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Law

Castan Centre for Human Rights Law

**Submission to the Department of Health and Human Services,
Victoria**

Review of the Assisted Reproductive Treatment Act 2008

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1. Introduction

The Castan Centre for Human Rights Law welcomes the Victorian Government's commitment to legislating to give all donor-conceived people the right to access identifying information about their donors, irrespective of when the person was born.¹

Granting access to information about parents to individuals conceived through assisted reproduction techniques, specifically donation insemination, aligns with international human rights law promoting the rights of the child, including the right to know one's parents. It is also consistent with international research showing that understanding one's parentage – biological and social – is a critical element of a person's healthy development, identity and well-being.²

The Castan Centre endorses the proposed method of regulating contact, but recommends against the imposition of any criminal penalty for a breach of the proposed contact preference regime. The imposition of a significant fine is not an appropriate measure to ensure compliance with the proposed contact management regime; has a number of unintended consequences; and is not analogous with other parent/child contact laws currently operating in Victoria.

2. International Law and the Rights of Donor-born Children

2.1 *The Best Interests of the Child*

Article 3 of the Convention on the Rights of the Child (CRC) states that, 'in all actions concerning children ... the best interests of the child shall be a primary consideration.' If there is a conflict between the rights of a child to know his or her biological parents, and the rights of a donor to anonymity or privacy, the rights of the child should be the primary consideration.

Victoria's *Assisted Reproductive Treatment Act 2008* (the Act) incorporates a similar best interests standard by providing that 'the welfare and interests of persons born or to be born as a result of treatment procedures are paramount.'³ The Act actually goes further than the CRC, as best interests are a paramount, rather than primary, consideration. The Act also applies the best interests standard to all donor-conceived persons, not only children, which is consistent with the approach of the CRC. This means that in weighing up the rights of a person to know his or her parentage, against the rights of a donor to remain anonymous, the rights of the donor-

¹ Department of Health and Human Services, *A right to know your identity: Giving donor-conceived people the right to access information identifying their donor* (June 2015), p. 5.

² Sarah Wise and Gabor Kovacs, 'Secrecy, family relationships and the welfare of children born with the assistance of donor sperm: Developments in research, law and practice' in Alan Hayes and Daryl Higgins (eds), *Families, policy and the law: Selected essays on contemporary issues for Australia*, (Australian Institute of Family Studies, 2014); and Law Reform Committee, Parliament of Victoria, *Inquiry into Access by Donor-Conceived People to Information about Donors* (2012).

³ s 5(a).

conceived person should be the paramount consideration. The Act confirms as one of its guiding principles that ‘children born as the result of the use of donated gametes have a right to information about their genetic parents.’⁴

Not all donor-conceived persons will want to access any or identifying information about the donor. However, for those persons who do, the inability to access such information can be distressing, frustrating, and traumatising.⁵

2.2 Right to know one’s parents

Article 7 of the CRC protects a child’s right to know his or her parents:

*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*⁶

The Committee on the Rights of the Child has interpreted this Article as requiring States Parties to ensure that adopted and donor-conceived children can discover the identity of their biological parent(s). This is evidenced in the following comments made by the Committee:⁷

- The Committee has expressed concern at the practice of keeping the identity of biological parents of an adopted child secret, or limiting access to such information for adopted children or children born as a result of medically assisted procreation, and has recommended that the child should have access to information about his or her parents.⁸
- The Committee has expressed concern about ‘anonymous births’ or facilities for anonymous abandonment of children and has recommended that States Parties take

⁴ s 5(c).

⁵ See Wise and Kovacs, above n 2; Law Reform Committee, above n 2; Victorian Assisted Reproductive Treatment Authority *Consultation with donors who donated gametes in Victoria, Australia before 1998: Access by donor-conceived people to information about donors* (2013), 8.

⁶ Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁷ See further Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, (UNICEF, 2007, 3rd ed); Ineta Ziemele, ‘Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents’, in A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (Eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, 2007).

⁸ Concluding observations of the Committee on the Rights of the Child regarding Switzerland, 25 February 2015, CRC/C/CHE/CO/2-4; Concluding observations of the Committee on the Rights of the Child regarding Turkmenistan, 10 March 2015, CRC/C/TKM/CO/2-4; Concluding observations of the Committee on the Rights of the Child regarding Armenia, 26 February 2004, CRC/C/15/Add.225, at [38]; Concluding observations of the Committee on the Rights of the Child regarding Russian Federation, 23 November 2005, CRC/C/RUS/CO/3, at [40], [41]; Concluding observations of the Committee on the Rights of the Child regarding Uzbekistan, 2 June 2006, CRC/C/UZB/CO/2, at [40], [41]; Concluding Observations of the Committee on the Rights of the Child regarding United Kingdom of Great Britain and Northern Ireland, 9 October 2002, CRC/C/15/Add.188, at [31], [32].

measures to obtain information so that such children can discover the identity of their parents.⁹

- The Committee has expressed concern about a practice of children who are fathered by Catholic priests not being aware of the identity of their fathers; and their mothers being required not to disclose information about the child's paternity in return for a regular payment from the Church.¹⁰
- The Committee has expressed concern that children born through surrogate mothers or to single mothers are not given information about their origins.¹¹

If a child's right to know his or her parents has been violated, the obligation to repair the breach by providing this information to the child remains throughout his or her life. That is, a person does not lose the right to know his or parents upon the attainment of majority. Indeed, as John Eekelaar observed,

It would be a grievous mistake to see the Convention as applying to childhood alone. Childhood is not an end in itself, but part of the process of forming the adults of the next generation. The Convention is for all people. It could influence their entire lives. If its aims can be realised, the Convention can truly be said to be laying the foundations for a better world.¹²

