Access by Donor-Conceived People to Information about Donors

ISSUES PAPER

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Queries regarding this submission should be directed to:
Contact persons  Alice Palmer and Laura Helm
Email  apalmer@liv.asn.au and lhelm@liv.asn.au
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1. Introduction

This Issues Paper has been prepared by the Law Institute of Victoria (LIV) to contribute to discussion about access by donor-conceived people to information about donors. It aims to explore the legal and human rights dimensions of the issue.

This paper does not reflect any views taken by the LIV and is not intended to express a policy position.

2. Law Reform Committee Inquiry - Background

On 28 March 2012, the Victorian Parliament’s Law Reform Committee (the Committee) tabled its report (the Report) on the Inquiry into Access by Donor-Conceived People to Information about Donors (the Inquiry).¹

The Report was the continuation of an Inquiry commenced under the former Parliament on 23 June 2010. The Committee is a Joint Investigatory Committee of the Parliament of Victoria. The Committee was established under the Parliamentary Committees Act 2003 (Vic). Members of the Committee have been drawn from both the Legislative Assembly and the Legislative Council. The Chair of the Committee is Mr Clem-Newton Brown MP.

Among the 30 recommendations made in the Report is the key recommendation that the Victorian Government introduce legislation to allow all donor-conceived people to obtain identifying information about their donors. To ensure that donors are not unreasonably affected by the release of identifying information about them, the Report also recommends that donors have the option of placing a veto on contact if they do not wish to be contacted by the donor-conceived person.

During the course of the Inquiry, the Committee received seventy-seven written submissions, and convened public hearings with fifty-one witnesses. The LIV did not make a submission to the Inquiry. The Victorian Government is required to table a response to the Report within six months.²

3. What is Donor-Conception?

Donor-conception is achieved through a donor treatment procedure,³ in which donor gametes (reproductive cells from a man or woman)⁴ or a donor embryo⁵ are used.

4. Relevant Law in Victoria

4.1 Access to donor information

The Report sets out the Victorian legislation which governs access by donor-conceived people to information about their donors.⁶ A summary of the law is set out below.

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¹ Law Reform Committee, Parliament of Victoria, Inquiry into Access by Donor-Conceived People to Information about Donors (2012).
² The last parliamentary sitting day in September is 13 September 2012, so a response is likely to be tabled on or before 13 September 2012.
³ Assisted Reproductive Treatment Act 2008 (Vic) s 3.
⁴ A donor oocyte (i.e. ovum) or donor sperm, Assisted Reproductive Treatment Act 2008 (Vic) s 3.
⁵ An embryo in respect of which consent had been given under section 16 of the Assisted Reproductive Treatment Act 2008 (Vic).
In Victoria, a donor-conceived person’s right to access donor information is determined by the date at which the gametes used in their conception were donated.

Prior to 1988, donor-conception was unregulated by specific legislation. Donors and recipient parents were usually required by the medical profession to sign anonymity contracts agreeing that they would not seek to discover each other’s identity, and this position has been maintained since legislation was introduced to specifically regulate the area in the late 1980s.

The relevant historic legislation is the *Infertility (Medical Procedures) Act 1984* (Vic) which came into effect in 1988. The governing legislation was amended twice; the *Infertility Treatment Act 1995* (Vic) became effective from 1 January 1998, and the current *Assisted Reproductive Treatment Act 2008* (Vic) (ART Act) came into effect on 1 January 2010. The ART Act creates two relevant registers, the Central Register and the Voluntary Register, maintained by the Registrar of Births, Deaths and Marriages.

**Rights of access to information in Victoria:**

- **Pre 1988:** people who were conceived using gametes donated prior to 1988 do not have a right to identifying information about donors. They might be able to obtain non-identifying or identifying information about their donors if their donors have provided that information to the Voluntary Register.

- **Between 1988-1997:** people who were conceived using gametes donated between 1988 and 1997 can obtain non-identifying information about their donor from the Central Register. They can obtain identifying information about their donor if their donor consents to the release of the information or alternatively, if their donor has provided that information to the Voluntary Register.

- **Post 1998:** people who were conceived using gametes donated after 1 January 1998 can obtain identifying information about their donor from the Central Register.

Legislative change would be required to provide people conceived from gametes donated prior to 1998 with access to identifying information about their donors.

Many submissions to the Inquiry noted that Victoria has “led the way in Australia in relation to recognising and facilitating the release of information to donor-conceived people. Victoria was the first jurisdiction in the world to develop comprehensive legislation regarding the use and development of ART.” Victoria was also the first jurisdiction to establish donor registers; the Central Register was introduced in 1988, followed by the Voluntary Register in 1997. As such, the Victorian model has been followed in the development of donor registers internationally.

For information on rights to access donor information in other Australian and international jurisdictions see Appendix 2.

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6 Law Reform Committee, above n 1, xx, Chapter 3.
7 Ibid xix.
8 Sonia Allan, Submission No 5 to Law Reform Committee, Parliament of Victoria, *Inquiry into Access to Information by Donor-Conceived Individuals about their Donors*, 2 August 2010, 10 (‘Submission No 5’).
10 Victorian Assisted Reproductive Treatment Authority, Submission No 19 to the Law Reform Committee, *Inquiry into Access to Information by Donor-Conceived Individuals about their Donors*, 6 August 2010, 2 (‘Submission No 19’).
11 Ibid 2.
4.2 Adoption legislation

The Report highlights the possible comparison between donor-conception and adoption. As noted in the Report, legislative change to adoption law in the 1980s which allowed “adopted people unqualified access to identifying information about their birth parents” is comparable to the Committee’s proposed reforms. Section 93 of the Adoption Act 1984 (Vic) allows adopted people access to identifying information about their birth parents.

There are, however, limitations to the comparison between access to information in the cases of adoption and donor-conception. While the number of children who might seek identifying information about a birth mother of father is likely to be very small, there might be a large number of donor-conceived people who seek identifying information about a single donor. The Committee notes that a single donor might have as many as 30 children conceived from sperm donations. As such the privacy implications in the case of donor-conception might be more significant.

4.3 Laws regulating private information

Information about donors who donated gametes prior to 1988 could be protected in a number of ways.

Common law protections of privacy under tort and contract

Some aspects of privacy are protected at common law, for example, by trespass, nuisance, breach of confidence and under contract. Courts have also flagged a possible tort of ‘invasion of privacy’.

For example, information about donors who entered into an agreement with a health service provider, prior to donation might be protected by contract law. What protection is accorded would be determined by the terms of the agreement made and the circumstances of each case. A requirement to keep the identity of a donor confidential might be express or implied in an agreement.

State and federal legislation protecting personal information

State and federal legislation protects private information collected and held by some entities.

Information about donors who donated to private institutions or public agencies in Victoria might be protected by the Health Records Act 2001 (Vic). The Act defines ‘health information’ to include personal (i.e., identifying) information about the physical, mental or psychological health of an individual, and can include personal information collected in providing an individual with a health service or in connection with the donation of body parts, organs or substances or certain genetic information. Access to health information is subject...
to Part 5 of the Health Records Act. Disclosure of health information is regulated by the Victorian Health Privacy Principles (HPPs) in Schedule 1 of the Health Records Act, with restrictions on disclosure by the entity holding the information applying regardless of when the information was collected. The status of health information of a donor, a donee and a donor-conceived person is not clear for the purposes of the access and disclosure provisions in the Health Records Act.

State government organisations, local councils and private sector organisations acting as contracted service providers to the Victorian government are required to protect the privacy of people’s personal information under the Information Privacy Act 2000 (Vic). ‘Personal information’ under this Act means information that is recorded and which can identify someone. Personal information could include someone’s name, address, sex, age, financial details, marital status, education or employment history.

