestones as expected. Amy and Brad's general practitioner became concerned about Cameron's weakness and difficulty feeding, and referred him to a paediatrician. Following examination and genetic testing, Cameron was diagnosed with Spinal Muscular Atrophy (SMA). The implications of this are that both Amy and the sperm donor are carriers of the disease.[1]
>
> After some discussion, Amy and Brad decide against contacting their fertility services provider to advise that the donor is likely a carrier of the SMA gene. They consider the information personal, and wish to focus on moving forward and caring for Cameron. They decide not to try for any more children, and discard the donor sperm they have in cryopreserved storage.

There is currently no legislative requirement for recipients of donated gametes to provide identifying or non-identifying information about themselves to gamete donors. Nor are they legally required to inform their fertility service provider or donor if they discover previously unknown health information that is relevant to the donor and/or suitability of the gametes to be used in donor conception procedures.[501]

Assisted Reproductive Treatment Further Amendment Act 2014 explicitly allows ART providers to disclose medical information[502] to donors, recipients and donor-conceived offspring, and donor-siblings in circumstances where disclosure is necessary to save a persons' life or to warn about a genetic or hereditary condition that may be harmful to the person or their descendants.[503]

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501 The yet-to-come-into-force *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) allows for ART providers to disclose certain medical information about donors and donor-conceived offspring, but not specifically information obtained from testing embryos; *Assisted Reproductive Treatment Further Amendment Act 2014 (Vic)* s16.

502 *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) s16.

503 Ibid

The status quo is such that the donor assumes all responsibility and recipients assume all benefit of the donation. This arrangement is both a hang-over from the past where any ongoing relationship between the parties was rejected outright, and may still be thought relevant to avoid the risk of negative gift-dynamics developing between the gamete donor and the recipients, who can never repay the donor for their 'gift'.[504] However, once again, a relationship between the parties could be supported and regulated by legislation in a way that would support the autonomy of both donors and recipients. This may be easily achieved by creating reciprocal obligations between donors and recipients that each will update the relevant donor register with information for the benefit of the other. Under this model, the risks of a direct personal relationship are avoided, and the parties' autonomy is supported by allowing them to choose to access information if, and when, they choose to do so.

8.5 Conclusion: From Secrecy to Openness

This Part served to highlight the trajectory of change in the relationships between parties to gamete donation from the 1980s to the present day. This change stemmed from a shift in public attitudes and subsequent introduction of State legislation and professional Guidelines to regulate donor conception practices. The result has been a palpable shift from separated and tightly 'bounded' parties to increasingly interdependent and relational parties to gamete donation.

I observed that this shift was tied to a generalised social evolution away from the strictly defined public/private spheres that are presumed by liberal socio-legal theories, and towards a post-liberal socio-legal society that is defined by greater flexibility between the boundaries of private and public and, ideally, by dispensing with the notion of boundaries entirely in favour of focussing on relationships. Within this post-liberal framework, relational theories of autonomy and rights present an exciting possibility for re-framing the relationships between parties to gamete donation in terms of relationships, rather than boundaries, and shift the focus from privacy to autonomy.

Nedelsky's relational theory of rights explains the purpose of rights not as a means of establishing boundaries between parties, but rather, as a means of structuring

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504 See Chapter 2 – Privacy and Secrecy in Gamete Donation, 2.7 *The tyranny of the gift*, page 43.

relationships between parties. It is within these relationships that individual autonomy may be supported or harmed. Nedelsky's relational theory of rights can be applied to the evolving relationships between parties to gamete donation to illustrate, firstly, the tentative development of relationships through early legislation, and then the development of interpersonal relationships brought about by legally prohibiting anonymity and facilitating exchange of information and, finally, the development of fully relational parties whereby donors', recipients', and donor-conceived offsprings' autonomy are maximised through their nested relationships.

In the next Part, I follow this trajectory of change from bounded selves to increasingly relational parties to gamete donation into the future, and suggest how law may structure these relationships in the future in order to best maximise the autonomy of donors, recipients and donor-conceived offspring.

PART 4 TOWARDS RELATIONAL PARTIES: FUTURE

In the previous Part, I described the trajectory of change in relationships between parties to gamete donation away from strictly separated, or 'bounded', parties and towards increasingly interpersonal and relational parties. I identified that this shift has been driven by a broad social zeitgeist, a change away from strictly defined spheres of public and private life that are presumed by liberal socio-legal theory, and towards more flexible interplay between boundaries of public and private. To an extent, this post-liberal shift in the way parties to gamete donation relate to one another has been supported by State legislation and professional guidelines, although such regulations are still organised around the metaphor of boundaries.

In order to fully describe the post-liberal trajectory of change, I introduced relational theories of autonomy and rights, which dispense with the metaphor of boundaries altogether and instead focus on the relationships between parties. I applied Nedelsky's relational theory of rights to understand how legal rights have structured the relationships between parties to gamete donation from the 1980s to present, and highlight the shift from bounded individuals towards relational parties to gamete donation.

In this part, I wish to further explore the shift towards interpersonal and fully relational parties to gamete donation. Although anonymous gamete donations are now prohibited in all Australian states and territories, the social and legal shift away from secrecy is not yet complete. This final step will allow the parties to interact in a mutually respectful way that serves all parties' interests. To be clear, this is not to say that the choice to donate gametes or the use of donor gametes is not a private matter for the parties, but that all parties, including donor-conceived offspring should be fully informed about the procedure, and information should be made available to donor-conceived offspring (although not the world at large). I begin by considering three recent government inquiries into contemporary donor conception practices and their recommendations for the future regulation of donor conception. In particular, the inquiries focus on the flow of information between the parties, which is achieved by reducing, and eventually ending, secrecy around donor conception. I suggest that an end to secrecy and information flow are crucial to the parties' sense of autonomy and,

especially for donor-conceived offspring, their capacity for creative interaction and sense of self. This discussion centres around the twin issues of disclosing to donor-conceived offspring the fact that they are donor-conceived, and allowing donor-conceived offspring to gain retrospective access to identifying information about their donors.

Finally, I consider the limitations of current boundary-focussed legislation for regulating donor conception practices, which is challenged by a post-liberal and relational shift in the social relationships between parties to gamete donation. I conclude that relational theories are integral to the task of describing how the law does, and could, operate to structure relationships between parties to gamete donation as we move into the future, because boundary metaphors have reached their limit in explaining how the relationships between parties to gamete donation function.

CHAPTER 9:
CONTEMPORARY SOCIAL ATTITUDES AND POLITICAL CONSIDERATION OF GAMETE DONATION AND DONOR CONCEPTION

9.1 Shifting Social Attitudes and Political Response

As discussed in Part 3, significant changes to the regulation of donor conception have taken place throughout Australia to prohibit anonymous donation and ensure that donor-conceived offspring may identify their donor when they have reached an appropriate age.[505] However, for many parties to gamete donation, secrecy still prevails and many donor-conceived offspring do not know that they are donor-conceived. Furthermore, while it is now generally accepted that donor-conceived offspring have an interest in gaining access to information about their donor, this interest is only recognized prospectively.

There have been increasing calls from adult donor-conceived offspring,[506] academics,[507] and support/lobby groups[508] to end secrecy surrounding gamete donation, and allow donor-conceived offspring to retrospectively gain access to identifying information about their donors. These calls have been met by opposition from organizations that represent the interests of medical practitioners and fertility

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505 In Western Australia the age at which donor-conceived offspring may gain access to identifying and non-identifying information about their donor is set at 16 years, while in Victoria, New South Wales and South Australia it is 18 years. The *NHMRC Guidelines* state that fertility service providers should make information about donors available to donor-conceived offspring who have reached the age of 18 years; *Human Reproductive Technology Act 1991* (WA) s 49(2b). *Assisted Reproductive Technology Act 2007* (NSW) s 37(1), 4(1); *Assisted Reproductive Treatment Act 2008* (Vic) s 59(a)(i). Australian Government National Health and Medical Research Council (*NHMRC Guidelines*), above n 25, guideline 6.11.

506 See e.g. Damian Adams and Caroline Lorbach, above n 8; In *Rose v Secretary of State for Health [2002] 2 FLR 962*, the English High Court held that donor anonymity contravenes the right of donor-conceived offspring to 'respect for private and family life' guaranteed by Article 8 of the *European Convention on Human Rights 1950*; cited in Sonia Allan (2012b) above n 18, 373*;* Sonia Allan (2012c), above n 110; Richard Chisholm, above n 28, 731-741.

507 See e.g. Eric Blyth, 'Information on genetic origins in donor-assisted conception: Is knowing who you are a human rights issue?' (2002) 5(4) *Human Fertility* 185; Eric Blyth and Abigail Farrand, 'Anonymity in donor-assisted conception and the UN Convention of the Rights of the Child' (2004) 12 *International Journal of Children's Rights* 84; Sonia Allan (2012b) above n 18.

508 For a review of the work of the Donor Conception Support Group (DCSG) and TangledWebs, see Damian Adams and Caroline Lorbach, above n 8, 715-718.

service providers, and some donors. I discuss these issues in detail below but, for now, it is sufficient to say that these are live issues in gamete donation.

These live social issues have been addressed in a number of political inquiries and committee reports, which have considered regulation of donor conception into the future. I focus on three recent committee reports that address the above issues from both a federal and State perspective.

9.2 The Australian Senate Legal and Constitutional Affairs References Committee: Donor Conception Practices in Australia

In February 2011, the Australian Senate Legal and Constitutional Affairs Reference Committee reported on Donor Conception Practices in Australia.[509] The scope of the Committee's inquiry was broad — to inquire and report on:

> The past and present practices of donor conception in Australia, with particular reference to:
>
> a. donor conception regulation and legislation across federal and state jurisdictions;
>
> b. the conduct of clinics and medical services, including:
>
> i. payments for donors;
>
> ii. management of data relation to donor conception; and
>
> iii. provision of appropriate counselling and support services;
>
> c. the number of offspring born from each donor with reference to the risk of consanguine relationships; and
>
> d. the rights of donor-conceived individuals.

The Committee received over 162 submissions from individuals and organisations,[510] and heard submissions at three public hearings. In total the Committee made 32

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509 Senate Legal and Constitutional Affairs References Committee, above n 88.

recommendations for Commonwealth regulation of donor conception. Encouragingly, the Committee supported legislative moves to support intrapersonal relationships between parties to gamete donation, while being critical of past practices of anonymity and secrecy.

Relevant to this thesis, the Committee recommended that nationally consistent legislation should be developed to regulate donor conception throughout all States and Territories of Australia, with particular attention to the rights of access by donor-conceived individuals to identifying and non identifying information about their donor and siblings.[511] The Committee also made recommendations for the establishment of a national register of gamete donors or, failing establishment of a national register,[512] the establishment of consistent and centrally administered state and territory registers.[513]

The Committee made specific recommendations as to granting access to the proposed donor register(s): it recommended that, at a minimum, the register(s) should allow donor-conceived offspring to gain access to identifying information about their donor upon reaching 18 years (or younger as agreed to by all states and territories), but that donors should not be allowed to gain access to identifying information about their donor-offspring without the consent of those offspring, nor should donor-conceived offspring access identifying information about their donor siblings without the consent of those siblings.[514] Although the Committee did consider submissions as to the retrospective release of information (including identifying information) about donors who had donated anonymously, it declined to make any specific recommendations about retrospectivity.[515]

The Committee recommended the establishment of a national voluntary register for purposes of recording information provided by donors who had previously donated

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510 162 submissions were listed in Appendix 3 of the Report, and a small number of submissions were accepted as confidential and were not published: Senate Legal and Constitutional Affairs References Committee, above n 88, 5.

511 Senate Legal and Constitutional Affairs References Committee, above n 88, recommendations 1-3.

512 The Committee noted that there may be constitutional limitations to the power of the Commonwealth to pass legislation in this area; Ibid 9,10, 24-26.

513 Ibid recommendations 5-8.

514 Ibid recommendation 9.

515 Ibid 96.

anonymously or as part of a private arrangement.[516] The Committee made recommendations for the preservation and long-term storage of records relating to donors and donor-conceived offspring, including calls for a moratorium on the destruction of records.[517] Finally, the Committee recommended that all states follow the lead of Victoria, so that the birth certificates of donor-conceived offspring are notated so that when they apply for their birth certificate over 18 years of age, they can be provided with additional information about their donor, should they wish.[518]

In August 2012, the Australian Government responded to the Senate Committee Report.[519] Although the Government supported the majority of the Committee's recommendations, it clarified that it did not have constitutional power to legislate comprehensively in the area of donor conception, and so could not support recommendations for federal legislation in this area. The Government noted that it supported proposals for donor registers and appropriate addendums to the birth certificates of donor-conceived offspring, but these were a matter for States and Territories.

9.3 The Parliament of Victoria Report of the Law Reform Committee for the Inquiry into Access by Donor-conceived People to Information about Donors

The Parliament of Victoria Law Reform Committee for the Inquiry into Access by Donor-conceived People to Information about Donors reported to the Victorian Parliament in March 2012.[520] Compared to the Commonwealth Senate Committee, the ambit of the Victorian Committee was narrower and specifically addressed the issue of retrospective release of information from donors who had donated anonymously. The Committee was asked to consider and report on the following:

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516 Ibid recommendations 10-12. The Committee also recommended that this voluntary register include a DNA databank.

517 Ibid recommendations 19,20.

518 Ibid recommendation 32.

519 Government Response to the Senate Legal and Constitutional Affairs References Committee Report: Donor Conception Practices in Australia, above n 329.

520 Parliament of Victoria Law Reform Committee, 'Inquiry into Access by Donor-Conceived People to Information about Donors' (120, Parliament of Victoria, March 2012).

a. ‘the legal, practical and other issues that would arise if all donor-conceived people were given access to identifying information about donors and their donor-conceived siblings regardless of the date the donation was made;

b. The relevance of a donor’s consent or otherwise to the release of identifying information and the National Health and Medical Research Council’s ethical guidelines on the use of assisted reproductive technology in clinical practice and research;

c. Any practical difficulties in releasing information about donors who provided their gametes before 1 July 1988, because in many cases records are not available either because the procedure was carried out privately or records were not stored centrally;

d. The options for implementing any changes to the current arrangements, including non-legislative options;

e. The impact that any such changes may have on the donor, the donor-conceived person and future donor programs;

f. The impacts of the transfer of the donor registers currently held by the Infertility Treatment Authority to the Registrar of Births Deaths and Marriages; and

g. The possible implications under the Charter of *Human Rights and Responsibilities Act 2006.*’

The significant outcome of the Victorian Committee’s inquiry was support for the retrospective release of information about gamete donors to donor-conceived offspring.[521] The Committee Chair noted that:

> When the Committee commenced its Inquiry, it was inclined towards the view that the wishes of some donors to remain anonymous should take precedence … Upon close inspection, however, and after receiving evidence from a diverse range of stakeholders … the Committee unanimously reached the

[521] Ibid 76.

