



Anonymity of IVF donors in NSW

By Julie Hamblin



With the passage through the NSW parliament of the *Assisted Reproductive Technology Act 2007*, NSW is now one of only a small number of jurisdictions worldwide to have legislation dealing comprehensively with assisted reproduction. The NSW legislation (passed in late 2007, but yet to come into force) establishes a detailed regulatory framework for the use of gametes and embryos in assisted reproductive technology (ART) procedures, covering issues such as consent, counselling, record-keeping and post-mortem use.

Photo © Dreamstime.com

A key objective of the legislation is to ensure that children born from donated gametes (semen or eggs) or embryos will be able, once they turn 18, to learn the identity of their biological parents. To facilitate this, the Act establishes a Central ART Donor Register, which will hold identifying information about donors and recipients and their children, and make this information available to certain limited classes of people in accordance with the legislation.

Before the passage of the *Assisted Reproductive Technology Act*, ART-providers were subject to self-regulation through the Code of Practice of the Reproductive Technology Advisory Committee of the Fertility Society of Australia, but there was limited and piecemeal statutory regulation in NSW. Semen donation was regulated by the *Human Tissue Act 1983* in a similar fashion to blood donation, sometimes with anomalous consequences, and research on human embryos

was regulated by both commonwealth and state legislation. The possible application of the *Anti-Discrimination Act 1977* to ART procedures, particularly in relation to treatment for single women or same-sex couples, was a source of uncertainty and concern for providers.

On the question of whether children born from ART procedures should have the right to know the identity of their biological parents, the practice has differed between providers. Some have required donors to consent in advance to the disclosure of their identity to any children born from their gametes or embryos. However, given the shortage of donors, others have been reluctant to require donors' consent to disclosure, for fear that this will further reduce the number of people willing to donate.

The new legislation makes it clear that it will not be possible in the future for the donors of gametes and embryos to remain anonymous. Although much of the detail of the

new requirements will be contained in regulations to the Act, which have yet to be released, the legislation imposes an obligation on ART-providers to notify the Central ART Donor Register of ART procedures performed using donated gametes and embryos, and to provide identifying information about both donors and recipients. In addition to permitting children born from these procedures to know the identity of their biological parents, the Register is also intended to allow the adult offspring of a donor to learn the identity of any other children of that donor, provided those children also consent.

These obligations will apply to all ART procedures carried out after the Act comes into force, even if the gametes or embryos used were donated earlier. It is possible that the regulations will allow different transitional arrangements for gametes or embryos already in storage, or where a couple wishes to use the same semen donor again, so that their existing child or children have a sibling from the same father.

Importantly, the Act contains a new limit to the number of families that can be created from the gametes of a single donor. ART-providers are not permitted to provide treatment using a donated gamete if it will result in offspring of the donor being born to more than five women, including the donor and any current or former spouse of the donor. This is significantly more restrictive than the existing Code of Practice, which permits up to ten families using the gametes of one donor.

The Act also lays down strict requirements for information provision and consent in relation to all ART procedures, whether or not they involve donated gametes or embryos. Gametes cannot be used if they have been stored for more than five years, and can be used only strictly in accordance with the gamete provider's consent. Donors are therefore able to stipulate by whom they wish their gametes to be used, and could, for example, direct that their gametes not be used to treat single women or same-sex couples. Directed donations of this kind may previously have fallen foul of the *Anti-Discrimination Act*.

On the vexed issue of post-mortem use of stored gametes or embryos, the Act provides that a gamete cannot be used after the death of the gamete-provider, unless the person previously consented to the use of the gamete after his or her death, and the woman receiving treatment using the gamete is aware of the person's death.

The Act regulates a number of other aspects of ART treatment, including provisions to the following effect:

- commercial surrogacy is prohibited;
- all surrogacy agreements are void, and therefore unenforceable;
- gametes and embryos can be exported from NSW, but only with the consent of the gamete provider;
- the importation of gametes and embryos into NSW is permitted as long as the other requirements of the legislation, such as those relating to consent and record-keeping, are complied with; and
- new infection control standards for ART-providers may be prescribed by the regulations.

For practical purposes, a key consequence of the new legislation for ART-providers will be the need to ensure that they have rigorous consent and record-keeping procedures, so they can demonstrate compliance with the regulatory requirements. While most ART-providers have been well-attuned to the importance of obtaining full and informed consent from both donors and recipients, there is now added importance to maintaining comprehensive and accurate records at all stages of ART treatment.

By establishing such a detailed regulatory framework for ART treatment, including the obligations to provide information to the Central ART Donor Register, the NSW Parliament has given a clear signal that it wishes to be involved in the oversight of this area of medical practice. It has also given strong endorsement to the principle that children born from ART procedures should be able to know who their biological parents are. It remains to be seen whether this will be a significant disincentive for future donors. ■

Julie Hamblin is a partner in the Health Law Group of HWL Ebsworth Lawyers, based in Sydney. She provides advice on health law and policy to hospitals, health professionals and other healthcare providers, and also acts in the defence of medical negligence claims. She works internationally as a consultant on HIV law and policy in developing countries. **PHONE** (02) 9334 8853
EMAIL julie.hamblin@hwlebsworth.com.au.

COLES & ASSOCIATES PTY LTD

HELEN L. COLES

MEDICO-LEGAL OCCUPATIONAL THERAPIST
(25 years medico-legal experience)

- Assessment of residual function, rehabilitation potential, employability
- Home visits/work site evaluations
- Recommendation of aids, equipment and services for home and work
- Assessment following work injury, motor vehicle accident, medical negligence, criminal assault, public access injury
- Assessment for family court related to special maintenance needs of former spouse or dependant
- Assessment for administrative appeals
- Availability - local, all states & overseas by negotiation

Watkins Medical Centre
225 Wickham Terrace, Brisbane
Tel: (07) 3832 2630 or (07) 3839 6117
Fax: (07) 3832 3150