Information about donors who donated to a federal government organisation or private sector agency might be protected by the Privacy Act 1988 (Cth), although the protections might not be effective for information collected prior to 1988. Disclosure of personal information, including ‘sensitive information’ which is defined to include ‘health information’, is regulated by the National Privacy Principles (NPPs) in Schedule 3 of the Privacy Act and the Information Privacy Principles (IPPs) in section 14 of the Privacy Act. Under NPP 2.1(a)(i), sensitive information can be disclosed only for a purpose directly related to the primary purpose for which the information was collected. Note that significant reforms of the Privacy Act have been proposed.

State and federal legislation providing rights of access to information

Victorian and federal legislation gives people rights to access to information and of correction in relation to documents about their personal affairs. Only the person who is the subject of the personal information may access that person’s information.

4.4 Human rights laws

The Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter of Human Rights) requires Victorian legislation to be assessed and interpreted in light of human rights. Any legislation proposed as a result of the Committee’s recommendations would be accompanied by a Statement of Compatibility assessing the human rights impacted by the proposed reforms.

The Charter of Human Rights contains several rights of relevance to the question of access to donor information by donor-conceived people:

- recognition and equality before the law (section 8)
- right to privacy (section 13(a))
- right to seek information (section 15(2))
- protection of families and children (section 17)
- right to enjoy one’s cultural, religious, racial or linguistic background (section 19(1))
Section 7(2) of the Charter of Human Rights provides guidance on the circumstances in which human rights can be limited:

A human right might be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including -
(a) the nature of the right; and
(b) the importance of the purpose of the limitation; and
(c) the nature and extent of the limitation; and
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

If the Government were to proceed to implement the Committee’s recommendations, it would need to determine that reasonable limits on a donor’s right, for example, to privacy and protection of families and children, are justified, for example, in light of the competing rights of donor-conceived people to recognition and equality before the law (as currently, not all donor-conceived people have the same rights of access to information), privacy (in the broader sense), information, protection of families and children, and cultural and religious rights.

There have been some cases in the United Kingdom regarding a child’s right to know his or her true identity:

- **Blood and Tarbuck v Secretary of State for Health**. In this case a mother sought to register the deceased father of her two children conceived by in vitro fertilisation on their birth certificates. It was held that s28(6)(b) of the Human Fertilisation and Embryology Act 1990 (UK) was incompatible (under s 4 of the Human Rights Act 1998 (UK)) with Article 8 (right to respect for private and family life) and Article 14 (prohibition against discrimination) of the European Convention on Human Rights to the extent that it did not allow a deceased father’s name to be given on the birth certificate of his child. The law was amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK).

- **Re T (a child)**. The court ordered DNA testing despite the mother’s objection holding that, in accordance with s21 of the Family Law Reform Act 1969 (UK) as amended by the Child Support, Pensions and Social Security Act 2000 (UK) and Article 8 of the European Convention on Human Rights, the tests were in the best interest of the child and that any interference with the rights of his mother and father was “proportionate to the legitimate aim of providing the [child] with the possibility of certainty as to his real paternity.”

In the Inquiry, the Committee heard evidence on the human rights impacts for both donor-conceived people who would like information regarding their donors and donors who wish to remain anonymous. On the balance of the evidence, the Committee found that all donor-conceived people should have access to identifying information about their donors (finding 9). However, they also found that if current arrangements permitting donor anonymity are changed to allow the release of identifying information, measures to protect donors and donor-conceived people from unreasonable interference in their private lives should be considered (finding 8). In the language of s7(2) of the Charter of Human Rights, it might be argued that the importance of the purpose of the limitation is borne out in the avoidance of

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25 Unreported, England and Wales High Court, Sullivan J.
26 [2001] EWHC (Fam) 10 (10 May 2001).
27 Ibid 62.
significant harm to donor-conceived people while the power of a contact veto (even if of limited practical effect) is a 'less restrictive means' of limiting the rights to privacy and family of the donor.28

An analysis of the balancing of rights is contained in the Report29 and in the submission to the Inquiry from the VEOHRC.30

5. The Committee’s Findings

In its 238 page Report, the Committee makes 10 findings (see Appendix 3), including its first finding that “[s]ome donor-conceived people suffer substantial distress when they are unable to obtain information about their donor, and/or if told of their donor-conceived status later in life” and its ninth finding that “[a]ll donor-conceived people should have access to identifying information about their donors”.

A number of arguments in favour of providing access to identifying information to all donor-conceived people in Victoria were proposed by the Committee, including:

- providing for communication of medical information between donor-conceived people and their donors;
- ensuring that donor-conceived people are able to exercise their rights under the Charter of Human Rights; and
- ensuring that the principle articulated in the ART Act, that “the welfare and interests of persons born or to be born as a result of treatment procedures are paramount”, is applied.”31

Nevertheless, the Committee noted the argument against provision of information namely that “donors were promised anonymity when making donations prior to 1 January 1998, and providing donor-conceived people with access to identifying information may constitute an unreasonable breach of donors’ privacy.”32

Despite an initial view that donors’ privacy should be preserved, the Committee “determined that the right of a donor-conceived person to have access to identifying information about his or her donor is paramount.”33

The Committee noted that “knowledge about parentage and heredity often forms a substantial part of a person’s sense of identity, and donor-conceived people who want this information, but are unable to obtain it, experience significant stress and frustration. Where people learn as youths or adults that they are donor-conceived, and are consequently forced to evaluate who they are through newly perceived relationships, the stress and frustration of not being able to find out more about their donor can be exacerbated. Unlike their parents, their donor, or the treating physician, the children are passive participants in donor-conception, and have had no influence on agreements made between those parties, even though they are substantially affected by those agreements.”34

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29 Law Reform Committee, above n 1, 73.
30 Victorian Equal Opportunity & Human Rights Commission, Submission No 74 to Law Reform Committee, Parliament of Victoria, Inquiry into Access by Donor-Conceived People to Information About Donors, 1 September 2011.
31 Law Reform Committee, above n 1, xx.
32 Id.
33 Id.
34 Ibid 37.
The Committee heard from nine donors, three of whom opposed the release of donor information. The Committee noted that “there are a wide range of views on the merits or otherwise of providing donor-conceived people with access to identifying information about donors.” A proportion of donors, it said, “do not want their families to know that they donated gametes, and fear the consequences to these relationships if this information is revealed. Some donors, and in some cases their spouses or families, also fear the repercussions of contact, and worry that their donor-offspring may intrude unreasonably on their lives if their identity is revealed.”

The Committee noted “these fears are real, and it is possible that some of them may be realised.” However, drawing on a comparison between adoption and donor-conception, the Committee noted “that the experience of adoption suggests that the actual incidence of ongoing distress due to contact with previously unknown offspring is low.”

The Committee noted that “while the release of identifying information to donor-conceived people may potentially cause discomfort and distress to some donors (although this will not always be the case), it is certain that some donor-conceived people are actually suffering from their lack of knowledge about donors. Although debates about the consequences of releasing identifying information often focus on the suffering that donors may experience, the fact is that many donor-conceived people are already suffering, in some cases quite profoundly, from not having access to this information.” As such, the Committee states that its view is that “the burden of suffering under current arrangements falls predominantly on the donor-conceived person.”

In finding that “[a]ll donor-conceived people should have access to identifying information about their donors”, the Committee has, in effect, proposed a limit on an anonymous donor’s right to privacy and protection of the donor’s family in favour of a donor-conceived person’s right to recognition and equality (donor-conceived people conceived with gametes donated before 1998 are not currently treated equally to those conceived with gametes donated after 1998), their right to privacy in the broader sense, their right to protection as part of a family and as children, and their cultural rights.