> conclusion that the state has a responsibility to provide all donor-conceived people with an opportunity to access information, including identifying information, about their donors.[522]

The Committee took into account the fact that to provide identifying information about donors is to provide information that may be used to contact them. Consequently, the committee recommended that donors (and donor-conceived offspring) should have the ability to lodge a veto against being contacted.[523] The Committee also considered the interests of donors to gain access to information about the result of their donations and donor-conceived offspring, and recommended that donors should be provided with access to non-identifying information, including medical information, about their donor-conceived offspring.[524] The Committee specifically considered the sharing of relevant medical information between donors, donor-conceived offspring, and donor-siblings, and recommended that a mechanism should be introduced to allow medical information to be conveyed to the parties where a significant genetic or hereditary risk exists.[525]

In September 2014, the Victorian Parliament passed the *Assisted Reproductive Treatment Further Amendment Act 2014*, to come into force on or by 29 June 2015.[526] Details of the *Assisted Reproductive Treatment Further Amendment Act 2014* have been discussed previously.[527] Briefly, the *Act* incorporated some, but not all, of the recommendations made by the Committee. In particular, while the *Act* provides for the formation of a comprehensive central register (including information from pre-1988 treatment procedures),[528] introduces specific mechanisms for disclosing

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522 Ibid xvii.
523 Ibid 81.
524 Ibid 106.
525 Ibid 107, 117.
526 *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) s2.
527 See Chapter 6 – State Legislation and Professional Guidelines to Regulate Gamete Donation and Donor Conception, 6.3 *Developing Relationships on their Own Terms: State Legislation and National Health and Medical Research Council Guidelines*, page 81.
528 *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) s5, 8. Information may also be provided by natural persons, who are protected from criminal or civil liability, in anticipation that some records may be held by individual (or retired) medical practitioners; *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) s6; Explanatory Memorandum, *Assisted Reproductive Treatment Further Amendment Bill 2013* (Vic), 3.

significant health information about donors, [529] and explicitly provides for a donor-linking service provided by VARTA,[530] it stops short of allowing full retrospective access for donor-conceived offspring to information about their donors.[531]

9.4 New South Wales Parliament Legislative Committee on Law and Safety 'Inclusion of Donor Details on the Register of Births' & 'Managing Information Related to Donor Conception'.

The New South Wales Parliament Legislative Committee on Law and Safety reported its inquiry into inclusion of donor details on the register of births in October 2012. The terms of reference were to 'inquire into and report on whether there should be provision for the inclusion of donor details on the register of births maintained by the Registrar of Births, Deaths and Marriages'.

The case of *AA v Registrar of Births, Deaths and Marriages and BB*[532] was the catalyst for the New South Wales Committee to commence its inquiry into inclusion of donor details on the register of births.[533] In *AA,* a female same-sex couple successfully applied to have the name of a sperm donor removed from their child's birth certificate, in order that the genetic mother's co-parent could be named on the birth certificate as a legal parent. Although the committee recommended against including donors' details on the Register of Births and birth certificates, the Committee did, however, recommend that New South Wales adopt the Victorian system of attaching addendums to the birth certificates of donor-conceived offspring.[534] The NSW Government response to the Committee report indicated that it would consider this issue following completion of the New South Wales Legislative

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529 Medical information is defined as '[information about] an individual that is or could be predictive of the health (at any time) of the individual or any descendants of the individual'; *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) s16.

530 *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) s21.

531 As noted previously, information about pre- 31 December 1997 donors may only be disclosed to other parties with consent; *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) s11.

532 *AA v Registrar of Births, Deaths and Marriages and BB* [2011] NSWDC 100; see also *LU v Registrar of Births, Deaths and Marriages (No 2)* [2013] NSWDC 123.

533 Committee on Law and Safety, above n 486.

534 Ibid 56.

Assembly Law & Safety Committee's report on *Managing Information related to Donor Conception*.[535]

The New South Wales Committee reported on *Managing Information related to Donor Conception* in October 2013. The terms of reference were to inquire into and report on the management of information related to donor conception in NSW, with particular regard to:

a) 'whether people conceived by donor conception prior to January 2010 should have access to donor conception information, including information that identifies their donor and donor-conceived siblings.

b) which agency should manage donor conception information and provide services related to the release of this information.

c) what counseling or support services and public education measures are necessary to support people who are seeking access to donor conception information.

d) any other relevant matter.'

Although the Committee did consider the recommendations made in the Victorian Committee report, and heard evidence from a number of stakeholders, it did not agree with the Victorian Committee's recommendation to mandate the retrospective release to donor-conceived offspring information about their donors. Instead, the Committee favoured the development of a new donor conception management agency to operate a Register of donor conception information on an active, consent-release model.[536]

The New South Wales Parliament responded to the reports of the Committee in 2014,[537] and supported legislation being drafted to enable an addendum to the birth certificates of donor-conceived offspring.[538]

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535 Ibid.

536 Ibid 52; for further discussion on models for releasing information about donrs to donr-conceived offspring, see Chapter 11 – Releasing information to Parties to Gamete Donation, 145.

537 Government of New South Wales, 'Government Response to NSW Legislative Assembly Committee of Law and Safety Inquiries into Donor Conception' (Parliament of New South

9.5 Conclusion: Contemporary Social Attitudes and Political Consideration of Gamete Donation and Donor Conception

The use of donor gametes has gained general social acceptance in Australia, and this has been reflected in significant changes to the regulation of donor conception. From a relational point of view, the most significant change has been the prohibition of anonymous donation in all states and territories of Australia, which has created the possibility of interdependent relationships between donors, recipients and donor-conceived offspring, when the treatment was pursued through a clinic.

Unsurprisingly, all three government inquiries discussed above focussed on the rights of donor-conceived offspring to gain access to information about their donors. In particular, both the Victorian and New South Wales inquiries considered whether identifying information about donors should be retrospectively released to donor-conceived offspring. Although the Victorian inquiry clearly supported such a move, the New South Wales Committee was more conservative and instead supported an active consent-release model.

Of course, the question of whether donor-conceived offspring should have the opportunity to gain access to information about their donors is moot if they do not know that they are donor-conceived. This issue was identified in both inquiries but not satisfactorily resolved by the New South Wales committee. Below, I go on to consider the twin issues of disclosing to donor-conceived offspring the fact that they are donor-conceived, and allowing donor-conceived offspring retrospective access to identifying information about their donors. I maintain that an end to secrecy and information flow is crucial to the parties' sense of autonomy and, especially for donor-conceived offspring, their capacity for creative interaction and sense of self.

Wales, 16 April 2014) <http://www.parliament.nsw.gov.au/Prod/Parlment/committee.nsf/0/089181807C549768CA257CC7008251CB>,

538 Ibid 1, 3.

CHAPTER 10:

KNOWING THAT THEY ARE DONOR-CONCEIVED

10.1 Gaining Access to Information: Ending Secrecy for Parties to Gamete Donation

'Information' can mean many things to parties to gamete donation. It may, for example, refer to information about the fact that an individual is donor-conceived, or the number of offspring that have been born as a result of a donor's donation, or information about a donor — their medical information, identity, physical appearance, or contact details. Recipients and donor-conceived individuals may wish to gain access to identifying and non-identifying information about their gamete donor for a variety of reasons, including establishing genetic heritage and self-identity, a desire to form relationships with their donor and half-siblings (who may themselves want information about their siblings), reducing the risk of consanguineous (incestuous) relationships, and knowing their medical history.[539] Some donor-conceived offspring simply wish to feel 'in control' of information directly relevant to them.[540] Donors, too, may wish to gain access to information about their donor-conceived offspring for many of the same reasons.

Our knowledge of the experiences of recipients, donor-conceived offspring, and donors with respect to sharing information is incomplete, and some information (for example, the experiences of those who do not know that they are donor-conceived) cannot be known. Most of the evidence available relates to sperm donation; relatively less is known about information sharing between parties to egg donation, because it is

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539 See e.g. Vassanti Jadv et al, 'Experiences of offspring searching for and contacting their donor siblings and donor ' (2010) 20(4) *Reproductive Biomedicine Online* 523; Iolanda Rodino, Peter Burton and Kathy Sanders, 'Donor information considered important to donors, recipients and offspring: an Australian perspective' (2011) 22(3) *Reproductive Biomedicine Online* 303; Ken Daniels et al, 'The best interests of the child in assisted human reproduction: the interplay between the state, professionals, and parents' (2000) 19(1) *Politics and the Life Sciences* 33; Sonia Allan (2012c), above n 110; Senate Legal and Constitutional Affairs References Committee, above n 88, 98 [6.14]. It has been argued in the literature on donor conception that donor-conceived offspring's knowledge of, and relationship with, their biological parent is necessary for identity formation; J Velleman 'Family history' (2005) 34(3) *Philosophical Papers* 357, 365.

540 Nuffield Council on Bioethics, above n 482, 98.

a more recent and less common procedure.[541] Nevertheless, changing social attitudes and legal regulations support increased flow of information between parties to gamete donation over time. The flow of information between parties to gamete donation is central to the shift away from bounded individuals and towards relational parties. As we move away from the metaphor of boundaries and towards a recognition of the actual relationships, the flow of information between parties becomes crucial; the flow of information and ideas within relationships may contribute greatly to the capacity for creative interaction, which includes the capacity to create oneself:

> For many people, the ongoing task of constructing, recognizing, becoming conscious of themselves — in some ways shifting who they are — is part of the project of autonomy.[542]

However, this desire for information is not constant over time, nor is it common to all donor-conceived offspring. Some donor-conceived people express very strongly the view that knowledge of their biological origins — both the truth about their conception and knowledge of their donor — is essential to their sense of self and to their social identity.[543] This knowledge may be so important that seeking it has become a major focus of their adult lives and, in addition to information, they desire contact and the possibility of forming a meaningful relationship with their donor. For other donor-conceived offspring, information about their donor may be useful to construct a 'back story' or 'narrative' for their life and be regarded as valuable but not vital to their well-being. Other donor-conceived offspring may have very little interest at all in information about their donor. Although the desire for information about their donor is not consistent across all donor-conceived offspring, a much clearer view emerges with respect to being told in the first place that they are donor-conceived: in a survey of members of the Donor Sibling Registry (DSR), only one per cent of donor-conceived adolescents and adults said that they wished they had never been

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541 For example, 1,796 IVF cycles using donated eggs were reported in 2010, compared to 2,405 insemination cycles using donated sperm; Alan Macaldowie et al, above n 28, 47.

542 Jennifer Nedelsky, (2011) above n 36, 49.

543 Haslanger distinguishes between a 'sense of self' defined as 'the cluster of basic traits that allow an individual to function as an agent, some of which are measured by the notion of "personal identity" … and "social identity" to refer to a person's reference group orientation'; Sally Haslanger, 'Family, ancestry and self: what is the moral significance of biological ties?' (2009) 2(1) *Adoption & Culture* 1, 8.

told, indicating a very strong preference for having this information even where the initial experience of finding out may be negative.[544]

10.2 Knowing That They are Donor-Conceived: the First Step to Relational Autonomy

Before donor-conceived offspring can gain access to information and actively engage in an interdependent relationship with their donor and parents (as recipients), they must first know that they are donor-conceived. Although all Australian States and Territories, by virtue of either state legislation or professional guidelines, either prohibit or recommend against, respectively, the practice of anonymous gamete donation, this important change can have no practical benefit for donor-conceived offspring who are never told by their parents that they are donor-conceived.

Even now that anonymity is lifted and recipients are encouraged and empowered to disclose the nature of conception to donor-conceived offspring, many choose not to do so. There is some evidence that higher levels of accessible donor information is associated with higher rates of disclosure,[545] and disclosure rates appear to be rising over time. Nevertheless, a significant number of donor-conceived offspring are never told by their parents that they are donor-conceived. For example, Australian and international studies of families using donor insemination showed consistent rates of between 28-40% of parents opting to tell their child(ren) that they are donor-conceived,[546] while the rate of telling for families using donated eggs is less clear. Most studies (relating to donor sperm) have reported parents' *intention* to disclose ranging from 29-78%,[547] while a recent UK study reported a 40% actual disclosure

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544 Nuffield Council on Bioethics, above n 482, 120.

545 S Klock and D Greenfield, 'Parents' knowledge about the donors and their attitudes towards disclosure in oocyte donation' (2004) 19 *Human Reproduction* 1575; Fiona MacCallum, 'Embryo donation parents' attitudes towards donors; comparison with adoption' (2009) 24 *Human Reproduction* 517.

546 Jennifer Readings et al, above n 491; Ken Daniels, Victoria Grace and Warren Gillett, above n 256; Emma Lycett et al, above n 491; Anna Rumball and Vivienne Adair, above n 491. However, some of the parents who reported that they had 'disclosed' to their children had discussed the use of fertility treatment but not the use of donated eggs or sperm; Jennifer Readings et al, above n 491, 491.

547 Clare Murray and Susan Golombock, 'To tell or not to tell: The decision-making process of egg-donation parents' (2003) 5(2) *Human Fertility* 89 (29%); S Klock and D Greenfield, above n 543 (59%); S Isaksson et al, 'Disclosure behaviour and intentions among 111 couples following treatment with oocytes or sperm from identity-release donors: follow-up at offspring age 1-4 years' (2012) 27(10) *Human Reproduction* 2998 (78%).

rate for children conceived as a result of egg donation at age 7 years, where the intention rate had been 56% at age 1 year.[548] The apparently increased rate of telling with egg donation, compared to sperm donation, may be linked to social attitudes towards the practices, with egg donation viewed as more familial, clinical and asexual than sperm donation,[549] and the idea that pregnancy, childbirth and nurturing the donor-conceived offspring compensate for a lack of genetic relatedness.[550] In addition, most of the research has been conducted on heterosexual couples, but there is evidence that female homosexual couples and single women are much more inclined to disclose to their children that they are donor-conceived, presumably as a result of having to explain the absence of a father.[551]

10.3 Legislative Responses to Telling Adult Donor-Conceived Offspring That They Are Donor-Conceived

As discussed in Part 3, significant changes to the regulation of donor conception have taken place throughout Australia to ensure that donor-conceived offspring may identify their donor when they have reached an appropriate age.[552] However, this information is generally only available by request.[553] This leaves donor-conceived

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548 Jennifer Readings et al, above n 491, 488.

549 Eric Blyth and Abigail Farrand, above n 507, 90.

550 Erica Haimes, 'Issues of gender in gamete donation' (1993) 36(1) *Social Science & Medicine* 85.

551 Disclosure rates between 90-100 percent have been reported for female same-sex and solo-mother families; Ruth Landau and Ruth Weissenberg, 'Disclosure of donor conception in single-mother families: views and concerns' (2010) 25(4) *Human Reproduction* 942; Madeleine Stevens et al, 'Openness in lesbian-mother families regarding mother's sexual orientation and child's conception by donor insemination' (2003) 21(4) *Journal of Reproductive and Infant Psychology* 347; Fiona MacCallum and Susan Golombok, see above n 256.

552 In Western Australia the age at which donor-conceived offspring may gain access to identifying and non-identifying information about their donor is set at 16 years, while in Victoria, New South Wales and South Australia it is 18 years. The *NHMRC Guidelines* state that fertility service providers must make information about donors available to donor-conceived offspring who have reached the age of 18 years; *Human Reproductive Technology Act 1991* (WA) s 49(2b). *Assisted Reproductive Technology Act 2007* (NSW) s 37(1), 4(1); *Assisted Reproductive Treatment Act 2008* (Vic) s 59(a)(i). Australian Government National Health and Medical Research Council (*NHMRC guidelines*), above n 25, guideline 6.11.

553 In some exceptional circumstances, information may be provided to parties to gamete donation without them requesting it. See e.g. Section 15 of the *Assisted Reproductive Technology Act 2007* (NSW), which provides for disclosure of medical information about a donor or donor-conceived offspring by a Fertility Services Provider directly to an individual and their treating medical practitioner in order to save a person's life or warn about the existence of a medical condition that may be harmful to that person or to that person's offspring; The *Privacy Act 1998* (Cth) allows disclosure of private information, when necessary to lessen or prevent '…a serious threat to the life, health or safety of any individual, or to public health or safety' or a 'serious

offspring in a situation whereby they will never know that further relevant information about themselves is available, unless they have been told that they are donor-conceived. This unhappy state of affairs was acknowledged in the UK *Warnock Committee Report* of 1984, which suggested that 'consideration should be given as a matter of urgency to making it possible for the parents registering the birth to add "by donation" after the man's name'.[554] This suggestion was never incorporated into English legislation.[555]

In Australia, legislation in South Australia and Western Australia is neutral as to whether donor-conceived offspring should be told of the nature of their conception. This is in contrast to legislation in Victoria and New South Wales, which supports advising donor-conceived offspring that they are donor-conceived. In Victoria, section 17B of the *Births Deaths and Marriages Registration Act 1996* (Vic) has specifically required the Registrar of Births, Deaths and Marriages to enter 'donor-conceived' against the registration entry of donor-conceived offspring born after 2010, and to attach an addendum to the birth certificate of those donor-conceived offspring who obtain a copy of their birth certificate at age 18 years or older,[556] specifying that further information is available.[557] Notification is not as explicit in New South Wales, but the *Assisted Reproductive Treatment Act 2007* (NSW) does allow the Director-General of the Department of Health to directly contact adult

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threat to the life, health or safety of another individual who is a genetic relative of the first individual'.

554 Department of Health and Social Security (*The Warnock Report*) above n 14, Para 4.25.

555 While most of the Warnock Committee's recommendations were carried straight through to the UK *Human Fertilisation and Embryology Act* 1990, this particular proposal was defeated in the House of Commons, because of concerns that it would be stigmatising for the donor-conceived person; Nuffield Council on Bioethics, above n 482, 28; Lucy Frith, 'Gamete donation and anonymity: the ethical and legal debate' (2001) 16(5) *Human Reproduction* 818, 822.

556 A problem inherent in the Victorian system was identified by Sonia Allan in her submission to the NSW Legislative Committee on Law and Safety. Specifically, although the Victorian system of issuing an addendum goes some way towards ensuring that donor-conceived individuals actually know that there is more information for them, it only applies to individuals who apply for a birth certificate after they have turned 18. She said: 'There are problems with the Victorian system. The problem with the Act, and this is really important, is the idea that this is disclosure. I do not know if you would call it a loophole but if a parent applies for the certificate prior to the child's eighteenth birthday and then the child has no reason after their eighteenth birthday to apply, the child or now adult will never know about the annotation because it is not marked on the birth certificate. The get-out of the individual knowing there is information there is to apply for the birth certificate before that person turns 18. I am not sure how you address that other than by encouraging parents to let their children know. I suppose too that at some point later down the track the donor-conceived individual might themselves make an application. That is an important thing: the annotation does not necessarily mean that the donor-conceived individual will know later on'; Committee on Law and Safety, above n 486, 50.

557 *Births Deaths and Marriages Registration Act 1996* (Vic) s17B.

donor-conceived offspring to ask the person 'whether he or she wishes to consent to the disclosure of [identifying] information'.[558] This type of provision had previously applied in Victoria too, under the *Infertility Treatment Act 1995* (Vic). Although the New South Wales legislation does not yet go as far as the Victorian legislation to ensure that adult donor-conceived offspring know about the nature of their conception, it does provide some incentive for recipients of donated gametes to advise their children of their donor-conceived status, because otherwise the truth may be exposed by a government official.[559] The New South Wales Legislative Assembly Law & Safety Committee recently recommended that New South Wales adopt the Victorian system of attaching addendums to the birth certificates of donor-conceived offspring,[560] and the recommendation was accepted by the NSW Government in its response.[561]

For now, there is no indication that other Australian states will follow suit and similarly amend legislation, and it remains to be seen whether developments in Victoria and New South Wales will influence the recipient's decision as to whether they tell donor-conceived offspring about the nature of their conception.

The legislative response in Victoria and New South Wales, which supports adult donor-conceived offspring's 'right to know' about their origins, is unique and has not been followed in the UK or elsewhere. The United Kingdom Nuffield Council Working Party on donor conception[562] recently considered whether Victorian-style addendums to birth certificates, or other means of notifying donor-conceived offspring of their donor-conceived status was desirable.[563] Although the Working

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558 *Assisted Reproductive Treatment Act 2007* (NSW), s40; I note that the NSW Government has recently approved the use of addendums to the birth certificates of donor-conceived offspring, including an intention to amend the *Births Deaths and Marriages Registration Act 1995* (NSW) Government of New South Wales, see above n 537 1-6.

559 The Family Court has in one case ordered a recipient mother to inform her child of the factual identity of his donor as his 'biological father'; see *R and J and Anor* [2006] FamCA 1398.

560 Committee on Law and Safety, above n 486, 56; Government of New South Wales, see above n 537, 1-6.

561 Ibid.

562 Nuffield Council on Bioethics, above n 482.

563 Although the Victorian Parliament did pass the *Assisted Reproductive Treatment Bill 2008* in order to include an addendum to the birth certificates of donor-conceived offspring, it was not universally supported. In the second reading speech, then Attorney-General the Hon. Rob Hulls MP, said '…it is not appropriate to record such information on a birth certificate or mandate telling children of the manner of their conception. This is better achieved through non-legislative means'; *Parliamentary Debates*, Parliament of Victoria Legislative Assembly, 10 September 2008, 3439.

Party decided that, all things being equal, it was desirable for parent's to advise their children that they are donor-conceived from a young age, it concluded that it was inappropriate for the government to disclose such information against parent's wishes.[564]

10.4 Knowledge is Power; A Relational Perspective

At this point, relational theory is helpful in determining the issue of whether donor-conceived offspring should be told that they are donor-conceived, and what (if any) role the law has in telling donor-conceived offspring that they are donor-conceived.

Clearly, children stand in relations of dependence and hierarchy to their parents. Particularly in these dependent/hierarchical relationships, a relational approach to autonomy can provide a guide to structuring such relationships so that they foster autonomy, rather than undermine it. As Nedelsky explains 'hierarchies of power are as inevitable as human dependence … even the best, most egalitarian society will have hierarchies of power as well as inequalities that flow from the unequal distribution of human talents and strengths'.[565] The important point is that inequality and dependence are not inherently problematic to relational theory — it is entirely possible for personal autonomy to thrive within relationships of inequality and/or dependence. However, when those in positions of power abuse that power to undermine the autonomy of those beneath them or dependent on them, relational theory directs our attention to the power relationships and how they are structured:

> A relational approach to both autonomy and law helps to figure out what constructive forms of power relations would look like.[566]

From this perspective, failure to disclose to donor-conceived offspring the fact that they are donor-conceived places them in a position of subordination in relation to recipients and the State. The ability of recipients and the State to withhold important information from donor-conceived offspring places such offspring in a subordinate position. Legislation that supports the interests of donor-conceived offspring to be informed would shift the power relations and allow donor-conceived offspring to

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564 Nuffield Council on Bioethics, above n 482, 59, 145, 146.
565 Jennifer Nedelsky (1990) above n 35, 64.
566 Ibid.

exercise autonomous judgement as to whether they wished to access further information about their donor.[567]

Legislative changes in Victoria, requiring inclusion of an addendum to the birth certificates of all donor-conceived offspring born after 2010 re-structure the relationship between donor-conceived offspring and the State in such a way that the individual child's autonomy is directly supported by the actions of the State. Furthermore, the legislation in Victoria indirectly supports a more equal relationship between recipients and donor-conceived offspring, who may be more inclined to disclose to their children the nature of their conception. Legislation in New South Wales also goes some way to supporting more equal relationships between the parties to gamete donation.

But what of the autonomy of recipients to choose whether their child knows that he or she is donor-conceived? Are recipients being dominated by the State when it takes an active role in advising offspring that they are donor-conceived? This is not necessarily the conclusion reached by a relational analysis. The autonomy of recipients — that is, their ability to make their own authentic life — is not compromised by their children knowing that they are donor-conceived. Indeed, a decision to withhold information from donor-conceived offspring in order that they will believe they are biologically related to both parents is to lie by omission, and likely to only be partially successful.[568] It is not a sound basis for an authentic life.

As discussed above, the United Kingdom Nuffield Council Working Party on donor conception[569] recently rejected the introduction of legislation similar to the Australian state of Victoria that would add a notation to the birth certificates of donor-conceived offspring to advise that they are donor-conceived. The reason was that, although the Working Party felt that it was desirable for parents to advise their children that they

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567 I recognise that many donor-conceived offspring do not have a legal right to gain access to information about their donor. I go on to discuss retrospective access to donors' information below; Chapter 10 – Releasing Information to Parties to Gamete Donation, *Retrospective Access for Donor-Conceived Offspring: Realising Relational Parties*, page 165.

568 It is the experience of many donor-conceived offspring who have found out that they are donor-conceived in adulthood that there was always an 'unspoken secret' in their relationship with their parents; see Chapter 4 – Secrecy in Gamete Donation, 4.2 *Effect of secrecy on the parties,* page 61.

569 Nuffield Council on Bioethics, above n 482.

are donor-conceived from a young age,[570] they explained that some 'parents may have strong reasons for not telling that may override the initial presumptions that such openness is likely to promote their child's welfare'.[571] For example, the Working Party heard that the use of donated gametes in reproduction could be met with very negative reactions by some cultural and religious groups, and that openness may result in stigmatization. Alternatively, recipients who had struggled with infertility may feel that the use of donated gametes is a personal matter.[572]

With respect, the reasons cited by the Working Party are reasons against broadcasting the use of donated gametes widely (which was never under consideration); they do not support a decision to withhold relevant information from donor-conceived offspring. The above reasons may support a decision to hold-off advising donor-conceived offspring of the nature of their conception until they have an understanding of broader social issues, and can make informed decisions about who (if anyone) to share such information with, but they do not generally support non-disclosure.

Although I reject arguments against disclosing to donor-conceived offspring that they are donor-conceived, there is the potential for recipients to feel coerced and therefore subordinated by Victorian-style legislation. In this case, the legitimate state objective of disclosing information to donor-conceived offspring can be reconciled with the autonomy of recipients of donated gametes by providing information and support to recipients to assist them to disclose to their donor-conceived offspring the fact that they are donor-conceived.[573]

10.5 Conclusion - Knowing They Are Donor-Conceived

Although donor anonymity is now either prohibited[574] or recommend against,[575] across all States and Territories of Australia, and information about donors must be

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570 Ibid 57-59,145,146.

571 Ibid 132.

572 Ibid.

573 I note that the Victoria State Government does offer significant support to recipients of donated gametes to disclose to their offspring that they are donor-conceived; Louise Johnson, Kate Bourne and Karin Hammarberg, see n 19; Victorian Assisted Reproductive Treatment Authority, above n 250.

574 *Infertility Treatment Act 1995* (Vic); *Assisted Reproductive Treatment Act 2008* (Vic); *Human Reproductive Technology Act 1991* (WA); *Assisted Reproductive Technology Act 2007* (NSW); *Assisted Reproductive Treatment Regulations 2010* (SA).

575 National Health and Medical Research Council (*NHMRC guidelines*), above n 25.

disclosed to adult donor-conceived offspring at their request, only the state of Victoria has assumed responsibility for advising donor-conceived offspring that they are donor-conceived. In all other States and Territories, it remains the sole discretion of recipients as to whether they disclose to their offspring that they are donor-conceived.[576]

Without knowing that they are donor-conceived, donor-conceived offspring will never have the opportunity to gain access to information about their donor that may be important for them to know. The current situation is undesirable, but the skill is to identify exactly why. A liberal rights analysis only leads us to consider a plethora of potentially competing rights that may be claimed by the parties – rights to privacy, rights to confidentiality, a 'right to know' - and never identifies the crux of the issue. A relational approach, however, allows us to step away from an adversarial model and examine how the current law structures relationships between the parties. It becomes clear that by recognising that it is important for donor-conceived offspring to have access to information about their donors, but allowing recipients discretion to disclose to their offspring that they are donor-conceived, the current law structures relationships of subordination and domination between donor-conceived offspring, recipients and the State. When recipients exercise their power to withhold important information from their donor-conceived offspring, they prevent their offspring from exercising autonomous judgement about whether, and when, to gain access to information about their donor.

Legislation that provides a mechanism for informing sufficiently mature donor-conceived offspring of the fact that they are donor-conceived re-shapes the relationships between the parties in a way that supports core liberal values such as autonomy.

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576 But see Government of New South Wales, above n 537, 1-6.

CHAPTER 11:
RELEASING INFORMATION TO PARTIES TO GAMETE DONATION

11.1 Gaining Access to Updated Identifying and Non-Identifying Information: Becoming Relational Parties

From 2010, anonymous gamete donation was prohibited throughout Australia by State legislation[577] and recommended against by the NHMRC *Guidelines*.[578] Identifying and non-identifying information about gamete donors is now held by State governments or individual fertility service providers, and released on request to donor-conceived offspring after they have attained sufficient age or maturity.[579]

Recipients and donor-conceived offspring may wish to gain access to donors' identifying information, non-identifying information, or both. Identifying information, such as name, address and date of birth, prevents donor anonymity and may facilitate contact with the donor. Non-identifying information includes such information as education and qualifications, health information history, physical appearance and characteristics, occupation, reason for donating and sexual orientation. Although release of non-identifying information is intended to preserve donor anonymity, the distinction between identifying and non-identifying information is increasingly

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577 *Infertility Treatment Act 1995* (Vic); *Assisted Reproductive Treatment Act 2008* (Vic); *Human Reproductive Technology Act 1991* (WA); *Assisted Reproductive Technology Act 2007* (NSW); *Assisted Reproductive Treatment Regulations 2010* (SA).

578 Australian Government National Health and Medical Research Council (*NHMRC Guidelines),* above n 25.

579 In Western Australia the age at which donor-conceived offspring may gain access to identifying and non-identifying information about their donor is set at 16 years, while in Victoria, New South Wales and South Australia it is 18 years. The *NHMRC Guidelines* recommend that fertility service providers make information about donors available to donor-conceived offspring who have reached the age of 18 years; *Human Reproductive Technology Act 1991* (WA) s 49(2b). *Assisted Reproductive* Technology Act 2007 (NSW) s 37(1), 4(1); Assisted Reproductive Treatment Act 2008 (Vic) s 59(a)(i). Australian Government National Health and Medical Research Council (*NHMRC Guidelines*), above n 25, guideline 6.11.

challenged by the post-liberal shift away from clearly defined boundaries between public and private.[580]

In general, donors provide identifying and non-identifying information when they make their donation. The type of information required is governed by a mix of state legislation and NHMRC *Guidelines* in Victoria,[581] Western Australia[582] New South Wales[583] and South Australia.[584] In the absence of other legislation, only the NHMRC *Guidelines* apply in Queensland, Tasmania, the Australian Capital Territory and the Northern Territory. For example, the NHMRC *Guidelines* place the responsibility for collecting information and maintaining records under the management of individual fertility service providers, and provide guidance on what information should be recorded in relation to donor-assisted conception procedures.[585] The *Guidelines* direct fertility services providers to record the full names and contact details of all gamete donors, recipients and (whenever possible) donor-conceived offspring, [586] and to collect additional specific information about gamete donors, including their name (including previous names), date of birth, address, personal and family medical history (including relevant genetic test results) and details of physical characteristics.[587] State legislation in Victoria,[588] Western Australia[589] and New South Wales,[590] directs that the information collected by fertility services providers must be forwarded to a central government register.[591]

A significant issue facing individual fertility service providers and the agencies that administer state registers is the accuracy of information contained within. Given that

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580 For example, apparently non-identifying information such as a donor's occupation and which university he or she attended may be sufficient to identify him or her, especially with the assistance of social media.

581 *Assisted Reproductive Treatment Act 2008* (Vic) s22.

582 *Human Reproductive Technology Act 1991* (WA) s45.

583 *Assisted Reproductive Technology Act 2007* (NSW) Pt 3.

584 *Assisted Reproductive Treatment Act 1988* (SA) s16.

585 National Health and Medical Research Council (*NHMRC Guidelines),* above n *25*, guideline 10.2.

586 Ibid guideline 10.2.

587 Ibid guideline 10.3.1.

588 *Assisted Reproductive Treatment Act 2008* (Vic) s 51, 52.

589 *Human Reproductive Technology Act 1991* (WA) s47; *Human Reproductive Technology Act 1991 Directions (30 November 2004)* 2.18.