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35 Ibid 73.
36 Id.
37 Id.
38 See Section 4.2 of this Issues Paper (which discusses the limitations to the comparison of adoption and donor-conception.)
39 Ibid 73.
40 Id.
41 Ibid 74.
42 Ibid xxix, 76 (Finding 9). Also see Appendix 3.
6. Issues Arising from the Committee’s Recommendations

The Report does not discuss many of the legal issues that might arise under its recommendations. This Issues Paper canvasses some of the legal and human rights issues that arise from the recommendations. (See Appendix 1 for a full list of the Recommendations.)

Recommendation 1

**That the Victorian Government introduce legislation to allow all donor-conceived people to obtain identifying information about their donors.**

**Issue: Retrospective law**

The legislation proposed in recommendation 1 would allow all people born from donor-conception conducted in the state of Victoria to access identifying information about their donors, including people conceived from gametes donated prior to 1998. As such, the legislation would operate retrospectively. While there is a presumption against retrospective application of legislation, the presumption can be rebutted by a clear statement evidencing contrary parliamentary intention. Therefore, with the inclusion of a clear intention for retrospective application, the legislation would be constitutionally valid.

Any new law would need to include a clear statement of retrospective application to override any common law protections of privacy. Further any necessary amendments to state and federal privacy laws (see section 4.3 above) would need to be made.

**Issue: Information availability**

It might be difficult in practice to make contact with some donors. Records might be incomplete or might have been lost or destroyed. Further, where complete records exist, information contained in the records might be of little assistance where donors have moved interstate, overseas or have died.

Any new law would need to address the preservation and the destruction of records. Proper regulation of the storage of medical records pertaining to donor-conception will be needed to ensure availability of information for people who accrue rights to access information under the reforms.

**Issue: Disclosure of conception origin**

The Report does not provide for mandatory disclosure of donor-conception by parents to their donor-conceived child. There is currently no such requirement in the context of adoption under Australian law. A practical implication of the omission of such a
requirement is that donor-conceived people who are not aware of their conception origin would be unable to use the rights provided to them by the legislation.

The ART Act introduced a requirement that where a child is conceived through a donor treatment procedure, the Registrar of Births, Deaths and Marriages must mark the child’s birth entry to note that he or she is donor-conceived. Under s17B into the Births, Deaths and Marriages Act 1996 (Vic), when issuing a birth certificate to a donor-conceived person (but not to a third party, such as a parent), the certificate must include an addendum stating that further information is available about the entry. The Committee notes that the rationale for this requirement is to provide a means by which, even if donor-conceived persons’ parents do not tell them that they were donor-conceived, they still have the opportunity to learn about the circumstances of their conception.49

Issue: Financial claims

The Committee does not address whether donor-conceived people would be entitled to make any financial claims from a donor, for example, a claim on a deceased donor’s estate or a donor-conceived sibling’s estate, or for maintenance under family laws. Any new law would need to address the implications of access to identifying donor information for any financial claims that might be made under succession and family laws.

Living parents have the primary duty to maintain their children and, in some cases, their adult children, under the Child Support Scheme (governed by Child Support (Registration and Collection) Act 1988 (Cth) and the Child Support (Assessment) Act 1989 (Cth)). In some cases, fathers of a child can also be required to pay childbirth expenses.50

Part IV of the Administration and Probate Act 1958 (Vic) provides for family provision (formerly known as testator’s family maintenance) proceedings, allowing the court to order that provision be made out of the estate of a deceased person for the proper maintenance and support of a person for whom the deceased had responsibility to make provision, where the deceased person made no, or inadequate, provision for the applicant in their will or where they died intestate.51

Any new law would need to consider the effect of Parts II and III of the Status of Children Act 1974 (Vic) on claims under family and succession laws. Under Parts II and III, there is an irrebuttable presumption that a donor is not the father of a child born as a result of the donor’s sperm donation, whether or not the donor was known to the child’s mother.52 Parts II and III may therefore prevent a donor-conceived person being entitled to make a claim on a deceased donor’s estate under current legislation. However, any new law would need to consider whether Parts II and III would preclude a family provision claim in the event that following contact between a donor and donor-conceived person, the donor and donor-conceived person formed a relationship or the donor assumed responsibility for maintaining the donor-conceived person.

Further, any new law would need to address whether claims for maintenance regarding a donor-conceived child will be permitted under family law.

Footnotes:
49 Law Reform Committee, above n 1, 21.
50 Family Law Act 1975 (Cth) s 67B.
51 Administration and Probate Act 1958 (Vic) s 91.
52 Status of Children Act 1974 (Vic) ss 10C – 10D; 13-16.
The relevance of the Victorian *Charter of Human Rights* and the right to equality would need to be considered in the context of succession laws (e.g. the extent to which any restrictions on claims by donor-conceived children might violate the right to equality before the law). The Inquiry by the Victorian Law Reform Commission into Succession Laws, currently underway, could be relevant to this issue.\(^{53}\)

**Issue: National consequences**

The Committee does not address the implications of the reforms for people conceived by donation outside of Victoria.

The Committee discusses the issue of differing or no legislation in other Australian jurisdictions in general. It notes the Australian Senate’s Legal and Constitutional Affairs References Committee recommended that there should be a centralised, national register during the course of its Inquiry into donor-conception practices in Australia.\(^{54}\)

**Recommendation 2**

That, in implementing Recommendation 1, the Victorian Government require that a child applying for identifying information about his or her donor only be provided with that information if:

1) the child’s parents have consented to the application; or

2) a counsellor has provided counselling to the child and has confirmed in writing that the person is sufficiently mature to understand the consequences of the disclosure.\(^{55}\)

**Issue: Age requirement**

The Committee notes that most people affected by the legislation will be legal adults.\(^{56}\) Nevertheless, as some people affected by the changes might be minors, the Committee advises that the legislation should include conditions on access to information for people who are under the age of 18 when they apply for access. It is noted by the Committee that 18 years is a standard age requirement in Victorian law and that the proposed conditions mirror the conditions attached to current access rights for people conceived by donation after 31 December 1997.\(^{57}\)

The Committee notes that some submissions called for the age requirement to be lowered.\(^{58}\) Some submission suggested that sixteen would be an appropriate age below which there should be restrictions on access.\(^{59}\) It has also been argued that where access to information accrues while a minor is completing the final year of secondary school it causes anxiety and disruption to studies.\(^{60}\) As such, it is suggested that a younger or older age requirement, for instance sixteen or twenty-one, might be more appropriate in order to avoid convergence of the right to access information and completion of secondary school.


\(^{54}\) Law Reform Committee, above n 1, 175.

\(^{55}\) Ibid xxv, 77.

\(^{56}\) Ibid 76.

\(^{57}\) Id.

\(^{58}\) Ibid 84.

\(^{59}\) Sonia Allan, above n 8; Victoria Human Rights and Equal Opportunity Commission, above n 29, cited in Law Reform Committee, *Inquiry into Access by Donor-Conceived People to Information about Donors*, above n 1, 84.

However, the Committee stated that the option for a counsellor to confirm that a minor is mature enough to understand the consequences of disclosure and to permit access to information is sufficient to provide minors with a right to access information before they attain eighteen years.  

Any new law would need to stipulate any age requirements.

**Recommendation 3**

**That, with the introduction of the legislation described in Recommendation 1, the Victorian Government require donor-conceived people to attend counselling prior to obtaining identifying information about donors.**  

**Issue: Counselling requirement**

The Committee noted that submissions called for reform to be accompanied by access to counselling. Provision counselling is highly recommended, particularly in light of the number of submissions that raised concerns about the limitations of services currently available.

However, a requirement that counselling be undertaken prior to obtaining identifying information raises a number of practical issues. Required counselling might not result in the desired outcomes for all participants. It might also be inappropriate to require people to attend counselling. Required counselling might also result in prejudice to people in remote and rural areas with limited access to counselling services.