590 *Assisted Reproductive Technology Act 2007* (NSW) s33(5); *Assisted Reproductive Technology Regulations 2009* (NSW) s14.

591 See Chapter 6 – State Legislation and Professional Guidelines to Regulate Gamete Donation and Donor Conception, page 77.

information about a donor might not be released for 18 or more years after the donation has been made, there is a significant risk that the information may become inaccurate and practically useless to the donor-conceived offspring (or recipients) who eventually gain access to it. State legislation in Victoria, Western Australia, New South Wales and South Australia is silent on the matter, while the *NHMRC Guidelines* place the onus on donors to keep clinics updated:

> Clinics should tell gamete donors (or gamete providers for donated embryos) that it is their ethical responsibility to keep the clinic informed about any changes to their health that may be relevant to the persons born or the recipients of their donation...[592]

It has been the experience of many donor-conceived offspring and recipients of donated gametes that donors often do not contact clinics after their donation to update information held about them.[593] This can result in decades-old information being provided to recipients and donor-conceived offspring. It has been reported that some recipients of donated gametes are acutely aware that information collected from gamete donors at the time of donation may quickly become outdated, and have sought early contact with their donor solely for purposes of ensuring access to updated information and contact details for the later benefit of their donor-conceived offspring.[594] There is, however, no current legal requirement or clear mechanism for gamete donors to update their details.

From a relational perspective, the current law structures relationships between recipients and donors, and between donor-conceived offspring and donors, that undermine the autonomy of the parties. Recipients and donor-conceived offspring who choose to gain access to information about their donor are dependent on both the donor to provide accurate identifying and non-identifying information, and the State to facilitate updating of such information. If the information available to recipients and donor-conceived offspring is outdated and inaccurate, they are unable to exercise

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592 Australian Government National Health and Medical Research Council (*NHMRC Guidelines),* above n 25, Guideline 10.3.2. Although the *Guidelines* do not impose any legal obligation on donors to update their information.

593 The Australian Senate Legal and Constitutional Affairs References Committee Inquiry received a number of submissions relevant to this issue; above n 88, 35-36 [3.17].

594 Jenni Millbank et al, above n 49, 60.

autonomous judgement about how to use the information. The current law neither requires nor supports donors to update information about them held in registers.

Below, I examine donors' health information to illustrate the importance of updating information. In particular, donors' health information may only further the autonomy of recipients and donor-conceived offspring to make informed health decisions if it is accurate and up-to-date. Although it is equally important for donors to update their identifying information, I will discuss identifying information later, in the context of retrospective release of donors' identifying information.[595]

11.2 Gaining Access to Updated Information: Health Information as an Example

Donor-conceived offspring and recipients may wish to gain access to a range of non-identifying information about their donor, such as their reason(s) for donating, health information, information about their family, and a photograph of the donor.[596] Of the range of non-identifying information available, donors' medical information is consistently believed by recipients and donor-conceived persons to be valuable: it is thought to assist with the prevention or diagnosis of disease in donor-conceived offspring.[597] Although the value of donors' medical information in the context of licensed donor conception may be widely overestimated, access to this information generates significant concern for recipients and donor-conceived offspring. To this end, the NHMRC *Guidelines* acknowledge the potential importance of genetic health information to donor-conceived offspring and recipients by specifically mentioning that providers should obtain from donors 'genetic test results that are relevant to the future health of the person conceived by gamete donation (and any subsequent offspring of that person) or the recipient of the donation'.[598]

Access to donors' medical history is perceived as important to recipients and donor-conceived individuals because it may disclose genetic health information, either indirectly through incidence of disease in the donor's family, or directly through

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595 See Chapter 11 – Releasing Information to Parties to Gamete Donation, 11.3 *Retrospective Access for Donor-Conceived Offspring: Realising Relational Parties*, 143.

596 Iolanda Rodino, Peter Burton and Kathy Sanders, above n 539, 307.

597 Senate Legal and Constitutional Affairs References Committee Inquiry, above n 88, 98.

598 Australian Government National Health and Medical Research Council, see n 25, guideline 10.3.1.

genetic test results or diagnosis of genetic disorder. Information about a gamete donor's medical history may assist recipients to make an informed choice as to whether they wish to seek further testing of donated gametes they have received, or embryos formed from them, and donor-conceived individuals may be better able to assess their risk of developing disease with a genetic component, or diagnose pre-existing disease in themselves or their families. While most donor-conceived offspring are simply anxious to know more about their family medical history from their donor's side,[599] there are situations where it is critical for recipients and donor-conceived offspring to be provided with updated information about their donor's health. Two poignant examples reported by the Victoria Law Reform Committee were those of Narelle Grech and a situation reported by the Fertility Society of Australia.

At the time of the Committee hearing, Narelle Grech was a 28 year old donor-conceived woman suffering from terminal bowel cancer. She had almost certainly inherited a high risk of early-onset bowel cancer from her sperm donor, but had been unaware of her increased risk of developing the cancer and was then unable to contact her donor and donor-conceived siblings to warn them of their risk.[600] Presumably, Ms Grech's donor did not know about a family history of early-onset bowel cancer when he made his donation, but may well have become aware of it several years later. In another case, a (pre-1988) anonymous sperm donor discovered several years after making his donation that he had a serious heart condition that put him at risk of sudden death. He had four donor offspring, and each had a 50% chance of inheriting the disorder. People who are at risk for the condition can undergo a simple medical screening test and, if they have the condition, it can be treated with medication and/or a pacemaker fitted. Each donor-conceived offspring needed to be contacted separately by the fertility service provider because there was no mechanism for updating information held about the donor and conveying that to recipients and donor-

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599 For example, several recipients of donated gametes and donor-conceived offspring who provided evidence to the UK Nuffield Council Working Party expressed concern about lack of updated information about their donor. For example, one recipient stated: 'The greatest impact would be regarding lack of medical background. We can only answer for my half of the family, and I think there is a risk that "unknown" for a condition might be interpreted as "not present" at a critical moment'. Nuffield Council on Bioethics, above n 482, 44.

600 Victoria Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors (March 2012) Submission no 67 (Narelle Grech), 103. Ms Grech died in March 2013, and was able to fulfil her wish to meet her donor shortly before she passed away.

conceived offspring. To complicate matters further, some of the offspring did not know that they were donor-conceived. One donor-conceived offspring did not find out for a further four years that he was at risk of sudden death and needed to be fitted with a pacemaker immediately. He was a pilot.[601]

Similar issues may arise when a donor-conceived offspring is diagnosed with a serious inherited condition, or recipients become aware of a heritable disease of an embryo or foetus. This information may be relevant to the donor, the donors family, and any donor siblings.

These cases suggest an urgent need to support the ongoing updating and exchange of information between parties to gamete donation by developing and supporting ongoing relationships between parties to gamete donation, in the interests of both donor-conceived offspring and donors.[602]

11.3 Retrospective Access for Donor-Conceived Offspring: Realising Relational Parties

Although the use of anonymous gamete donors has been prohibited across all states and territories of Australia in the past decade, the relevant State legislation and professional Guidelines only apply prospectively. Accordingly, donor-conceived offspring who were conceived from gametes donated before relevant legislation and guidelines were introduced may not be able to access information about their donor. Importantly, the relevant date is the date of donation, rather than the date of conception or birth. This means that donor-conceived offspring who were conceived or born after —sometimes many years after — anonymous gamete donation was prohibited may not be able to gain access to information about their donor.[603] In

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601 Victoria Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors (March 2012) Transcript of evidence, Melbourne, 8 September 2011, 54.

602 To this end, the Victoria Senate Committee recommended that the Victorian Government introduce a mechanism for donors' medical information to be provided to donor-conceived offspring who may be at risk of genetic disease; Recommendation 9. Victoria Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors (March 2012).

603 For example, the Infertility Treatment Authority of Victoria (as it was then known) permitted the use of gametes donated prior to 1 January 1998 up to 31 May 2006; Infertility Treatment Authority, 'Conditions for license: applications for licenses by hospital and day procedure centers' (Infertility Treatment Authority, 2006) 5.10.

addition, the amount of information available to donor-conceived offspring varies significantly between jurisdictions. In Victoria, donor-conceived offspring can gain access to identifying information about their donor if they were conceived from gametes donated from 1 January 1998.[604] Donor-conceived offspring may only gain access to donor's identifying information if they were born from gametes donated from 1 January 2004 in Western Australia,[605] from 1 January 2010 in New South Wales,[606] and from 1 September 2010 in South Australia.[607] Queensland, Tasmania, the Australian Capital Territory and the Northern Territory do not have separate legislation governing the collection, storage and disclosure of information to/from parties to gamete donation. As such, they are governed by the NHMRC *Guidelines* that have, since 2004, recommended against the use of donated gametes unless the donor consents to releasing identifying and non-identifying information to donor-conceived offspring.[608]

The current law creates a somewhat arbitrary divide between donor-conceived offspring who are able to gain access to information about their donors, and those who are not.[609] The divide is entirely based on where and when gametes were donated.[610] The issue of whether donor-conceived offspring should be granted retrospective access to identifying and non identifying information about their donors

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604 *Infertility Treatment Act 1995* (Vic) s 59.

605 *Human Reproductive Technology Act 1991* (WA).

606 *Assisted Reproductive Technology Act* 2007 (NSW) *Assisted Reproductive Technology Regulations 2009 (*NSW) s16 (a), (c).

607 *Reproductive Technology (Clinical Practices) (Miscellaneous) Amendment Act* 2009; However, the SA Act requires clinics to conform with the NHMRC Guidelines, which prohibited clinics from using anonymously donated gametes from 2004.[607]

608 Ibid.

609 See e.g. Karin Hammarberg et al, 'Proposed legislative change mandating retrospective release of identifying information: consultation with donors and Government response' (2014) 29(2) *Human Reproduction* 286, 287; Damian Adams and Caroline Lorbach, above n 8, 714; Sonia Allan (2012b) above n 18, 360-361; Evidence to Senate Legal and Constitutional Affairs References Committee, 'Donor Conception Practices in Australia', Parliament of Australia, Canberra, 2 November 2010, 40 (Robyn Bailey, on behalf of Single Mothers by Choice).

610 For example, only donor-conceived offspring born in Victoria post-1998, in Western Australia post-2004, and New South Wales or South Australia post-2010 have a legislative right to access identifying information about their donors; *Assisted Reproductive Treatment Act 2008* (Vic) s59 (a)-(b), *Human Reproductive Technology Act 1991* (WA) s49, *Assisted Reproductive Technology Act 2007 (NSW*) s37; *Assisted Reproductive Treatment Act 1988* (SA) s16, *Assisted Reproductive Treatment Regulations 2010* (SA) reg 4(c).

is one of the most sensitive and complex issues in donor conception, and provokes passionate arguments from those in favour[611] and those against.[612]

Before discussing retrospective release of information to donor-conceived offspring, it is important to acknowledge the significant changes in social values and practices of privacy that have occurred over the past two decades. In the past, strong liberal separation between public and private spheres was secured by practices of secrecy and anonymity in gamete donation. There has since been a blurring of the divide between public and private, accompanied by a reduction in secrecy surrounding gamete donation and prohibition of anonymity. As discussed in Part 2 of this thesis, recipients, donors, and medical practitioners in the past had both real and perceived concerns about sharing information between parties to gamete donation. Until relatively recently, social attitudes towards gamete donation were generally hostile and secrecy and anonymity were thought to be in the best interests of donor-conceived offspring, recipients and donors. From the turn of the 21st century, social changes have influenced regulation of donor conception practices and resulted in the prohibition of anonymous donation in all Australian jurisdictions, and reduced support for secrecy.[613] The question is whether it is appropriate to retrospectively apply current social and legal standards to practices that occurred in the past.

The introduction of retrospective legislation is not treated lightly under law. There is a common law presumption[614] against retrospective application of legislation and it is generally understood that reasons in favour of retrospective application must be extremely persuasive in order to displace the presumption against it. Within the debate about donor-conception two main camps have emerged: those in favour of a consent-release model, and those in favour of retrospectivity for all donor-conceived

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611 See e.g. Sonia Allan (2012a), above n 93; Sonia Allan (2012b) above n 18; Sonia Allan (2012c), above n 110.

612 Guido Pennings, above n 92.

613 See *Births Deaths and Marriages Registration Act 1996* (Vic), section 17B.

614 See e.g. *Maxwell v Murphy* (1957) 96 CLR 261. In *Fisher v Hebburn Ltd* the High Court of Australia stated that '[t]here can be no doubt that the general rule is that an amending enactment - or, for that matter, any enactment - is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts, or events which occurred before its commencement.' *Fisher v Hebburn Ltd* (1960) 105 CLR 188, 194.

people, regardless of consent.[615] Of those persons who made submissions to the Victorian Parliament Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors, very few favoured absolute anonymity, whereby donors should never be offered the opportunity to consent to release of their identifying information to donor-conceived offspring.[616]

11.4 Consent-Release of Donors' Identifying Information

In the absence of legislation t the contrary, all states and territories in Australia is that identifying information about gamete donors will not be released to any other party to gamete donation without the consent of the donor. In general, gamete donations were made on the basis of anonymity before legislative changes required donors to consent to the provision of identifying information to recipients and donor-conceived offspring.

Those in favour of a consent-release model for retrospectively releasing donors' identifying information to donor-conceived offspring are opposed to forced release of donors' identifying information where they had donated anonymously.[617] However,

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615 For example, Sonia Allan reported that, of the 77 submissions made to the Victorian Parliament Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors, 52 submissions favoured allowing retrospective release of donors information to donor-conceived offspring, 11 submissions supported release of donors' information subject to their consent, and two submissions suggested that retrospective release of information should be presumed, subject to donors' withdrawing consent; Sonia Allan, 'Deciding on access to donor-conception information' (2012d) 37(4) *Alternative Law Journal* 272, 272.

616 For example, Allan reported that only four of 77 submissions made to the Victorian Parliament Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors opposed release of 'anonymous' donors' information to donor-conceived offspring; Sonia Allan (2012d), Ibid, 272. These comprised three donors and the Australian Medical Association; Parliament of Victoria Law Reform Committee, above n 520, 67-68.

617 See e.g. Office of the Information Commissioner Queensland, Submission No 20 to the Senate Legal and Constitutional Affairs References Committee, Donor Conception Practices in Australia, 3; Canberra Fertility Centre, Submission No 48 to the Senate Legal and Constitutional Affairs References Committee, Donor Conception Practices in Australia, 7; Fertility Society, Submission No 106 to the Senate Legal and Constitutional Affairs References Committee, Donor Conception Practices in Australia', 11; Melbourne IVF, Submission No 32 to the Victorian Parliament Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors, 9 August 2010; David de Kretser, Submission No 54 to the Victorian Parliament Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors, 11 August 2011; Fertility Society of Australia, Submission No 66 to the Victorian Parliament Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors, 12 August 2011; Gab Kovacs, Submission No 40 to the Victorian Parliament Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors, 3 August 2011; Office of the Victorian Privacy Commissioner, Submission No 58 to the Victorian Parliament Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors, 12 August 2011; Victorian Infertility

they generally believe that donors should be given the opportunity to consent to release, if they so choose. Many are in favour of actively contacting donors' to ascertain their wishes.

Those who support the consent-release model cite several arguments against forcibly releasing donors' identifying information, where the donation had been made on the understanding of anonymity. Below, I will discuss the desire to maintain confidence in medical practitioner-patient relationships, the contractual nature of the agreement, the circumstances of gamete donation in the past, and the perceived hypocrisy of requiring donors to provide information while recipients are not required to disclose anything.

A broad argument against forced retrospective release of donors' information to recipients and donor-conceived offspring regardless of donors consent is that the therapeutic relationship between medical practitioners and patients may be generally undermined if medical practitioners were required to disclose information about donors who had made their donation on the condition of anonymity.[618] This argument presumes that the relationship between donor and medical practitioner is governed by the same principles as any other medical practitioner-patient relationship: the medical practitioner is privy to the donor's medical history and information gathered in the course of examination, which forms the basis of confidential medical information.[619] It is well understood that the effective practice of medicine depends on a relationship of trust and confidence between medical practitioners and their patients, and there is a risk that this relationship may be generally undermined if agreements with patients are not upheld.[620] Linked to this argument is the matter of enforceable contractual agreements. Those who oppose retrospective release of donors' information regardless of consent argue that donors entered into enforceable contractual agreements whereby they agreed to provide gametes on the condition that they would

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Counsellors Group, Submission No 64 to the Victorian Parliament Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors, 12 August 2011.

618 This point was noted by the Victorian Parliament Law Reform Committee above n 88, 67.

619 Tom Beauchamp and James Childress, 'Principles of Biomedical Ethics' (Oxford University Press, 5th ed, 2001), 305-306

620 In *Duncan v Medical Practitioners' Disciplinary Committee* [1986]1 NZLR 513, Jeffries J stated at 520: 'without trust, a doctor/patient relationships would not function so as to allow freedom for the patient to disclose all manner of confidences and secrets in the practical certainty that they would repose with the doctor…'

remain anonymous. A submission to the New South Wales Parliamentary Committee inquiry into managing information related to donor conception stated:

> We would not simply take a contract and void it because of someone else's wish. We could not run businesses or any other human affairs if every contract was subject to people saying subsequently that they regretted it or that they were not there to comment. It happens and it is not the greatest tragedy. I can certainly understand and appreciate that the offspring would like to know. However, reasonable ends do not justify any means, and in this case the means are forcible retrospective disclosure. Many donors will agree to change their consent agreements, but they have to be asked, not bludgeoned into it.[621]

The circumstance of the donation may tell against the retrospective release of donors' identifying information without their consent. In particular, it has been reported that many men donated their sperm in less than ideal circumstances – some without counselling as to the implications of their donation, and others may have donated under coercion.[622] For example, the New South Wales Parliamentary Committee inquiry into managing information related to donor conception heard in evidence that:

> It is said anecdotally that many of the donors were medical students … Some hospitals would say things like— they were told in the third year medicine course: "We need sperm, go over and donate" and they would donate. … There was no thought or consideration of the implications; it was just the culture of the time. In fact, some writing at the time said it was just like blood—it patently is not just like blood.[623]

Finally, some opposed to required retrospective release of donors' information have pointed out the apparent double-standards with respect to release of information regardless of consent to donor-conceived offspring. If recipients are not required to disclose to donor-conceived offspring the fact that they are donor-conceived, why

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621 Committee on Law and Safety, above n 486, 42.
622 Ibid, 43.
623 Ibid.

should donors be forced to disclose to donor-conceived offspring information they may rather not disclose?[624]

Those in favour of a consent-release model for retrospectively disclosing donors' identifying information note that many (if not most) donors are willing to agree to the release of their identifying information when contacted, usually many years after the donation.[625] A submission received by the Victoria Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors advised:

> Do we really know what donors want? Surely it is courteous to ask them rather than presume their wishes have remained unchanged in the many years since they donated. In my experience from contacting many donors … in fact many do not necessarily wish to remain unknown.[626]

Although donors who had donated on the basis of anonymity may later agree to release of their identifying information to donor-conceived offspring, the above arguments call for sensitivity in making this decision. In particular, some donors may require the expertise of counsellors to reach a decision and understand the implications of their decision. Furthermore, the number of offspring born to a single donor was not necessarily well-regulated in the past – up to 30 donor-conceived offspring from a single Victorian sperm donor has been reported.[627] It may therefore not be in the interest of these donors or their offspring to forcibly release identifying information without offering appropriate counselling to such men.

Already, the NHMRC *Guidelines*, and practices of many fertility service providers support an active consent-release model for disclosing donors' identifiable information to donor-conceived offspring. The *Guidelines* recommend that fertility service providers who receive a request for identifying information from a donor-

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624 VARTA, Consultation with donors who donated gametes in Victoria, Australia before 1988: Access by donor-conceived people to information about donors, 2013, 21; I note at this point that donors in Victoria may also argue that they have a right to privacy under the *Charter of Rights and Responsibilities Act 2006* (Vic) s 13

625 Studies have reported that sperm donors who formerly donated anonymously may now wish to meet with their donor-conceived offspring, and may have become more open to the release of identifying information to their donor-conceived offspring as they matured; Marilyn Crawshaw, Eric Blyth and Ken Daniels, 'Past semen donors' views about the use of a voluntary contact register' (2007) 14(4) *Reproductive BioMedicine Online* 411; Ken Daniels et al, above n 18.

626 Parliament of Victoria Law Reform Committee, above n 520, 71.

627 Ibid, 79.

conceived offspring go to some effort to seek consent from gamete donors who have not given prior permission to release their identifying information (because the donation was made before anonymity was prohibited and the donor has not independently made contact with the provider to allow disclosure). Providers are advised to 'make an appropriate effort to … contact the gamete donor and obtain his or her consent to release of information'.[628] However, the value of this identifying information to donor-conceived offspring does not trump donors' privacy interests, and identifying information about gamete donors will not be released under the *Guidelines* if the donor cannot be contacted, or if they withhold consent.[629] State legislation is silent on the matter. Accordingly, some fertility service providers are of the view that it is not a breach of donors' privacy to contact them to request permission to release information to their donor-conceived offspring.[630]

11.5 Retrospective Release of Donors' Identifying Information Regardless of Consent

The consent-release model may still fail to sufficiently recognise the interests of donor-conceived offspring, and may be criticised for placing the interests of the donor ahead of those of the donor-conceived offspring.[631] Those in favour of full retrospective release believe that identifying information about gamete donors should be released to donor-conceived offspring regardless of whether donors consent to the release or not. Some, who support this position, have suggested that a contact veto system[632] would better balance the rights and interests of all parties, allowing information release while giving the donor the choice about whether s/he would like to explore the possibility of contact.[633] Such a system would also involve contacting the donor first, if possible, regarding information release.

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628 Australian Government National Health and Medical Research Council, above n 25, guideline 6.13.

629 Ibid. Similar provisions apply in the case of releasing donor-sibling information.

630 Parliament of Victoria Law Reform Committee, above n 520, 51.

631 See e.g. Damian Adams, above n 16, 370, 378.

632 Contact vetoes indicate to the recipient of identifying information that any attempts at contact are unwelcome. Contact vetoes have been effectively employed in the context of retrospective release of identifying information to adoptees and birth parents; E. Wayne Carp, 'Does opening adoption records have an adverse social impact? Some lessons from the U.S., Great Britain, and Australia' (2007) 10(3-4) *Adoption Quarterly* 29, 46; Sonia Allan (2012b) above n 18, 362-363.

633 Sonia Allan was likely the first proponent of full retrospective release to Australian donor-conceived offspring to suggest the use of contact vetoes for gamete donors, as a reasonable

In support of retrospective release to all donor-conceived offspring, a number of arguments have been offered. These include, analogies to adoption, psycho-social effects of 'genealogical bewilderment', risk of consanguinity, doubts about the validity of donors' contracts for anonymity, and recourse to 'rights of children'. Below, I discuss each argument in turn.

11.5.1 Analogy to Adoption

The trend away from donor anonymity and secrecy in donor conception has, at least in part, been driven by changes in social attitudes towards adoption,[634] which now favour open adoption practices and allow adopted persons access to information about their birth parents, even where that information had previously been sealed.[635]

Both adoption and gamete donation involve rearing a child who is not genetically related to at least one parent, and for this reason gamete donation (specifically, sperm donation) has been conceptualised by some as 'semi-adoption'.[636]

One argument in favour of retrospective release of donors' identifying information to all donor-conceived offspring draws an analogy between donor conception practices and practices of adoption.[637] In particular, both donor conception and adoption can be said to have followed similar paths with donor-conception practices lagging behind those of adoption. From the first decade of the 20th century, to the late 1970s, adoption was usually in the form of 'closed adoptions', whereby the newborns' birth certificates were legally altered in order to displace the name of the biological parent(s) with that of the adoptive mother and father, and no contact or further

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compromise between the interests of donors and donor-conceived offspring; Sonia Allan, submission No 5 to the Parliament of Victoria Law Reform Committee, above n 520, 16. Sonia Allan (2012b) above n 18, 362-363, 368, 375.

634 Robyn Rowland, above n 17, 392; Ken Daniels and Karyn Taylor, above n 6,159. The Victorian *Waller Committee* drew an explicit analogy between the release of birth-parent information to adoptees, and potential for retrospective release of donor information to donor-conceived offspring in future, noting that 'there can be no guarantee of permanent, complete anonymity'. Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization (*Waller Committee Report*), above n 270, 20.

635 I note that adopted individuals may face the same problems with outdated identifying information as donor-conceived offspring face.

636 WH Cary, 'Results of Artificial Insemination with an Extra-Marital Specimen (Semi-Adoption)' (1948) 56 *American Journal of Obstetrics and Gynaecology* 727.

637 See e.g. Richard Chisholm, above n 28.

information was permitted between the biological parent(s) and the adopted child.[638] During this period, adoptive parents were advised against disclosing to their adoptive children the fact that they were not their genetic offspring,[639] as were recipients of donated gametes. In both cases, practices of privacy leant heavily towards protecting the parties from each other and preserving the image of the 'proper' family unit. In both cases, too, the services were seen as a service for childless couples: in the mid-twentieth century, there was an oversupply of children awaiting adoption, and too few adoptive parents, and so adoption was seen as a service to unwed mothers and childless couples, rather than a service to children.[640]

However, from the 1970s, the practices began to diverge. Secret adoptions fell away in the latter decades of the twentieth century, while practices of secrecy and anonymity prevailed for much longer in the case of donor conception. There were three primary reasons for the change to adoption practices. First, adoption came to be defined as a service for children in need, rather than a service for childless couples,[641] as the number of children available for adoption declined from the 1970s. In 1971-72, 9,798 children were adopted in Australia and that number has fallen sharply to just 339 in 2012-13.[642] The decrease in the number of children available for adoption can be attributed to two causes. Firstly, changed attitudes towards single parenthood have made it more acceptable[643] and financially feasible for an unmarried woman to keep her child.[644] Secondly, the availability and use of contraceptives and abortions has

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638 Pauline Kenny et al, 'Past adoption experiences: Impacts, insights and implications for policy and practice ' (2013) 7(1) *Communities, Children and Families Australia* 35, 35.

639 In fact, the act of adoption was seen by some as threatening to the cultural 'standard' heterosexual couple and two children, as it 'too easily' allowed unwed mothers to give up the burden of their sin and move on with their lives; Petra Nordqvist and Carol Smart, above n 174, 12.

640 Petra Nordqvist and Carol Smart, Ibid, 21; Pauline Kenny et al, above n 638, 36; the UK Tomlin report went so far as to state that 'the people wishing to get rid of children are far more numerous than those wishing to receive them'; Child Adoption Committee, 'First Report 'the Tomlin Report'' (Parliament of England, 1925) [4].

641 Jane Lewis, 'Adoption: The Nature of Policy Shifts in England and Wales, 1972-2002' (2004) 18 *International Journal of Law, Policy, and the Family* 235, 238.

642 Of the 339 children adopted in Australia, 210 were Australian-born children and, of those, 70 were adopted by a step-parent; Australian Institute of Health and Welfare, '*Adoptions Australia 2012–13*' (Australian Institute of Health and Welfare, 2013), 14-15.

643 All Australia states and territories removed the status of illegitimacy for ex-nuptial children in the 1970s; *Status of Children Act 1996* (NSW); *Status of Children Act 1974* (Vic); *Status of Children Act 1978* (Qld); *Family Relationships Act 1975* (SA); *Status of Children Act 1974* (Tas); *Parentage Act 2004* (ACT); *Status of Children Act* (NT).

644 Welfare support has been available for single mothers from 1973 in the form of Supporting Mother's Benefit; Pauline Kenny et al, above n 638, 35.

reduced the incidence of unwanted pregnancies.[645] The second reason for the end of secrecy in adoptions is linked to the first; with fewer women giving up their babies for adoption, the children who became available for adoption were increasingly those who had been removed from their families by the State because of neglect or mistreatment, and often following failed interventions.[646] These were older children who knew who their birth parents were, and so there was no opportunity for adoptive parents to pretend to be their birth parents. For example, in 2012-13, only 48% of Australian children who were adopted in 2012/13 were infants under 12 months of age.[647] The third reason for an end to secrecy in adoptions was a move away from the 'clean and complete break' philosophy that there should be no further contact between adopted children and their biological parent(s) after the child has been relinquished. From the 1980s, this philosophy was challenged and adopted children over the age of 18 years and biological parents may now gain access to identifying information about each other, even if the adoption was initially made on the condition of anonymity.[648] Furthermore, open adoption arrangements, whereby the adult parties agree to allow a degree of contact and/or information exchange, have been the most common adoption arrangement – at over 80% of Australian adoptions – from 1998-99.[649]

Currently, there is some evidence that the paths of adoption practices and donor-conception practices are starting to converge once again. From the 1980s, State governments began passing legislation to regulate donor conception, and even became involved in regulating what kind of people may become parents through donor conception and other ARTs,[650] as they had with adoption. Over time, single women

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645 David de Vaus, '*Diversity and Change in Australian Families'* (Australian Institute of Family Studies, 2004), 92.

646 Petra Nordqvist and Carol Smart, above n 174, 21.

647 Australian Institute of Health and Welfare, above n 642, 15.

648 In some Australian states and territories, parties may file an identifying information veto, prohibiting the release of identifying information to the other parties, or a contact veto, prohibiting contact from the other parties. Information and contact vetoes are discussed in more detail from page 185.

649 Australian Institute of Health and Welfare, above n 642, 26.

650 But see e.g. *McBain v State of Victoria* [2000] FCA 1009 (28 July 2000), in which the Federal Court considered whether section 8(2) of the *Fertility Treatment Act 1995 (*Vic), which restricted the application of 'treatment procedures' (ie. artificial insemination and fertilisation procedures) to women who are married or in defacto relationships with a man, was inconsistent with s.22 of the *Sex Discrimination Act 1984* (Cth). Justice Sundberg held that section 8(2) was inconsistent and therefore inoperative by reason of section 109 of the Constitution. The State of Victoria imposes a presumption against assisted reproductive treatment for persons with certain criminal convictions; *Assisted Reproductive Treatment Act 2008* (Vic) section 14.

and homosexual couples have been granted access to donor conception and ARTs – as with adoption.

Drawing an analogy between the situation of donor-conceived offspring and adoptees is said to set a precedent for granting retrospective access to donors' information to donor-conceived offspring:

> Both adoption and donor conception practice were historically shrouded in secrecy but adoption practice has now changed significantly and practices in the 'spirit of openness'. This move within adoption practice to 'openness' attempted to achieve the best of both worlds - providing security for the child and the new family without cutting the child off from knowledge of its roots or totally excluding the birth parents.[651]

The analogy between adoption and donor conception practices has also been drawn by those who have put forward the idea of contact vetoes,[652]noting that this means of managing contact between parties when releasing identifying information has proved successful in adoption.[653]

Nevertheless, although very strong comparisons have been made,[654] the argument that donor conception should be treated in policy as if it were the same as adoption has been criticised by persons opposed to retrospective release of donors' information to all donor-conceived offspring.[655] In particular, the situation is parties to adoption are not identical to those of parties to donor conception, and it may therefore be wrong to assume that donor conception practices should simply follow along the path cleared by adoption. Primarily, the roles and intentions of the parties are different. Donor conception is intended to create a new human being with the goal of providing a

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651 International Social Service Australia, Submission No 20, to the Committee on Law and Safety, Inquiry into Managing Information Related to Donor Conception' 6 May 2013, 33.