Any new law would need to clarify whether the government has an obligation to provide counselling, or whether the obligation to attend counselling is solely the responsibility of the donor-conceived person.

**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.

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61 Law Reform Committee, above n 1, 84.
62 Ibid 77.
63 Id.
64 Ibid 119, 137.
65 Ibid xxv, 81.
**Issue: Contact vetoes**

Contact vetoes have been used in adoption law in Australia, for example under the *Adoption Information Act 1990* (NSW). It would seem that there was popular appeal for contact vetoes in adoption law. A survey conducted in April 1992 found that almost half the applications made under the *Adoption Information Act 1990* (NSW) were accompanied by a veto on contact (although some vetoes were later removed).\(^{66}\)

Some commentators have argued that it should not be necessary to take action, namely by registering a contact veto, to protect privacy.\(^{67}\) However, the Committee viewed the contact veto system as a compromise which enables competing rights to privacy and to access information to be balanced.

Contact vetoes raise a number of issues. Compliance with contact vetoes is difficult to enforce and as such contact vetoes are often criticised as failing to offer sufficient protection to those who wish to avoid contact.\(^{68}\) However, as noted by the Committee, the vetoes appear to have achieved their purpose in past. For instance, within the first two years of operation of *Adoption Information Act 1990* (NSW) there was a very high rate of compliance with contact vetoes and only one case of arguable breach occurred.\(^{69}\)

However, contact vetoes likely do not provide the same assurance in the current age of technology and social media. For instance, upon receipt of a donor’s name a donor-conceived person might be able to acquire a great deal of information through the Internet, including social media websites and other online resources, while technically observing a commitment to not make contact with a donor. Moreover, provision for penalty upon breach of a contact veto, as is recommended by the Committee, might prove difficult to enforce.

Also at issue is whether registration of a contact veto should be accompanied by a fee. The Committee recommends that a contact veto must be registered against each person conceived by donation. The Committee notes that a single donor might have as many as 30 children conceived from sperm donations.\(^{70}\) The Committee proposed that registration of a contact veto elapse after 5 years. As such, requirement of a fee for each registration could be prohibitively expensive.

One alternative position might be that any veto should continue for the donor’s life unless the donor withdraws it. The Committee’s proposal for lapping periods could mean some vetoes will not be renewed due to human error or reasons beyond the donor’s control. Given the ramifications of a veto ending, there is an argument that there needs to be certainty around the veto ending. Having a permanent veto (unless it is withdrawn) would also save on administrative costs and expense to the donor.

Any new law would need to contain detailed requirements for contact vetoes to ensure their effectiveness.

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\(^{66}\) Turner, above n 59, 345.
\(^{67}\) Law Reform Committee, above n 1, 347.
\(^{68}\) Id.
\(^{69}\) Ibid 79.
\(^{70}\) Id.
Recommendation 6

That the Victorian Government introduce the measures proposed in Recommendation 1 through Recommendation 5 following a period of time sufficient to publicise and inform the Victorian community of retrospective changes to donor-conception arrangements.\(^7^1\)

**Issue: Publicising the changes**

Many people may be affected by the changes and as such it is important that thorough national and local advertisement of the changes takes place. While an extensive media campaign was launched in New South Wales about the changes under the *Adoption Information Act 1990* (NSW) a survey conducted in 1992 found a substantial minority, approximately 27%, of people affected remained unaware of the changes.\(^7^2\)

The period of time and what advertising measures would be undertaken would need to be addressed in any new law.

Recommendation 7

That the Victorian Government encourage organisations, agencies and persons holding information on donor-conception to release, upon request, non-identifying information about a donor to a donor-conceived person, his or her parents, and his or her descendants.\(^7^3\)

**Issue: Liability of record holders**

The Committee considers that release of non-identifying information would not breach a donor’s right to privacy and is unlikely to breach any anonymity agreements or privacy legislation.\(^7^4\) The Committee does not address whether their recommendation that organisations be encouraged to release non-identifying information regarding donor-conception raises breach of contract or confidentiality issues. However, the Committee notes that while the release of information is not provided for under current legislation, in practice, organisations have released basic non-identifying information and argues it is preferable that donors and donor-conceived people have a right to access this information under legislation.

Any new law would need to provide appropriate protections from liability for record holders.

Recommendation 8

That the Victorian Government encourage organisations, agencies and persons holding information on donor-conception to release to a donor, upon request, non-identifying information about his or her donor-conceived offspring.\(^7^5\)

See analysis under Recommendation 7 above.

\(^7^1\) Ibid xxv, 83.
\(^7^2\) Turner, above n 59, 344.
\(^7^3\) Law Reform Committee, above n 1, xxv, 83.
\(^7^4\) Ibid 83.
\(^7^5\) Ibid xxv, 106.
Recommendation 9

That the Victorian Government introduce a mechanism for medical information from a donor to be provided to a donor-conceived person, where there is evidence of hereditary or genetic disease or risks to the health of the donor-conceived person.  

Issue: Nature of mechanism

The nature of the mechanism requires elaboration. Siblings who wanted to receive any such information, should it become available, could be permitted to register for the information. The Privacy Commissioner’s Public Interest Determinations 11,\textsuperscript{77} 11A\textsuperscript{78} and 11B\textsuperscript{79} allow genetic concerns to be relayed to the patient’s relatives without prior warning that contact with such information might occur. In the case of donor-conceived people, they might be unaware they have relatives or perhaps that they were donor-conceived.

Issue: Liability of donors/health care providers for genetic defects

The Committee’s recommendation that medical information be provided from a donor to a donor-conceived person might raise liability issues. Whether this recommendation raises a risk of liability for donors who donated sperm that might have caused congenital defect or heritable disease should be considered. Similarly, possible liability of health care providers that used donations that might have caused congenital defect or heritable disease should be considered. As with medical negligence, it may be that there is no liability if the service provider’s processes would have been considered reasonable by peers at the time of the service.

Any new law would need to address the question of liability for donors and health care providers with respect to donations that might have caused congenital defect or heritable disease.

Issue: Availability of medical information

The Committee recommends that this information should be passed on to the donor-conceived person, presumably where possible, independently of the donor. A practical impediment to this recommendation is that information regarding a donor’s health and genetic background might not always be available. Where genetic or health information is available, provision of the information to a donor-conceived person might breach the Health Records Act 2001 (Vic) unless it falls under an exception. An exception might apply where the “organisation reasonably believes that the use or disclosure is necessary to lessen or prevent... a serious and imminent threat to an individual's life, health, safety or welfare”\textsuperscript{80}.

Implementation of recommendation 9 would require any new law to provide for appropriate exemptions under the Health Records Act.

\textsuperscript{76} Ibid xxv, 107.
\textsuperscript{77} Privacy Act 1988 – Part VI – Public Interest Determination No. 11 – Collection and use of genetic relatives to enable use or disclosure of genetic information (in force under section 72 of the Privacy Act 1988).
\textsuperscript{78} Privacy Act 1988 – Part VI – Public Interest Determination No. 11A – Collection and use of contact details of genetic relatives to enable use or disclosure of genetic information (in force under s 72 Privacy Act 1988).
\textsuperscript{79} Privacy Act 1988 – Part VI – Public Interest Determination No. 11B – Collection and use of contact details of genetic relatives to enable use or disclosure of genetic information (in force under s 72 Privacy Act 1988).
\textsuperscript{80} Health Records Act 2001 (Vic) Schedule 1, 2.2(h)(i).
Recommendation 10

That the agency managing the donor registers be empowered to release to a donor-conceived person, upon request, non-identifying information about his or her donor-conceived siblings.81

**Issue: Consanguineous relationships**

The Committee notes that fear of entering a consanguineous relationship is pronounced for many donor-conceived people.82 As such, the Committee found that the release of non-identifying information about donor-conceived siblings might permit assurance against the risk. The Committee does not address the legal ramifications of consanguineous relationships.