652 Sonia Allan, submission No 5 to the Parliament of Victoria Law Reform Committee, Inquiry into Access by Donor-conceived People to Information About Donors, 2 August 2010,16; Sonia Allan (2012b) above n 18, 362-363, 368, 375

653 Ibid.

654 See e.g. Richard Chisholm, see n 28.

655 For this point of view, see e.g. Ilke Turkmendag, Robert Dingwall and Therese Murphy, 'The Removal of Donor anonymity in the UK: The Silencing of Claims by Would-Be Parents' (2008) 22(3) *International Journal of Law, Policy and the Family* 283, 289-290.

service to the recipient(s)[656] and the donor never has parental rights and responsibilities in relation to the donor-conceived offspring. By contrast, adoption is intended to find a permanent home for an existing child with the goal of providing a service to the child.[657]

In addition, changes to adoption practices were driven by tremendous social changes that occurred from the 1960s, and therefore, some of the social reforms that influenced the development of adoption policy may not be relevant to donor conception practices which were reformed from the 1980s. While many of the arguments in favour of retrospective release of information to adoptees are highly relevant and support retrospective release of information to donor-conceived offspring, parties to donor-conception should perhaps exercise caution in following directly in the footsteps of parties to adoption.

11.5.2 Genealogical Bewilderment

Although blood relations may be less important in shaping a child's development than was once thought,[658] blood relations form the major basis for kinship in society. While a child's development is shaped by both social and genetic factors, her sense of self-identity is to some degree linked to her sense of kinship. Donor-conceived offspring who know that they are donor-conceived but cannot gain access to information about their donor may feel a sense of 'lost identity' and desire to connect with their donor or other biological-kin.[659] This phenomenon has been referred to as 'genealogical bewilderment'.[660]

There is evidence that donor-conceived offspring who cannot gain access to information about their donor may feel a deep sense of frustration and 'incompleteness'. McNair observed that these feelings 'suggest that identity is related to genetic inheritance in some way, and a fuller sense of identity for a donor-

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656 Mary Warnock accurately, but unflatteringly states that "The child is being used as a means to the parents' ends, namely to have or seem to have a 'normal' family...'; Mary Warnock, 'The Good of the Child' (1987) 1(2) *Bioethics* 141, 151.

657 *Adoption Act 2000* (NSW) s7(b), 8(1)(b); *Adoption of Children Act 2011* (NT) s 8(1); *Adoption Act 2009* (Qld) s2(a); *Adoption Act 1994* (WA) s3(1)(b).

658 Sonia Allan (2012b) above n 18.

659 Amanda Turner and Adrian Coyle, above n 262*;* Jadv Vassanti et al, above n 539, 524.

660 The term was first coined in 1952, in relation to adoptees; Audrey Marshall and Margaret McDonald, The Many Sided Triangle: Adoption in Australia (Melbourne University Press, 2001), 213.

conceived person may only be achieved through gaining access to details about their donor'.[661]

For some donor-conceived offspring, the experience of genealogical bewilderment and resulting difficulties in identity formation are significant. Donor-conceived offspring have reported feeling separated from their kin, deprived of contact with half their biological family and associated deprivation of culture and heritage.[662] For these donor-conceived offspring, the loss of biological links may leave them with an incomplete sense of self and make it difficult for them to lead a fulfilled life.[663]

Of course, this argument is not unchallenged. Some academics have questioned whether the value of this type of information has been overstated,[664] and others have directly challenged the presumption that donor-conceived offspring are entitled to knowledge of their genetic origins.[665]

11.5.3 Risk of Consanguineous Relationships

Another driving force in the argument for retrospective release of donors' identifying information to donor-conceived offspring is the risk of unknowingly forming consanguineous relationships with their siblings or donor.[666] This risk may be a significant source of anxiety for some donor-conceived offspring, and is not without grounds; given the small population in Australia and significant number of donor-conceived offspring in existence,[667] it is feasible that donor-conceived siblings may

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661 Ruth McNair, 'Outcomes for Children Born of ART in a Diverse Range of Families' (Victoran Law Reform Commission, 2004), 43 cited in Sonia Allan, (2012b) above n 18, 358.

662 Damian Adams, Submission No 4 to the Committee on Law and Safety, 'Inquiry Into Managing Information Related to Donor Conception' October 2013, 2.

663 Vardit Ravitsky, 'Knowing Where You Come From: The Rights of Donor Conceived Individuals and the Meaning of Genetic Relatedness' (2010) 11(2) *Minnesota Journal of Law, Science and Technology*, 655, 674-681.

664 For example, there is insufficient evidence to conclude that knowledge about family medical history improves risk prediction or plays a significant role in improving health outcomes; Inmaculada De Melo-Martin 'Gamete Donation: Is There a Right to Know One's Genetic Origins?' (2014) 44(2), *Hastings Centre Report*, 28, 31.

665 See e.g Ibid.

666 Sonia Allan (2012b) above n 18; Sonia Allan (2012c), above n 110.

667 In its report on 'Donor Conception Practices in Australia', the Senate Legal and Constitutional Affairs References Committee accepted that there were between 20,000 and 60,000 donor-conceived offspring in Australia; Senate Legal and Constitutional Affairs References Committee, above n 88, 2. In her submission to the Committee, Dr Sonia Allan calculated that there would be around 20,000 donor-conceived offspring in Australia, if an average of 600 donor-conceived people were born each year since the 1970s, Sonia Allan, Submission No 30 to the Senate Legal and Constitutional Affairs References Committee 'Donor Conception Practices

cross paths. This risk may be exacerbated in States and Territories with low populations.[668]

Entering into consanguineous relationships may lead to negative legal, physical and psychological outcomes, and there is a clear public interest in allowing people to identify their genetic parents. The *Marriage Act 1961* (Cth) explicitly renders void marriages between an individual and their parent, and an individual and their half sibling.[669] State and Territory criminal law also makes incest between individuals and their parents and half-siblings a criminal offence.[670] One of the main reasons for outlawing such marriages is that the relationship may bear children who are at increased risk of genetic or chromosomal abnormalities.[671] For some donor-conceived offspring, the threat and perceived risk of consanguinity poses an obstacle to the formation of romantic relationships

11.5.4 Doubts about the Validity of Anonymity Contracts

Doubts have also been raised about the validity and enforceability of the contracts donors entered into when making their donation.[672] Typically, donors and recipients are said to have entered into verbal or written contracts, which assured the parties of anonymity.[673] It has been argued that these contracts should be enforced as with any

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in Australia' 2010, 5. However the Donor Conception Support Group (DCSG) estimates that the number of donor-conceived offspring in Australia may be closer to 60,000 individuals, Caroline Lorbach, (DCSG), *Committee Hansard*, 2 November 2010, 14.

668 Sonia Allan (2012b) above n 18.

669 See *Marriage Act 1961* (Cth) s 23(1)(b), which voids marriages involving 'prohibited relationships'. Section 23(2)(a),(b) explicitly states that 'prohibited relationships' include 'marriages between an individual and their parent and an individual and their sibling, including half-sibling'.

670 *Crimes Act 1900* (NSW) s 78A; *Crimes Act 1958* (Vic) s 44; *Criminal Code* (QLD) s 222; *Criminal Law Consolidation Act* 1935 (SA) s 72; *Criminal Code* (WA) s 329; *Criminal Code* (Tas) s 133; *Crimes Act 1900* (ACT) s 62; *Criminal Code* (NT) s 134.

671 Sonia Allan (2012b), above n 18, 638.

672 Sonia Allan (2012b) ibid, 639-640; Sonia Allan (2012c), above n 110, 371-33; Anne Rees, 'Keeping Mum about Dad: "Contracts" to Protect Gamete Donor Anonymity' (2012) 19 *Journal of Law and Medicine* 758.

673 For example, the Australian Medical Association Victoria Branch (AMA Vic), submitted to the Victorian Parliament's Law Reform Committee inquiry into access by donor-conceived offspring to information about donors, that pre-1988 donors were given 'explicit and implicit assurances that their donations were entirely anonymous and that no contact would be made in the future'; Australian Medical Association (Victoria), Submission No DCP71 to the Parliament of Victoria Law Reform Committee, Inquiry into Access by Donor-conceived People to Information About Donors, 18 August 2011, 1.

legal contract,[674] and may override the interests of donor-conceived offspring.[675] Anne Rees succinctly sums up the recourse to such 'contracts':

> Potentially the reason that the 'contract' argument is consistently raised is because merely stating that donors' medical records must be kept confidential might meet the argument that disclosure of the identity should be one of the recognised exceptions to protection of privacy and/or confidentiality. Laws protecting privacy and confidentiality recognise that these are not absolute concepts and permit a balancing of interests.[676]

However, the agreements entered into by gamete donors (and sometimes) recipients in the past, that the donor would remain anonymous to recipients, cannot be said to meet the formal requirements of enforceable contracts under law.[677] In general, the agreements are combined into consent forms, and require only that the donor will not seek the identity of any donor-conceived offspring, nor the identity of any recipients of his[678] donation. Sometimes, there was an explicit 'understanding' (but no promise) from the hospital or clinic that it would not release the donor's information to recipients, but there was no mention of donor-conceived offspring in these agreements,[679] and Rees concluded that an intention to prevent release of information to donor-conceived offspring could not realistically be implied into such agreements.[680] In addition, the promises made by the parties to these agreements do not appear to be supported by consideration. That is, the clinics had not given anything to the donor in return for his promise.[681] For the above reasons, these

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674 John Dobson (President of the Law Society of New South Wales) verbal submission to the Committee on Law and Safety, 'Report on the Inquiry Into Managing Information Related to Donor Conception', 29 April 2013, cited in Committee on Law and Safety, above n 486, 42.

675 David Handelsman verbal submission to the Committee on Law and Safety, 'Report on the Inquiry into managing information related to donor conception', 6 March 2013, cited in Committee on Law and Safety, above n 486, 42.

676 Anne Rees, above n 672, 767.

677 Ibid, 768.

678 Most of these agreements to anonymity involved sperm donors, but the arguments may be equally applied to ovum donors.

679 Sonia Allan and Anne Rees obtained and considered consent forms dating from the 1970s ad 1980s from a Victoria (Melbourne Royal Women's Hospital, Queen Victoria Medical Centre), New South Wales (Westmead Hospital); Anne Rees, above n 672, 761-762; Sonia Allan (2012b) above n 18, 372.

680 Anne Rees, Ibid, 764; see also *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266.

681 I note that a deed under seal does not require valuable consideration to be enforceable. However, the agreements between donors and clinics and recipients and clinics do not purport to be deeds.

agreements are not enforceable in contract against the parties and, in any case, donor-conceived offspring cannot be considered parties to the agreements.[682]

Outside of any contractual agreement, Rees does suggest that an individual donor might be able to restrain a clinic from voluntarily disclosing to donor-conceived offspring his identity on the basis of promissory estoppel, if he were able to demonstrate that there was:

> the creation or encouragement by the defendant [hospital] in the plaintiff [donor] that a ... promise be performed ... to the plaintiff by the defendant ... and reliance on that by the plaintiff, in the circumstances where departure from the assumption by the defendant will be unconscionable.[683]

Finally, very few donors were provided with counselling as to the consequences of their donation and the agreement to anonymity, and so it is unlikely that they could be said to have made an informed decision to sign the contract. Furthermore, it is reported that, in the past, clinics would not accept gamete donations from donors who did not agree to anonymity, and so the condition of anonymity was imposed by clinics rather than by donors.[684]

11.5.5 Rights of the Child

The belief that children have a right to know their genetic parents is commonly cited by those in favour of retrospective release of donors' identifying information to donor-conceived offspring.[685] The view finds some support from international case law,[686] and some limited support within Australia.[687] Furthermore, the Australian

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682 It is a well-established principle of law that an agreement between parties cannot bind a stranger to it; see *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

683 Rees adapts the words of Priestley JA in *Austotel Pty Ltd v Franklins Selfserve Stores Pty Ltd* (1989) 16 NSWLR 582 at 610; Anne Rees, above n 672, 764; see also *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

684 Committee on Law and Safety, above n 486, 36.

685 See e.g. Sonia Allan (2012b) above n 18, 364-366; Sonia Allan (2012c), above n 110, 640-643; John Tobin, 'Donor-conceived individuals access to information about their genetic origins: The relevance and role of rights' (2012) 19 *Journal of Law and Medicine* 742; Edwina Schneller, above n 17; Vardit Ravitsky above n 663, 655.

686 For example, in the case of 'Sarah P' heard in the Regional Appeals Court in Hamm, Germany in 2013, the Court decided that the interest of the applicant to gain access to identifying and non-identifying information about her donor outweighed the donor's privacy interest; Oberlandesgericht Hamm, I-14 U 7/12, 6 February 2013. See also *Johnson v. Superior Court (California Cryobank, Inc)* (2000), 80 Cal. App. 4th 1050 and *Rose v Secretary of State for*

Commonwealth Government is party to a number of United Nations Declarations,[688] Treaties and Conventions[689] relating to Human Rights. In particular, the United Nations *Convention on the Rights of the Child* (*CROC*) and the *International Covenant on Civil and Political Rights* (*ICCPR)* provide that children have a right to know their parents and identity.[690] Under International Law, the Commonwealth Government has a good faith obligation to take reasonable measures to secure these rights for Australian citizens.[691] However, these international legal obligations are not legally enforceable by citizens against the Australian Government, and the right to know one's parents and identity has not been specifically incorporated into domestic federal legislation. Donor-conceived offspring in Victoria may also refer to the Charter of Human Rights and Responsibilities Act 2006, which provides for recognition and equality before the law, protection of families, and protection of children.[692] However, this has not been tested in court to date.

11.6 A Relational Approach to Retrospective Release

Current Australian State and Territory legislation recognises the interests of donor-conceived offspring in gaining access to identifying information about their donor, by prohibiting anonymous gamete donation. However, donor-conceived offspring who were conceived from gametes donated on the basis of anonymity may not be able to gain access to identifying (and in some cases, non identifying) information about their donor.

Donor-conceived offspring who cannot identify their donor may suffer legal, psycho-social and physical difficulties. Granting retrospective access to identifying

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Health [2002] 2 FLR 962, where donors who had donated anonymously were required to make their identifying information available; but see contra *Pratten v British Colombia (Attorney General) 2012* BCCA 480 and *Pratten v Attorney General of British Columbia and College of Physicians and Surgeons of British Columbia* 2013 SCCC No. 35191, where the Supreme Court of Canada overturned the decision of the Supreme Court of British Columbia to release identifying information about Ms Pratten's donor to her pursuant to the *Canadian Charter of Rights and Freedoms*.

687 The Family Court has in one case ordered a recipient mother to inform her child of the factual identity of his donor as his 'biological father'; see *R and J and Anor* [2006] FamCA 1398.

688 For example, Australia is a signatory to the United Nations *Universal Declaration on Human Rights* (1948), and the *Declaration of the Rights on the Child* (1959).

689 United Nations *Convention of the Rights of the Child*, opened for signature 20 November 1989 (CROC); International Covenant of Civil and Political Rights (ICCPR)

690 CROC Articles 7 and 8 are relevant.

691 Art 26 Vienna Convention on the Law of Treaties 23 May 1969 (1155 UNTS 331).

692 *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

information about a person's donor is the primary means of alleviating these difficulties and allowing donor-conceived offspring to come to terms with their genetic parentage. However, the decision to retrospectively release identifying information which was given with a promise of anonymity is controversial. Above, I have considered arguments for both release with consent and release regardless of consent in relation to disclosing gamete donors' identifying information to all donor-conceived offspring.

The current law draws a distinction between donor-conceived offspring who have a 'right' to access identifying information about their donor and those who do not. The metaphor of rights as boundaries invites us to draw a (metaphorical) line in the sand between those donor-conceived offspring who may currently gain access to identifying information about their donor, and those who may not, by referring to the relevant legislation. With rights conceptualised as boundaries, arguments in favour of retrospectively releasing (previously anonymous) donors' identifying information may be perceived as an attempt to break through existing boundaries and displace the privacy rights of donors.[693] The argument is framed in terms of conflict between the 'rights' of donor-conceived offspring and the 'rights' of donors; thus one party will be the victor and the other will have his or her rights vanquished. This is scarcely an exaggeration. Within the literature and many government inquiries, there is a constant 'weighing up'[694] of the rights of gamete donors and the rights of donor-conceived offspring,[695] with a threat of litigation.[696]

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693 Guido Pennings has asserted that '[M]any people consider the proposed retrospective abolition of donor anonymity as an unacceptable violation of the donors' rights' ; Guido Pennings, above n 92, 2281; but see Sonia Allan (2012a) above n 93. See also, John Dobson (President of the Law Society of New South Wales) verbal submission to the Committee on Law and Safety, 'Report on the Inquiry into managing information related to donor conception', 29 April 2013, cited in Committee on Law and Safety, above n 486, 42; David Handelsman verbal submission to the Committee on Law and Safety, 'Report on the Inquiry into managing information related to donor conception', 6 March 2013, cited in Committee on Law and Safety, ibid.

694 I accept that 'weighing' and 'balancing' rights of parties is a recognised human rights mechanism. However, I put forward the argument that this mechanism is bound to a liberal understanding of rights and autonomy, and that parties' interests may be better reconciled through a relational analysis that critically considers how law structures relationships between the parties.

695 See e.g. 3.3.4 'Weighing rights and interests'; Parliament of Victoria Law Reform Committee, above n 520, 73.

696 In a submission to the Parliament of Victoria *Inquiry into Access by Donor-Conceived People to Information about Donors* Monash IVF stated that 'Donors who consented at a time when anonymity was guaranteed … may find retrospective access to identifying information about them confronting. This would likely be viewed as changing the conditions of the contract they

Another way of approaching the issues raised in this context is to consider the way that legal rights structure the relationships between parties to gamete donation. A relational analysis allows us to move outside the metaphor of rights as boundaries, and instead consider how donors and donor-conceived offspring actually relate to one another. The analysis is not conflict-driven, but instead seeks to understand the interests of the parties and then consider how the law can structure relationships that best promote all interests.

Immediately, the distinction between donor-conceived offspring who may gain access to their donor's identifying information, and those who may not, is revealed to be arbitrary and based purely on where and when their donor made his or her gamete donation, and when the law changed in the relevant jurisdiction. The distinction is not made on the value of the information to the donor-conceived offspring, nor on the quality or quantity of information available to him or her. Our understanding of the interests of donor-conceived offspring shifts, too – the concrete and immediate legal, psychosocial and physical benefits of gaining access to donors' identifying information need not be considered individually, but within the broader goal of furthering the autonomy of donor-conceived offspring by allowing them to gain access to full information about their donor as and when they wish to do so.

The interests of donors are also reconceptualised under relational theory. Donors' legal and social complexity becomes more apparent and they can more clearly be understood as self-directing agents. In this light, the motivations of gamete donors become more relevant,[697] and they can be seen to have a range of interests in sharing

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agreed upon and may open the door for litigation'; Monash IVF, submission 26, 6 August 2010, pp1-2; Parliament of Victoria Law Reform Committee, above n 520, 51; Hammarberg et al, also reported that some (anonymous) donors in their study claimed that they would seek redress through the courts if their identifying information was released to donor-conceived offspring, Karin Hammarberg et al, above n 609, 289. Although, in reality, such donors would be most unlikely to succeed in litigation, the perceived threat may be real.

697 In addition to a frequently-cited desire to help (known and unknown) infertile people, some donors report political motivations, a desire to test their own fertility, and a desire to procreate; Maggie Kirkman, above n 123, 330; Ken Daniels, Gillian Lewis and Ruth Curson, 'Information sharing in semen donation: The views of donors' (1997) 44 *Social Science & Medicine* 673; Ken Daniels, 'Anonymity and Openness and the Recruitment of Gamete Donors. Part 2: Oocyte Donors' (2007) 10(4) *Human Fertility* 223, 225.

information. For example, some donors desire contact with their donor-conceived offspring, while others reject or fear such contact.[698]

From a relational perspective, the current law structures relationships between donor-conceived offspring and donors that undermine the autonomy of the parties. The law is unclear as to whether donors who originally donated anonymously can be contacted to seek their permission to release their identifying information to donor-conceived offspring, and it is inconsistently applied on this point.[699] There is no distinction between releasing identifying information and permitting contact. Worse still, State and Territory legislation generally requires medical practitioners to store patient records for only 7-15 years before they can be destroyed,[700] and in most states and territories there is no specific requirement for fertility service providers to retain information about gamete donor and donor conception records beyond this general time frame.[701]

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698 Karin Hammarberg et al, above n 609, 289-290; Marilyn Crawshaw, Eric Blyth and Ken Daniels, above n 625; Ken Daniels, 'Anonymity and Openness and the Recruitment of Gamete Donors. Part 1: Semen Donors' (2007) 10(3) *Human Fertility* 151, 154; Ken Daniels, above n 697, 226; Sonia Allan (2012b) above n 18, 367-368; Ken Daniels and Karyn Taylor, above n 6, 162-164.

699 E.g. Lauren Burns, submission No 40 to the Parliament of Victoria *Inquiry into Access by Donor-Conceived People to Information about Donors*, 29 July 2010, 3-4; Caroline & Patrice Lorbach, submission No 76 to the Parliament of Victoria *Inquiry into Access by Donor-Conceived People to Information about Donors*, 5, and Michael Adams, Parliament of Victoria *Inquiry into Access by Donor-Conceived People to Information about Donors, Committee Hansard*, 3 November 2010, 7. All reported the requests for information directed to the Victorian Infertility Treatment Authority were dealt with inconsistently, and with a lack of clarity over whether the Authority could contact donors to request their permission to release information: cited in Parliament of Victoria Law Reform Committee, above n 520, 36.

700 *Health Records and Information Privacy Act 2002* (NSW), *Health Practitioner Regulation (New South Wales) Regulation 2010,* and *State Records Act 1998* (NSW) all require medical records to be kept for at least seven years from the date of last entry in the record, unless the patient was less than 18 years old at the date of last entry in the record, in which case the record must be kept until the patient attains or would have attained the age of 25 years. The *Health Records Act 2001* (Vic) requires that private medical records are retained for seven years from the last entry, and public health records must be retained for 15 years, but require a longer period of storage where the patient is under 18 years; the *Health Records (Privacy and Access) Act 1997* (ACT) requires that public and private records are retained for seven years from the last entry; the *Public Records Act 2002* (QLD) and *State Records Act 2000* (WA) deal only with public records, and requires that they are retained for 10 years from the final entry or action, or for 10 years after the patient has reached the age of 18 years. In Tasmania, the *Archives Act 1983* (Tas) requires public records to be retained for 15 years. In South Australia, that *State Records Act 1997* (SA) and in the Northern Territory the *Information Act 2002* (NT) imposes obligations on public sector agencies to retain records for a period of time listed in Retention Schedules, which are not publically available.

701 I note that recent legislative amendments in Victoria now requires identifying records about donor conception procedures to be kept for at least 99 years after the date of creation of the

The interests of donors must also be taken into account. Although some individuals and groups argue strongly against the retrospective disclosure of donors' identifying information to donor-conceived offspring, most donors who oppose the retrospective release of their identifying information cite a fear of being contacted by their donor-conceived offspring, rather than opposition to the release of information per se.[702] This is not an unreasonable concern – while some donor-conceived persons wish simply to identify their donor and know their name or other details,[703] identifying information can or course, be used to initiate contact. Other donors are open, or at least ambivalent, to contact from donor-conceived offspring.[704] However, the retrospective release of donors' identifying information is separate from the issue of contact between donor and donor-conceived offspring, or the development of an interpersonal relationship.

A well-implemented legal model for the retrospective release of donors' identifying information to all donor-conceived offspring may satisfy the interests of donor-conceived offspring to gain access to information about their donor, while supporting donors to make a well-informed decision as to whether they will allow contact. For donors who maintain their objection after appropriate counselling, contact vetoes may allow the interests of both donor and donor-conceived offspring to be reconciled.[705] Contact vetoes have been effectively employed in the context of retrospective release of identifying information to adoptees and birth parents.[706] Both adoptees and birth parents may gain access to identifying information about each other, but may also seek a contact veto to indicate that they do not wish to be contacted by the other party. Contact vetoes may be appropriate in the context of retrospective release of

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record; *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) s23; *Assisted Reproductive Treatment Act 2008* (Vic) s121A.

702 For example, the Victoria Law Reform Committee reported that only three of nine donors who made submissions to the inquiry opposed retrospective release of their identifying information. Two of the men cited a fear of being contacted by their donor-conceived offspring; Anonymous (confidential), Submission No 15 to the Parliament of Victoria Law Reform Committee, *Inquiry into Access by Donor-Conceived People to Information about Donors*, 30 July 2010; Name withheld, Submission No 13 to the Parliament of Victoria Law Reform Committee, *Inquiry into Access by Donor-Conceived People to Information about Donors*, 5 August 2010; cited in Parliament of Victoria Law Reform Committee, above n 520, 68-69.

703 Sonia Allan (2012b) above n 18, 364.

704 Karin Hammarberg et al, above n 609, 289

705 Sonia Allan, above n 633; Sonia Allan (2012b), above n 18, 362-363, 368, 375.

706 E. Wayne Carp, above n 632, 46; Sonia Allan (2012b), above n 18, 362-363.

identifying information about gamete donors. One donor-conceived offspring told the Victoria Inquiry:

> [D]onors who don't want contact, that's absolutely within their rights, and I respect that, and every donor-conceived person I've ever spoken to also respects that and is conscious of not wanting to intrude upon a donor or invade their life in any way.

Full retrospective release of donors' information to donor-conceived adults, combined with provision for contact vetoes was recommended by the Victorian Law Reform Committee *Inquiry into Access by Donor-Conceived People to Information About Donors*.[707] However, the Victorian Government did not fully support these recommendations. Rather, the Government proposed a 'facilitative and relationship-focused model' of access to identifying information, and passed the *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic), which provided for a consent-release model for retrospective disclosure of identifying and non-identifying information about pre-1998 donors. The majority of the Act comes into effect on 29 June 2015. Passage of the Bill was not without significant debate in the Victoria Parliament. Ultimately, however, a consent-release model was seen as an appropriate compromise between the rights of donor conceived offspring and donors who had made their donation on the basis of anonymity. Jeanette Powell, the Member for Shepparton stated during a second reading of the *Assisted Reproductive Treatment Further Amendment Bill*:

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[707] 'Recommendation 1: That the Victorian Government introduce legislation to allow all donor-conceived people to obtain identifying information about their donors'; Parliament of Victoria Law Reform Committee, above n 520, 76, 'Recommendation 4: That, with the introduction of the legislation described in Recommendation 1, the Victorian Government introduce provisions for contact vetoes that may be lodged by a donor or a donor-conceived person following counselling, with the following features:

- that contact vetoes only be available to people conceived from gametes donated prior to 1998, and the donors of those gametes;
- that donors may only lodge a contact veto after they have been informed that a donor-conceived person has lodged an application for identifying information about them;
- that a veto prohibits contact between the donor and the donor-conceived person;
- that suitable penalties be established for breach of a veto; •that a veto lapses within five years if not renewed by the person who
- lodged it; and
- that the person who lodged a veto may withdraw it at any time.';

Parliament of Victoria Law Reform Committee, above n 520, 78-81.

> Members of the opposition have said that donor-conceived people who were born before 1988 cannot find out the identities of their parents. As I said earlier, this bill provides a safeguard that if a donor-conceived person was conceived, or a donation of gametes was made, before 1988 then, with the consent of the donor, donor-conceived people can have access to such information. This is really important because we need to protect people's rights to privacy. We need to protect people, but we also need to ensure that the donor's experience is a good one as well as the experience of a child of that donation.[708]

Although States and territories have power to regulate the provision of information to and from parties to donor conception, and have some power to prevent unwanted contact between the parties, it is neither possible nor desirable to compel the parties to form personal relationships. The matter of contact between the parties will always be a private matter that must be agreed to by the parties.

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708 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 August 2014, 2677 (Jeanette Powell, the Member for Shepparton).

CHAPTER 12:
A RELATIONAL FUTURE

12.1 Beyond Information: Anticipating Legal Responses to Alternative Family Structures Involving Gamete Donation

The nature of legal change is essentially reactive rather than proactive. As such, the law tends to lag behind social change and technological innovation. This lag is particularly evident when considering the relationships between parties to gamete donation, and how these relationships are recognised and structured by law. Assisted reproductive technologies have brought about radical changes in family building and family formation from the 1980s which have, in turn, prompted changes in social attitudes towards family building and family formation — shifting from a liberal model of the traditional hetero-normative nuclear family to a less prescriptive post-liberal acceptance of single-parent, same-sex,[709] and multi-layered families.

Although there have been significant changes to the regulation of assisted reproductive technology in an effort to keep pace with social change and technological innovation, these changes have mostly focussed on the dissemination of information between parties to gamete donation. This is appropriate, given that such information is crucial to the project of autonomy for parties, and particularly important for donor-conceived offspring.

However, current legislation and Guidelines do not necessarily reflect contemporary changes in family building and family formation, although these have been, to some extent, driven by reproductive technologies. In particular, current legislation and *Guidelines* reinforce traditional notions of the hetero-normative nuclear family through statutory presumptions of parentage, which provide that the donor is not the legal parent of donor-conceived offspring, and that the infertile (heterosexual) couple will be the child's legal parents, even if neither are biologically related to the child.[710] This position is generally supported by family law, which although designed to be

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709 See e.g. *McBain v State of Victoria* (2000) 99 FCR 116.

710 *Status of Children Act 1974* (Vic); *Family Relationship Act 1975* (SA); *Status of Children Act 1996* (NSW); *Artificial Conception Act 1985* (WA); *Parentage Act 2004* (ACT); *Status of Children Act* (NT); *Status of Children Act 1974* (Tas).

somewhat flexible and sophisticated in its approach, follows legal rules designed to ensure that children have two legal parents. This situation has created a gap between how the law operates and how families operate, and may not support the interests of parties to gamete donation.

Here, I consider how the law may respond in future to address this shortcoming. It is not my intention to prescriptively set-out specific legislation that could best support the interests of parties to gamete donation, or prescribe legislative changes to the recognition of parentage. Rather, I have set out to critically analyse the existing law, which fails to grant non-traditional families the same legitimacy as other families.

12.2 Relational Theory, Gamete Donation and Non-Traditional Families

As previously discussed, relational theories of law focus on how relationships between parties are structured by law and whether this structure supports the parties' interests. This is in contrast to liberal theory, which tends to cast the parties in adversarial roles and focuses on the competing rights claimed by the parties.

Currently, legislation to regulate the parentage of donor-conceived offspring is intended to mimic as closely as possible the hetero-normative nuclear family, and allow donor-conceived families to 'pass' as 'normal'. It may also serve to conceal the use of donated gametes. The value of this structure is clearly rooted in the past, when the private realm of the family was closed, donor conception was not a socially acceptable practice, and the parties may have had genuine fears about being identified as other than a heterosexual nuclear family. In the past, it may well have been in the parties' interest to imitate the idealised family form. The existing relationship structure supports a liberal, boundary-focused concept of law and does not accommodate contemporary family formation. The current law does not seriously contemplate alternative family formation, and structures relationships between parties in such a way as to exclude and frustrate the intentions of families that do not fit the idealised form.

Some progress has been made to recognise alternative family forms, but the results are clumsy and sit uneasily within a legal structure designed to deny their existence.