Under the *Marriage Act 1961* (Cth) consanguineous marriages are invalid.83 Under the *Crimes Act 1958* (Vic) incest is a punishable offence.84 It should be noted, however, that it is not illegal for people who are genetically related to have sexual intercourse if they are not aware that they are genetically related.85

**Issue: Liability of managing agency**

The Committee does not address whether the recommendation that the managing agency be encouraged to release non-identifying information about donor-conceived siblings raises contractual or confidentiality issues. Any new law would need to provide appropriate protections for the managing agency.

Recommendation 11

That the agency managing the donor registers be empowered to release to the parents of a donor-conceived person, upon request, non-identifying information about that person’s donor-conceived siblings.86

See analysis under Recommendation 10 above.

Recommendation 13

That the Victorian Government introduce a mechanism for medical information from a donor-conceived person to be provided to that person’s donor-conceived siblings where there is evidence of hereditary or genetic disease or risks to the health of the donor-conceived person.87

See analysis under Recommendation 9 above.

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81 Law Reform Committee, above n 1, xxv, 113.
82 Ibid 111.
83 *Marriage Act 1961* (Cth) s 23(1)(b), (2)(a), (b).
84 *Crimes Act 1958* (Vic) s 44(2), (4).
85 Ibid s 44.
86 Law Reform Committee, above n 1, xxv, 114.
87 Ibid xxv, 117.
Recommendation 14

That the Victorian Government introduce legislation to empower one agency to provide all services relating to the provision of information, linking and counselling services related to donor-conception, including management of the donor registers, a letterbox service, education and public campaigns.\(^88\)

**Issue: Administration**

The Committee notes submissions suggested the management of donor-conception records, release of information and support services could be considerably improved.\(^89\)

The Report states:

[The] Committee heard from a number of people and organisations that the model of service delivery formerly practiced by the [Infertility Treatment Authority] was far superior to current arrangements. Consequently, the Committee believes that it is critical that donor-conception stakeholders are able to access all relevant information services through one agency. The same agency that manages the donor registers should provide all associated counselling and donor-linking services, in addition to providing education and running public campaigns about donor-conception. Having a single agency responsible for all of these services will allow donor-conception stakeholders to easily access the information and support that they need, it will remove any confusion as to which is the appropriate agency to approach, and will eliminate current problems associated with the limits on information-sharing between [Family Information Networks and Delivery] and [the Registry of Births, Death and Marriages].\(^90\)

The Committee recommends the Victorian Assisted Reproductive Treatment Authority (VARTA) as an appropriate management agency. This recommendation would result in a change of managing agency as the Registry of Births, Deaths and Marriages currently manages the registers under the ART Act.

In order to carry out the functions listed above, the managing agency would require appropriate resources and financing in order to operate successfully. The Report does not state whether the managing agency would be entitled to charge fees to finance operations and whether there would be an option for waiver of such fees in appropriate circumstances to ensure any fees charged do not prohibit access.

Recommendation 15

That the agency referred to in Recommendation 14 be granted access to the Victorian register of electors in order to conduct its functions.\(^91\)

See analysis under Recommendation 14 above.

\(^{88}\) Ibid xxvi, 148.

\(^{89}\) Ibid 148.

\(^{90}\) Id.

\(^{91}\) Ibid xxvi, 149.
Recommendation 16

That VARTA assume the responsibilities of the agency referred to in Recommendation 14.\(^\text{92}\)

See analysis under Recommendation 14 above.

Recommendation 17

That the Victorian Government introduce legislation to transfer ownership of, and responsibility for, the donor register databases currently held by the Victorian Registry of Births, Deaths and Marriages, to the agency referred to in Recommendation 14.\(^\text{93}\)

See analysis under Recommendation 14 above.

Recommendation 18

That the agency referred to in Recommendation 14 offer comprehensive and ongoing counselling and support services, in association with managing the donor registers, to all donor-conceived people, recipient parents and donors, and their relatives, and that counselling be compulsory for:

- a donor-conceived person who is seeking identifying information about his or her donor;
- a donor who is seeking identifying information about his or her donor-conceived offspring; and
- a donor or donor-conceived person who applies to lodge a contact veto.\(^\text{94}\)

See analysis under Recommendation 3 above.

Recommendation 19

That the Victorian Government introduce a mechanism by which identifying information about a donor can be released directly to a donor-conceived person, in appropriate circumstances.\(^\text{95}\)

**Issue: Appropriate circumstances**

Clarification as to what would constitute appropriate circumstances would need to be set out in any new law.

Recommendation 20

That the agency referred to in Recommendation 14 provide a letterbox service for donor-conception stakeholders, based on the service previously provided by the ITA.\(^\text{96}\)

See analysis under Recommendation 14 above.

\(^{92}\) Ibid xxvi, 151.
\(^{93}\) Id.
\(^{94}\) Ibid xxvi, 153.
\(^{95}\) Ibid xxvi, 153.
\(^{96}\) Ibid xxvii, 154.
**Recommendation 21**

That if the Committee’s recommendations are implemented, VARTA conduct a public information and awareness campaign advising the public of relevant changes in the provision of information to donor-conception stakeholders, particularly targeting pre-1998 donors.  

See analysis under Recommendation 6 above.

**Recommendation 23**

That the Victorian Government introduce legislation to provide that destruction of, falsifying or tampering with, any records that identify parties to donor-conception, is an offence.

**Issue: Offence**

Currently, destruction of information about donor-conception is regulated by the *Health Records Act 2011* (Vic) and the *Assisted Reproductive Treatment Act 2008* (Vic). Breach under the *Health Records Act* requires intent to evade or frustrate the operation of the Act. In contrast, the ART Act creates a strict liability offence. The ART Act refers to falsifying records, the *Health Records Act* does not. The seriousness of falsifying records warrants a strict liability approach.

The Report does not state whether the offence of destruction of, falsifying or tampering with records that identify parties to donor-conception would require intent or would be a strict liability offence. Any new law would need to stipulate the nature of any offences.

**Recommendation 24**

That the Victorian Government introduce legislation to require that persons or organisations that hold records containing information on pre-1988 donor-conception provide copies of the records to a central agency, and in the case of PROV, that pre-1988 donor-conception records be transferred to a central agency.

**Issue: Liability of record holders**

The Committee’s recommendation that records be transferred to a central agency raises concern as to whether organisations and/or individuals would be liable under the *Health Records Act*. If the transfer of records were prescribed by a new Act, s.7 of *Health Records Act* would probably apply to permit the release.

In its 2007 report, the Victorian Law Reform Commission noted that privacy law protects a donor’s details from being provided by a clinic to a third party without a

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97 Id.
98 Ibid xxvii, 167.
100 *Assisted Reproductive Treatment Act 2008* (Vic), s121.
102 Public Record Office Victoria.
103 Law Reform Committee, above n 1, xxv, 169.
104 In the case of inconsistency between the *Health Records Act* and another Act, the other Act prevails: *Health Records Act 2011* (Vic), s7.
donor’s consent. As such, provision of information about a donor would breach privacy law unless authorised by retrospective law. The implications of retrospective operation of law are discussed above.

Any new law would need to provide for appropriate exemption from the Health Records Act.

Recommendation 26

That the agency referred to in Recommendation 24 approach individual doctors who are known to have provided donor insemination services and obtain copies of records held by them, if any, containing information on parties to donor-conception.

See analysis under Recommendation 23 above.

Recommendation 27

That the Victorian Government introduce legislation to transfer responsibility for the central and voluntary registers from the Victorian Registry of Births, Deaths and Marriages to the agency described in Recommendation 14.

See analysis under Recommendation 14 above.

Recommendation 28

That the Victorian Government provide a facility within the voluntary register for DNA matching.

Issue: Request for DNA testing where records are available

This recommendation requires elaboration. Further, how the managing agency would respond to requests for DNA testing where records are available is not addressed by the Report. Any new law would need to consider the relevance of ‘parentage testing procedures’ under the Family Law Act 1975 (Cth).

Recommendation 29

That where records for donors or donor-conceived people are unavailable, incomplete, or ambiguous, the Victorian Government offer a concession for DNA testing if that person wishes to lodge DNA matching data on the voluntary register.

See analysis under Recommendation 28 above.

106 Id.
107 Ibid xxv, 171.
109 Family Law Act 1975 (Cth) ss 69V - 69ZD.
110 Law Reform Committee, above n 1, xxv, 175.
7. Submissions to the Inquiry and other views

7.1 Submissions in favour of retrospective access by donor-conceived people to information about donors without donor consent

Victorian Equal Opportunity and Human Rights Commission (VEOHRC)\(^\text{111}\)

VEOHRC is in favour of access by donor-conceived people to information about donors on human rights grounds (see section 7.5 for discussion of human rights perspective).

VEOHRC notes that “whilst Victoria is widely regarded as having a progressive model of assisted reproductive treatment (ART) regulation, the Act still contains provisions which are donor-centric, and limit the rights of donor-conceived people.”\(^\text{112}\) VEOHRC recommends two alternate options for law reform. Firstly, new legislation should “require the disclosure of reasonably available identifying information about a donor upon request from approved persons (such as donor-conceived people and donor recipients)” and that access to information for donor-conceived people should accrue at no later than 18 years.\(^\text{113}\)

VEOHRC’s second option for reform is that legislation should “require that… on request by approved persons … the responsible authority… must make all reasonable attempts to contact a donor and ask them to: provide identifying and non-identifying information, and consent to the release of the information to an approved person.”\(^\text{114}\) Where consent cannot be obtained the responsible authority should be permitted to release to an approved person: information that is readily available where disclosure is in the best interest of the donor-conceived person and counselling has been provided to the approved person.\(^\text{115}\)

7.2 Submissions in favour of facilitating access by donor-conceived people to information about donors by proactively seeking donor consent

Public Interest Law Clearing House (PILCH)\(^\text{116}\)

PILCH is in favour of access by donor-conceived people to information about donors on human rights grounds (see section 7.4 for discussion of human rights perspective).

PILCH notes in a submission to the Standing Committee on Legal and Constitutional Affairs (and provided to the Committee)\(^\text{117}\) that a balance must be struck between access to donor identifying information and the rights of donors to privacy and submits that “at present, the balance is struck too far in favour of the rights of donors.”\(^\text{118}\) PILCH submits that new legislation should place “greater importance on the rights of donor-conceived individuals”\(^\text{119}\) and obligate the Registrar of Births, Deaths and Marriages\(^\text{20}\) and empower the Medical

\(^{111}\) Victorian Human Rights and Equal Opportunity Commission, above n 29.

\(^{112}\) Ibid 2.

\(^{113}\) Ibid 3.

\(^{114}\) Id.

\(^{115}\) Id.

\(^{116}\) Public Interest Law Clearing House, Submission No 27 to Law Reform Committee, Parliament of Victoria, Inquiry into Access by Donor-Conceived People to Information about Donors, 6 August 2010 (’Submission No 27’); Public Interest Law Clearing House, Submission No 62 to Law Reform Committee, Parliament of Victoria, Inquiry into Access by Donor-Conceived People to Information about Donors, 12 August 2011 (’Submission No 62’); Public Interest Law Clearing House, Submission No 62A to Law Reform Committee, Parliament of Victoria, Inquiry into Access by Donor-Conceived People to Information about Donors, 14 September 2011 (’Submission No 62A’).

\(^{117}\) Public Interest Law Clearing House, Submission No 27, above n 116, 8.

\(^{118}\) Id.

\(^{119}\) Id.

\(^{120}\) Public Interest Law Clearing House, Submission No 62, above n 116, 1.
Practitioners “to facilitate requests by donor-conceived individuals to access [information identifying donors]”\textsuperscript{121} including “by acting as intermediaries and communicating such requests by contacting donors directly.”\textsuperscript{122}

**Victorian Assisted Reproductive Treatment Authority (VARTA)\textsuperscript{123}**

VARTA (formerly the Infertility Treatment Authority) is responsible for administering aspects of the *Assisted Reproductive Treatment Act 2008 (Vic)* and noted in its submission that it “has a wealth of knowledge and experience in the area of donor-conception and donor-linking practice.”\textsuperscript{124}

VARTA is in favour of giving all donor-conceived people an opportunity to request identifying and non-identifying information about their donors. VARTA submits that in order to protect the human rights of donor-conceived people and donors, consent should be obtained from donors upon request for information by a donor-conceived person prior to the release of information.\textsuperscript{125}

**Victorian Privacy Commissioner (VPC)\textsuperscript{126}**

The VPC is not in favour of access by donor-conceived people to information about donors without donor consent on the grounds of a privacy law perspective.

The VPC acknowledges the importance of donor-conceived individuals being able to obtain information about their donors and states that “obtaining one’s own personal information is in fact a privacy right in itself.”\textsuperscript{127} The VPC also acknowledges the right to privacy that donors were “legally assured of”\textsuperscript{128} when they donated. The VPC notes that pre-1988 donors generally “entered into donation arrangements with the medical provider directly and were assured of confidentiality, and similarly agreed not to seek the identity of children conceived.”\textsuperscript{129} The VPC further notes these “donors were commonly young, receiving inadequate counselling and unaware of the magnitude of their donation, and often compensated with medical treatment, STD testing, money or course credits.”\textsuperscript{130}

The VPC does not support legislation that would enable donor-conceived people to obtain donor-identifying information upon request. It submits that such an option for reform “would basically abrogate the right to privacy that donors were legally assured of.”\textsuperscript{131}

The VPC supports the VLRC Final Report (2007) position (see 7.3) that “donors (are) to be contacted and asked to consent to the release of information only upon request for information by a donor-conceived person.”\textsuperscript{132}

\textsuperscript{121} Public Interest Law Clearing House, Submission No 27, above n 116, 1-2.
\textsuperscript{122} Public Interest Law Clearing House, Submission No 62, above n 116, 1.
\textsuperscript{123} Victorian Assisted Reproductive Treatment Authority, Submission No 76 to Law Reform Committee, Inquiry into Access by Donor-Conceived People to Information About Donors, 12 August 2011, 10 (‘Submission No 76’).
\textsuperscript{124} Ibid 2. It should be noted that VARTA does not currently manage the registers and has not managed them since January 2010. Upon introduction of the ART Act, control of the registers was transferred to BDM. This was a legislative amendment that reflected a recommendation of the VLRC report of 2007, which formed the basis of the reforms in the ART Act.
\textsuperscript{125} Victorian Assisted Reproductive Treatment Authority, Submission No 19, above n 10, 7.
\textsuperscript{126} Office of the Privacy Commissioner, Submission No 58 to Law Reform Committee, Inquiry into Access by Donor-Conceived People to Information About Donors, 12 August 2011.
\textsuperscript{127} Ibid 2; Information Privacy Act 2000 (Vic) Schedule 1, Information Privacy Principle (IPP 6).
\textsuperscript{128} Office of the Privacy Commissioner, above n 126, 3.
\textsuperscript{129} Ibid 2.
\textsuperscript{130} Id.
\textsuperscript{131} Ibid 3.
\textsuperscript{132} Office of the Privacy Commissioner, above n 129, 3.
The VPC submits that “any proposed contact itself would be a form of privacy imposition”\textsuperscript{133} and as such when contact is made with a donor “contact details need to be carefully verified and contact made in a confidential, appropriate fashion.” The VPC further submits that “truly voluntary and informed consent”\textsuperscript{134} must be obtained before a donor’s information is disclosed.