For example, in all States and Territories of Australia, birth certificates may record a child's mother, father, or co-parent. However, while a female same-sex partner is automatically recognised as legal co-parent of a child born to her partner,[711] male same-sex partners are not equally recognised in the Northern Territory and South Australia.[712] Furthermore, the current law is only capable of structuring two-parent nuclear families, and does not accommodate other family formations. This shortcoming has been highlighted by two recent New South Wales cases, the first of which was *AA v Registrar of Births, Deaths and Marriages* [2011] FLC 93-477.[713] In *AA,* a female same-sex couple successfully applied to have the name of a sperm donor removed from their child's birth certificate, in order that the genetic mother's co-parent could be named on the birth certificate as a legal parent. The step was taken because only two parents may be registered on a birth certificate. The donor and his family had maintained a close relationship with the child, and were reportedly devastated by the decision. Judge Stephen Walmsley noted that 'a provision for registration of a third parent for a situation such as this one might be a neat answer to the problem this case presents'.[714] *AA* has been followed by *LU v Registrar of Births, Deaths and Marriages (No 2)* [2013] NSWDC 123.

At face value, these cases may appear to be limited by their facts – only applicable to same-sex couples using informal methods of donor conception. However, the issues raised and the principles in play have a broader relevance, because there are important social values at stake. Already, in any situation where the donor is known – for example where a female relative donates eggs – there are questions as to what role the donor should play in the life of donor-conceived offspring.[715] As we move towards increasingly relational parties to gamete donation, the question of parenthood, and whether or how these 'degrees of parenthood' should be recognized, looms large.

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711 See *Parentage Act 2004* (ACT) s 8, *Status of Children Act 2003* (NT) s 5DA, *Status of Children Act 1974* (Tas) s10C, *Artificial Conception Act 1985* (WA) s 6A, *Family Relationships Act* 1975 (SA) s8, *Status of Children Act 1996* (NSW) s14(1A).

712 *Status of Children Act 2003* (NT) s 5DA; *Family Relationships Act 1975* (SA) s8

713 See also the English case of *ML & AR v RW-B & SW-B [2011] EWHC 2455 (Fam)*, involving a dispute between two same-sex couples for the custody of two girls.

714 *AA v Registrar of Births, Deaths and Marriages and BB* [2011] NSWDC 100, 36. The case of *AA* was the catalyst for the New South Wales Legislative Committee on Law and Safety to commence an inquiry into inclusion of donor details on the Register of Births. Although the committee recommended against including donors' details on the Register of Births and birth certificates, they did not directly address the issue of allowing three parents to be registered on a birth certificate.

715 Petra Nordqvist and Carol Smart, above n 174, 14.

What is clear, however, is that in order to promote the interests of parties to gamete donation, the law should be capable of structuring relationships that meet the needs of the parties and reflect their intentions. As a starting point, relational theory directs us to the interests of the parties, which form the basis of evaluating the legal relationships. If the interests of parties to gamete donation are no longer to mimic the hetero-normative nuclear family, what are they to be? I suggest that it is in the interests of parties to gamete donation to have their *kinships* recognised. The concept of kinship goes beyond notions of 'family' and lends itself to describing the ways in which people know themselves to be related to each other. It is a personally, culturally and historically shaped concept and equally describes biological and social relations. From a relational perspective, good law will structure legal relationships between parties to gamete donation that recognise and support kinships.

Already, the law in some Canadian provinces provides for the registration of three parents on a child's birth-certificate, which better accommodates the reality of gamete donation, and acknowledges both social and biological relationships.[716] Obviously, this option will not be appropriate for all parties to gamete donation, but with a breakdown of anonymity and secrecy, and the rise of non-traditional family structures, more parties may find it appropriate. As the legal regulation of donor conception in Australia moves towards a more relational model, it is appropriate to re-consider the role and recognition of gamete donors.

12.3 Conclusion: Regulating the Relationships Between Parties to Gamete Donation in the Future

To date, most changes to the regulation of donor conception have focussed on the flow of information between the parties. In particular, ending donor anonymity and secrecy between recipients and their donor-conceived offspring is essential to promoting the autonomy of the parties, and follows a general socio-political trend away from strictly defined boundaries between parties, and towards increasing interdependence.

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716 See e.g. *A.A. v. B.B.,* 2007 ONCA 2, (Ontario) and the *Family Law Act 2011* (British Columbia) s30.

At the same time, assisted reproductive technologies brought about radical changes in family building and family formation from the 1980s which have, in turn, prompted changes in social attitudes towards family building and family formation — shifting from a liberal model of the traditional hetero-normative nuclear family to a less prescriptive post-liberal acceptance of single-parent, same-sex,[717] and multi-layered families.

In general, these changes in family formation have not been well accommodated by Australian law, which continues to be built around the 'model' heterosexual two-parent family with two biological children. In future, the regulation of family structures may also follow the broad social-political trend away from strictly defined boundaries so that it recognises and accommodates interdependent and atypical family structures that are formed on the basis of kinship, rather than biological relatedness and legal fiction.

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[717] See e.g. *McBain v State of Victoria* (2000) 99 FCR 116.

CONCLUSION

Here, I return to the aim of my research, which was to trace the development of legal relationships between parties to gamete donation over time, especially as they pertain to the flow of information. In doing so, I developed my overarching thesis that the relationships between parties to gamete donation are following a trajectory of change over time away from strictly separated, or 'bounded', parties and towards increasingly interdependent and relational parties. Further, by applying Nedelsky's relational theory of autonomy and law, I demonstrated that this change in the way parties relate to one another is desirable because it supports the interests of the parties.

The Trajectory of Change

As discussed in Part 2, the practice of donor conception was once fraught with legal and social risk for the parties, and defined by strict practices of secrecy and anonymity. The parties did not know each other, and most donor-conceived offspring were never told that they were donor-conceived. From the turn of the nineteenth century to 1984,[718] donor conception involved only artificial insemination with donor sperm, and was not specifically recognised as a legitimate means of family-building under the law. From the mid-1980s, however, Australian States and Territories began to adopt specific legislation and *Guidelines* to recognise and regulate donor conception. This change also coincided with the development of in-vitro fertilisation treatment, including the use of donor eggs. These legislative changes have, as detailed in Part 3, focussed on reducing practices of secrecy and anonymity in gamete donation, and thus opened the way for interdependent relationships between parties to gamete donation to develop. By 2010, all Australian States and Territories had prohibited anonymous gamete donation.

Legal relationships between parties to gamete donation were stable from at least the early 1900s to the 1980s, but have undergone significant changes over the past thirty years. The trajectory of change is from isolated parties without knowledge of each

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[718] This period represents the time when donor-assisted conception began to be documented in the literature, and the introduction of legislation to govern the practice; Addison Hard, above n 2; *Infertility (Medical Procedures) Act 1984* (Vic).

other (and in the case of donor-conceived offspring, without full knowledge of themselves), towards increasingly interdependent parties who may gain access to information about each other and shape their own relationships.

This trajectory of change, shaped by the introduction of state legislation and ethical *Guidelines,* did not occur in a vacuum, however. As is often the case, legal change in this area followed socio-political change. As discussed in Part 3, broad social changes preceded legal regulation of donor conception, and provide context to the changing relationships between parties to gamete donation.

Social Context for the Change

From the early 1900s to 1984, relationships between parties to gamete donation were defined by strong privacy rights, which effectively barred them from establishing any functional relationship after the donation had been made. Practically, secrecy and anonymity between the parties functioned to protect them not only from each other, but also from social disapproval. Practices of anonymity and secrecy also played a crucial role in reinforcing the liberal ideal of the autonomous 'bounded self', [719] and offered (adult) parties strong privacy rights as a means of defining metaphorical boundaries between each other.

In the past thirty years, parties to gamete donation have moved from being strictly separated, to identifiable and increasingly interdependent individuals, and walls of secrecy between the parties have been significantly dismantled. This trajectory towards increasingly interdependent parties to gamete donation has followed, and been driven by, a major social change away from strictly defined spheres of public and private life that are presumed by liberal socio-legal theory, and towards more flexible interplay between boundaries of public and private. For parties to gamete donation, the shift has been manifested by an increasing exchange of information over time. To an extent, this post-liberal shift in the way parties to gamete donation relate to one another has been supported by State legislation and ethical guidelines, although such regulations are still organised around the metaphor of boundaries.

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719 Jennifer Nedelsky (1990) above n 35, 168.

Understanding and Evaluating the Trajectory in Relational Terms

Relational theories of autonomy and in particular Nedelsky's theory of autonomy and law, have been central to my thesis, both to describe the post-liberal trajectory of change, and to demonstrate that this change in the way parties relate to one another is desirable and principled.

As a starting point, relational theories reject the ideal of the 'self-made man' as both unrealistic and inaccurate. Linked to legal theories of rights, relational theories dismiss the liberal presumption that rights function to define a sphere of individual sovereignty to separate the self from others. Relational theories reject the metaphor of boundaries to explain the purpose of rights, and instead propose that relationships provide a more helpful focus of analysis. That is, relational theories of rights propose that rights structure relationships and it is relationships that foster or detract from individual autonomy, not well-maintained boundaries of individual sovereignty. This shift is important because, as Code points out 'starting points and focal points shape the impact of theoretical discussion'.[720] With relationships shifted to the foreground, relational theories of rights view legal rights not as mechanisms for separating individuals from one another, but as an important means of shaping and forging relationships between individuals.[721]

In the past, relationships between parties to gamete donation were defined by practices of secrecy and anonymity that created strict boundaries between donor and recipient. Legislative and regulatory changes from the 1980s have reduced secrecy, ended donor anonymity and increased sharing of information between the parties, and have facilitated increasingly interpersonal and relational parties to gamete donation.

In Part 3 of this thesis, I demonstrated that the shift in how parties to gamete donation relate to each other is part of a broader social trajectory of change from a liberal society, with clearly demarcated public/private boundaries towards a post-liberal society, with increasing 'play' between these boundaries. This trajectory of change can also be understood as a shift away from the liberal concept of rights and

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720 Lorraine Code, above n 433, 129.
721 Jennifer Nedelsky (1990) above n 35, 3.

autonomy, and towards an increasingly relational understanding of the role of legal rights in structuring relationships between the parties. While liberal theories of rights predict that the breakdown of boundaries between the parties would result in reduced autonomy, this has not occurred. Relational theories allow us to make sense of this by understanding that relationships, rather than boundaries, foster individual autonomy.

Relational theories not only allow us to understand the trajectory of change, but also allow us to evaluate whether that change is a good thing. By shifting the focus to relationships, and how they are structured by legal rights, we can determine whether individuals' interests (I focus on autonomy), are enhanced or harmed by the relationships. Good law structures positive relationships and therefore enhances individual autonomy, while bad law structures poor relationships that harm individual autonomy. In Part 3 of my thesis, I identified that prohibition of anonymous gamete donation and increased sharing of information between parties to gamete donation had improved the autonomy of all parties, and was therefore an improvement on the previous law, which reinforced feelings of shame and fear, and had prevented the parties from forming any kind of interdependent relationship. Nevertheless, I observed that relationships shaped by secrecy and anonymity are still, to some extent, supported by the current law. I propose that the autonomy of the parties — particularly donor-conceived offspring — could be further enhanced by disclosing to donor-conceived offspring the fact that they are donor-conceived, and allowing donor-conceived offspring retrospective access to identifying information about their donors.

Given the current trajectory of social and legal change, I anticipate that future regulation of donor-conception practices will move away from a boundary metaphor for rights and adopt a relationship-centric approach. This regulation will deal with the remaining issues of secrecy and anonymity, which prevent the parties from forming mutually respectful and interdependent relationships, which serve the interests of all parties.

Relational Parties in Practice

I do not presume that legislation that supports interdependent and relational parties to gamete donation will create 'perfect' relationships for all parties to gamete donation. Such legislation would simply ensure that the parties have the information and

support they need to develop relationships on their own terms, and within the legal limits that apply to all interpersonal relationships.

Although relational parties to gamete donation may define their relationships on their own terms, this will not always be easy and will rarely be simple. However, the challenges they face are common to many family and kinship relationships, which may not conform to the liberal ideal of the heterosexual couple and two biological children. I suggest that, as society becomes more accepting of alternative family structures, parties to gamete donation should be supported by the law to shape and develop their own relationships, unique to their understanding of 'kinship'.

As discussed in Part 4, current legislation to regulate the parentage of donor-conceived offspring is intended to mimic as closely as possible the hetero-normative nuclear family, and allow donor-conceived families to 'pass' as 'normal'. It may also support secrecy and serve to deny the use of donated gametes both to the outside world and within the family. However, this approach is tied to the practices of secrecy and autonomy. Despite changes in donation practices - including the use of known donors, and the use of donor gametes by homosexual couples and individual women - the current law does not seriously contemplate alternative family formation, and structures relationships between parties in such a way as to exclude and frustrate the intentions of families that do not fit the idealised form.

Future developments in the law may obviously benefit 'non-traditional' families, if it allows legal recognition of flexibly defined kin-relationships. However, it must be noted that some outwardly 'traditional' families may also wish to establish a legally-recognised kinship-connection between donor, recipients and donor-conceived offspring. For example, in Nordqvist and Smart's sociological study of the lived experiences of English recipients of donated gametes, they noted that, in relation to known-donors, 'not [all recipients] expressed … anxiety about clear boundaries between themselves, the donor and the donor's family. Rather than seeing them as a threat, some families nurtured the connectedness that came with a known donor'.[722] One couple and their donor-conceived offspring, in particular, had fostered a particularly close relationships to their known egg donor and her family, such that the

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722 Petra Nordqvist and Carol Smart, above n 174, 120.

couple also acted as godparents to their donor's own children.[723] Given the opportunity, such families may wish to have their kinship legally recognised.

Concluding Words

Throughout this thesis, I have traced the development of legal relationships between parties to gamete donation from the early 1900s to the present, and into the future. Donors, recipients and donor-conceived offspring now have access to greater information about each other than ever before, and recipients of donated gametes are now a diverse group, including lesbian couples, single women and heterosexual couples. From the mid 1980s, when legislation to regulate the practice of gamete donation was first introduced, to the present, there have been significant changes in the rights, duties, and expectations of parties to gamete donation. From strict practices of secrecy and anonymity, the parties are now significantly interdependent and the interests of donor-conceived offspring have shifted to the foreground.

However, throughout this change, the interests of the parties have generally been framed as competing. Typically donors were thought to seek anonymity and resist attempts by donor-conceived offspring to gain access to information about their biological contributor, while recipients were said to claim privacy rights against both the donor, and their donor-conceived offspring, to prevent interference by the donor and to keep the nature of conception a secret from the donor-conceived offspring. The issues are framed as a battle to draw, re-negotiate, and maintain boundaries between the parties, and these boundaries are often defined by legal rights.

Throughout this thesis, I have followed the change in the relationships between parties to gamete donation - away from bounded parties and towards increasingly interdependent and relational parties – from the mid-1980s, when legislation was introduced in response to a broader social trend away from the liberal model of clearly defined spheres of public/private, and towards a post-liberal society with increased transparency, or 'play' between the domains of public and private. Further, I identified that this trajectory of change – both for parties to gamete donation and society as a whole – is best described by relational theories of autonomy, which view the individual in terms of his or her relationships, rather than as an isolated individual.

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723 Ibid, 121.

By consciously replacing the metaphor of boundaries to describe the role of rights, with a study of the actual relationships, I was able to elucidate the role of legal rights in defining the relationships between parties to gamete donation over time and into the future. Further, by applying Nedelsky's relational theory of autonomy and law, I demonstrated that the current trajectory of change in the way parties relate to one another is desirable because increased interdependence supports the interests of the parties, including their autonomy. Although there may be reluctance to let go of the liberal understanding of rights as boundaries around individual agents, relational theories provide a more satisfactory explanation for the social and legal trajectory of change away from bounded selves and towards interdependent and relational parties to gamete donation.

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