7.3 Submissions opposing retrospective access by donor-conceived people to information about donors without donor consent

Australian Medical Association Victoria (AMA)\textsuperscript{135}

The AMA “does not support allowing access to information that would identify a donor without the express consent of that donor.”\textsuperscript{136} The AMA notes that donors who donated prior to 1988 “were given explicit and implicit assurances that their donations were entirely anonymous and that no contact would be made in the future.”\textsuperscript{137} The AMA submits that “[t]hese assurances should be respected and pre-1988 donors should not be approached by individual clinics nor by a central registry” to provide information to donor-conceived people. The AMA submits that donors should “be invited to place their details on a voluntary register.”\textsuperscript{138}

The AMA’s stance is based primarily on ‘legally binding’ contractual assurances that were given to donors prior to 1 July 1988 that their identities would not be revealed to donor recipients or to donor-conceived people and that they would be able to remain anonymous.

In addition, the AMA’s position draws on medical and ethical guidelines. Guideline 6.13 of the ‘National Health and Medical Research Council’s Ethical Guidelines on the use of Assisted Reproductive Technology in Clinical Practice and Research’ states; “Respect the privacy of all persons involved in ART procedures. People have a right to privacy. Clinics must not release identifying information to another person without the consent of the person.”\textsuperscript{139}

The AMA states that retrospective application of the law would “negatively impact upon public and donor confidence in the ART scheme in Victoria.”\textsuperscript{140} The AMA submits that a current shortage of donors and ongoing difficulties experienced by ART clinics to attract new donors “could be exacerbated if donors felt that their rights and obligations could be altered in the future without their consent.”\textsuperscript{141}

7.4 Victorian Law Reform Commission’s 2007 Final Report

Prior to the enactment of Victoria's ART Act, the Victorian Law Reform Commission (VLRC) ‘Assisted Reproductive Technology and Adoption Final Report’ suggested that regulation of ART in Victoria is in need of reform and made a number of recommendations “designed to meet the needs of all children born through ART and to provide a robust framework capable

\textsuperscript{133} Ibid 4.
\textsuperscript{134} Id.
\textsuperscript{135} Australian Medical Association, Submission No 71 to the Law Reform Committee, \textit{Inquiry into Access to Information by Donor-Conceived People about Donors}, 18 August 2011.
\textsuperscript{136} Ibid 1.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} National Health and Medical Research Council, \textit{Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research} (June 2007).
\textsuperscript{140} Australian Medical Association, above n 138, 3.
\textsuperscript{141} Id.
of accommodating future social and technological change.”

The VLRC’s recommendations are formulated from a position in which the best interests of children born through ART are the paramount consideration.\(^\text{143}\)

Note that the VLRC report was tabled in parliament in June 2007 and the government responded by implementing a majority of the recommendations in the ART Act 2008. The VLRC report was written under the previous regulatory environment (i.e., when the 1995 Act was in effect.)

The VLRC did not support retrospective operation of any legislation providing access to donor information. The preferred option of the VLRC was the following model:

Where a person who was donor-conceived prior to 1 January 1998 wishes to obtain identifying information about the donor and there is no donor registration on the voluntary register:

- the donor-conceived person should contact the managing agency to request that it facilitate contact with the donor
- the managing agency should contact the clinic at which ART took place and request they forward a letter to the donor
- the letter should explain the donor’s options regarding provision of information and state that counselling is available.\(^\text{144}\)

7.5 Human rights perspectives in submissions

A number of organisations discuss access by donor-conceived people to information about donors from a human rights perspective.

VEOHRC states its position supporting retrospective application of the law by referencing sections of the Charter of Human Rights including:

- need to respect the best interests of the child (s.17)
- respect for identity, family and private life (s.13)
- access to information (s.15), and
- protection from discrimination (s.8)

VEOHRC also demonstrates the significance of the rights of the child by highlighting the best interests of the child in the United Nations Convention on the Rights of the Child stating “all actions concerning the child should take full account of his or her best interests”\(^\text{145}\) and that “in assessment of a child’s best interests, the views of children must be given due weight according to their age and level of maturity”.\(^\text{146}\)

VARTA acknowledges possible implications under the Charter of Human Rights with respect to the rights of the donor, the right to privacy and reputation as outlined in section 13 which highlights the importance of ensuring informed consent is obtained from donors before releasing information to a donor-conceived person.

VARTA also acknowledges the National Health and Medical Research Council’s (NHMRC) ethical guidelines and the connection with the ART Act, which states in s 5(a) that “the welfare and interests of persons born or to be born as a result of treatment procedures are paramount”. The NHMRC ethical guidelines state that “people conceived using donated gametes are entitled to know their genetic parents”.

\(^\text{142}\) Victorian Law Reform Commission, above n 48, 6.
\(^\text{143}\) Id.
\(^\text{144}\) Ibid 14 (Recommendation 97).
\(^\text{146}\) Ibid, art 12.
PILCH states that the interest of donor-conceived people in knowing their genetic origins is consistent with various human rights recognised in the *Charter of Human Rights and Responsibilities Act 2006* including:

- section 8 - the right to equality before the law
- section 17 – rights for protection of families and children
- section 19 – cultural rights
Appendix 1 – Committee Recommendations

In its Final Report, the Victorian Parliament Law Reform Committee made the following recommendations to the Victorian Government:

**Recommendation 1:**
That the Victorian Government introduce legislation to allow all donor-conceived people to obtain identifying information about their donors.

**Recommendation 2:**
That, in implementing Recommendation 1, the Victorian Government require that a child applying for identifying information about his or her donor only be provided with that information if:

1) the child’s parents have consented to the application; or
2) a counsellor has provided counselling to the child and has confirmed in writing that the person is sufficiently mature to understand the consequences of the disclosure.

**Recommendation 3:**
That, with the introduction of the legislation described in Recommendation 1, the Victorian Government require donor-conceived people to attend counselling prior to obtaining identifying information about donors.

**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.

**Recommendation 5:**
That, with the introduction of the legislation described in Recommendation 1, the Victorian Government introduce provisions for donors to lodge a contact preference form for presentation to a donor-conceived person.

**Recommendation 6:**
That the Victorian Government introduce the measures proposed in Recommendation 1 through Recommendation 5 following a period of time sufficient to publicise and inform the Victorian community of retrospective changes to donor-conception arrangements.

**Recommendation 7:**
That the Victorian Government encourage organisations, agencies and persons holding information on donor-conception to release, upon request, non-identifying information about a donor to a donor-conceived person, his or her parents, and his or her descendants.
Recommendation 8:
That the Victorian Government encourage organisations, agencies and persons holding information on donor-conception to release to a donor, upon request, non-identifying information about his or her donor-conceived offspring

Recommendation 9:
That the Victorian Government introduce a mechanism for medical information from a donor to be provided to a donor-conceived person, where there is evidence of hereditary or genetic disease or risks to the health of the donor-conceived person

Recommendation 10:
That the agency managing the donor registers be empowered to release to a donor-conceived person, upon request, non-identifying information about his or her donor-conceived siblings

Recommendation 11:
That the agency managing the donor registers be empowered to release to the parents of a donor-conceived person, upon request, non-identifying information about that person’s donor-conceived siblings

Recommendation 12:
That the voluntary register remain the only means for donor-conceived people to seek identifying information about their donor-conceived siblings

Recommendation 13:
That the Victorian Government introduce a mechanism for medical information from a donor-conceived person to be provided to that person’s donor-conceived siblings where there is evidence of hereditary or genetic disease or risks to the health of the donor-conceived person

Recommendation 14:
That the Victorian Government introduce legislation to empower one agency to provide all services relating to the provision of information, linking and counselling services related to donor-conception, including management of the donor registers, a letterbox service, education and public campaigns

Recommendation 15:
That the agency referred to in Recommendation 14 be granted access to the Victorian register of electors in order to conduct its functions

Recommendation 16:
That VARTA assume the responsibilities of the agency referred to in Recommendation 14

Recommendation 17:
That the Victorian Government introduce legislation to transfer ownership of, and responsibility for, the donor register databases currently held by the Victorian Registry of Births, Deaths and Marriages, to the agency referred to in Recommendation 14

Recommendation 18:
That the agency referred to in Recommendation 14 offer comprehensive and ongoing counselling and support services, in association with managing the donor registers, to all donor-conceived people, recipient parents and donors, and their relatives, and that counselling be compulsory for:
• a donor-conceived person who is seeking identifying information about his or her donor;
• a donor who is seeking identifying information about his or her donor-conceived offspring; and
• a donor or donor-conceived person who applies to lodge a contact veto

Recommendation 19:
That the Victorian Government introduce a mechanism by which identifying information about a donor can be released directly to a donor-conceived person, in appropriate circumstances

Recommendation 20:
That the agency referred to in Recommendation 14 provide a letterbox service for donor-conception stakeholders, based on the service previously provided by the ITA

Recommendation 21:
That if the Committee’s recommendations are implemented, VARTA conduct a public information and awareness campaign advising the public of relevant changes in the provision of information to donor-conception stakeholders, particularly targeting pre-1998 donors

Recommendation 22:
That VARTA continue its education and public campaigns role, with a particular focus on encouraging and supporting the parents of older donor-conceived children to tell their children about the circumstances of their conception

Recommendation 23:
That the Victorian Government introduce legislation to provide that destruction of, falsifying or tampering with, any records that identify parties to donor-conception, is an offence

Recommendation 24:
That the Victorian Government introduce legislation to require that persons or organisations that hold records containing information on pre-1988 donor-conception provide copies of the records to a central agency, and in the case of PROV, that pre-1988 donor-conception records be transferred to a central agency

Recommendation 25:
That the legislative changes proposed in Recommendation 24 be advertised in a public campaign targeting the medical profession

Recommendation 26:
That the agency referred to in Recommendation 24 approach individual doctors who are known to have provided donor insemination services and obtain copies of records held by them, if any, containing information on parties to donor-conception

Recommendation 27:
That the Victorian Government introduce legislation to transfer responsibility for the central and voluntary registers from the Victorian Registry of Births, Deaths and Marriages to the agency described in Recommendation 14

Recommendation 28:
That the Victorian Government provide a facility within the voluntary register for DNA matching
Recommendation 29:
That where records for donors or donor-conceived people are unavailable, incomplete, or ambiguous, the Victorian Government offer a concession for DNA testing if that person wishes to lodge DNA matching data on the voluntary register

Recommendation 30:
That the Victorian Government provide regular reports to an appropriate inter-jurisdictional body, such as the Standing Committee of Attorneys-General or the Council of Australian Governments, on progress with the development and implementation of reforms to donor-conception legislation
Within Australia there are a number of jurisdictions which provide for the release of donor information.

**Western Australia**

In Western Australia, donor-conceived people born after 2004 are able to access identifying and non-identifying information about donors. People born prior to 2004 are able to access non-identifying information however in practice this access is limited as the central register has contained such information only since 1993. In addition, a voluntary register exists in Western Australia.

**New South Wales**

In New South Wales, donor-conceived people born after 1 January 2010 are able to access identifying and non-identifying information about donors. A voluntary register exists in New South Wales.

**South Australia**

In South Australia, donor-conceived people born after 2010 are able to access identifying and non-identifying information about donors, and people born after 1988 can access information with a donor’s consent. The age upon which the right to access non-identifying information accrues is sixteen years old.

However, access to information in practice is made difficult by the non-existence of a central registry.

**Other States and Territories**

In Tasmania, Queensland, the Australian Capital Territory and the Northern Territory, access to information is determined by reference to the National Health and Medical Research Council’s (NHMRC) ‘Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research’. NHMRC guidelines provide that where legislation does not regulate a request to access donor information, organisations should examine and respond to donor consent forms to determine whether to permit access.

**International laws**

Austria, Finland, The Netherlands, New Zealand, Norway, Sweden and the United Kingdom recognise and provide for access to information regarding donor-

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147 Sonia Allan, ‘Psycho-social, ethical and legal arguments for and against the retrospective release of information about donors to donor-conceived individuals in Australia’ (2011) 19(2) Journal of Law and Medicine, 354, 360-361 (‘Release of donor information article’).
148 Human Reproductive Technology Act 1991 (WA) s 49.
149 Human Reproductive Technology Act 1991 (WA).
150 Assisted Reproductive Technology Act 2007 (NSW) s 37.
151 Assisted Reproductive Treatment Act 1998 (SA) s 16; Assisted Reproductive Treatment Regulations 2010 (SA) reg 4(c); Reproductive Technologies (Clinical Practices) Act 1988 (SA).
153 Sonia Allan, Release of donor information article, above n 150, 361.
154 National Health and Medical Research Council, above n 142.
155 Sonia Allan, Release of donor information article, above n 150, 361.
In all jurisdictions, advance donor consent to release of information is required and donor-conceived individuals seek donor information from a registry in which information is held once consent is provided.\textsuperscript{164}

Generally, the age upon which the right to access information accrues is eighteen years old.\textsuperscript{165} In the Netherlands, the right to access accrues at sixteen years old.\textsuperscript{166} In Sweden there is no age requirement, rather the person seeking information must have “achieved sufficient maturity” for the right to accrue.\textsuperscript{167}

\textsuperscript{161} Lag om insemination (Law on Insemination) (Sweden) 1984, replaced by Genetic Integrity Act (Sweden) 2006. Effective from 18 March 1985.

\textsuperscript{162} Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (UK); Human Fertilisation and Embryology Act 2008 (UK). Effective from 1 April 2005.

\textsuperscript{163} Sonia Allan, Submission No 5, above n 8, 13.

\textsuperscript{164} Ibid 17.

\textsuperscript{165} Ibid 21.

\textsuperscript{166} Ibid 22.

\textsuperscript{167} Id.
Appendix 3 – Committee Findings

Finding 1:
Some donor-conceived people suffer substantial distress when they are unable to obtain information about their donor, and/or if told of their donor-conceived status later in life.

Finding 2:
Current arrangements for access to information by people conceived from gametes donated prior to 1988 are confusing, inconsistent, and applied in a haphazard manner. Outcomes differ depending on the treating clinic, and/or the treating physician, from which a person's parents received treatment.

Finding 3:
Current legislative arrangements pertaining to rights of access to information by people conceived from gametes donated after 1998 are satisfactory.

Finding 4:
The introduction of measures to provide all donor-conceived people with access to identifying information will require legislative change.

Finding 5:
The circumstances of donor-conception and adoption with regard to a person's right to identifying information are largely comparable.

Finding 6:
All donor-conceived people should be aware of the manner of their conception. A person's parents should be principally responsible for informing that person of his or her donor-conceived status.

Finding 7:
Donors have a wide range of views on the desirability of allowing the release of identifying information about them to their donor-offspring. Most donors empathise with the needs of donor-conceived people, but some express concern about the potential for their family life to be affected should identifying information about them be released.

Finding 8:
If current arrangements permitting donor anonymity are changed to allow the release of identifying information, measures to protect donors and donor-conceived people from unreasonable interference in their private lives should be considered.

Finding 9:
All donor-conceived people should have access to identifying information about their donors.

Finding 10:
Current provisions of the Assisted Reproductive Treatment Act 2008 allowing donors to seek identifying information about children conceived from gametes donated after 1988 should not be extended retrospectively to allow donors to seek identifying information about children conceived from gametes donated prior to 1988.
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