3. Criminalising contact with donors

The 2012 *Inquiry into Access by Donor-Conceived People to Information about Donors*, recommended that establishing a contact veto scheme was appropriate, despite it limiting the rights of donors. It stated that:

[I]t is appropriate that donors, and donor-conceived people, should have the option of lodging a contact veto. This would not prevent a donor's offspring from accessing identifying information about them, but would prohibit donor-offspring from attempting to make contact with the donor. A contact veto could be

⁹ Concluding observations of the Committee on the Rights of the Child regarding Switzerland, 25 February 2015, CRC/C/CHE/CO/2-4; Concluding observations of the Committee on the Rights of the Child regarding India, 7 July 2014, CRC/C/IND/CO/3-4 at [41]; Concluding observations of the Committee on the Rights of the Child regarding Luxembourg, 31 March 2005, CRC/C/15/Add.250 at [29]; Concluding observations of the Committee on the Rights of the Child regarding the Holy See, 25 February 2014, CRC/C/V A T/CO/2, at [35],[36]; Concluding Observations of the Committee on the Rights of the Child regarding Denmark, 15 February 1995, CRC/C/15/Add.33 at [11]; Concluding Observations of the Committee on the Rights of the Child regarding Norway, 25 April, 1994, CRC/C/15/Add.23 at [10].

¹⁰ Concluding observations of the Committee on the Rights of the Child regarding The Holy See, 25 February 2014, CRC/C/V A T/CO/2, at [33], [34].

¹¹ Concluding observations of the Committee on the Rights of the Child regarding Morocco, 14 October 2014, CRC/C/MAR/CO/3-4; Concluding observations of the Committee on the Rights of the Child regarding Israel, CRC/C/ISR/CO/2-4, paras 33 and 34.

¹² John Eekelaar 'The Importance of Thinking that Children have Rights' in Philip Alston, Stephen Parker & John Semour (eds), *Children, Rights, and the Law* (Oxford University Press, 1992), p 234. Cited in Michelle Giroux and Mariana De Lorenzi 'Putting the Child First: A Necessary Step in the Recognition of the Right to Identity' (2011) 27(1) *Can J Fam* 53, 61. Grioux and De Lorenzi assert that the right to know one's identity should not be limited to children alone, and ought to apply to every individual 'whatever his or her age'.

enforced through legislated penalties which would apply if the veto was breached. The Committee is aware that the introduction of contact vetoes will have the effect of constraining people's ability to freely associate with certain other people. The Committee believes, however, that this constraint is an appropriate measure to complement removing the right of donors to prevent their identity from being revealed to their donor-offspring.¹³

The Discussion Paper proposes regulating the release and use of identifying information via a contact preference process to be managed by the Victorian Assisted Reproductive Treatment Authority (VARTA). Both the donor and the donor-conceived person may lodge a contact preference with VARTA, for example, that contact be by email or phone, or that there be 'No contact'. Donors will have two months after being notified that an applicant has sought their identifying information to elect whether or not to specify a contact method. If a contact preference is lodged, then prior to information being released to a donor-conceived offspring, that person must enter into an undertaking with the Secretary to the Department of Health and Human Services that they will comply with the contact preference. Breaches of this undertaking can attract a fine of up to 60 penalty units, which currently equates to \$9,100.¹⁴

If the applicant becomes aware of the location of the donor they must not act on that information or initiate contact with the donor. Rather, they must surrender this information to VARTA, who will then contact the donor, advise them that their identifying information has been released, and offer counselling and the option to lodge a contact preference. Again, if the donor-conceived offspring goes outside the regulatory regime and initiates contact, they can be fined up to 60 penalty units.

The overarching policy aim is to accord respect and dignity to all participants as far as possible by centralising, controlling and facilitating the linking up of pre-1998 donor-conceived offspring and their donors.

3.1 Recommendations of the Castan Centre

While the Castan Centre endorses the proposed method of regulating contact, it **recommends against imposing a criminal penalty for a breach of the proposed contact preference regime**. Imposing a criminal penalty diminishes the utility of the proposed scheme and runs contrary to not only the tenor of the amendment, redressing an imbalance in the law and achieving substantive equality.

¹³ Parliamentary Law Reform Committee, Victoria, *Inquiry into Access by Donor-Conceived People to Information about Donors* (March 2012), pp. 79-80.

¹⁴ See *Penalty Interest Rate Act 1983* (Vic) s 2, and Victorian Government Gazette Number G18 dated 7 May 2015.

Creating a system for regulating information and access that is enforced through the threat of fines is not a tailored and effective measure to manage a highly sensitive issue for the donor-conceived offspring, and in its current form, is inconsistent with other Victorian laws concerning access to health and medical information, and contact regimes for adopted children.

3.2 The importance of a tailored regulatory approach to enforcement

A donor-conceived person wanting to access information about where they come from is a sensitive matter that requires a careful appraisal of the most appropriate way of achieving the policy objectives. The threat of prosecution and imposition of a significant fine is inconsistent with the overarching objectives of the proposed amendments. This is because it penalises people for wanting to find out the pieces of the jigsaw puzzle that can help them to construct their identity. The unique nature of the problem the amendments seek to address, requires a more nuanced and sensitive approach to enforcement.

3.2.1 Unintended consequences and multiplied harm

It is not difficult to envisage a variety of circumstances where, along their journey to identify their donor, an individual could be provided with the means of contacting and meeting their donor that breaches their undertaking, but was entirely consensual by all parties. It would be naïve to think that VARTA alone can entirely control each and every aspect of the contact management process. Volunteers, sympathetic not-for-profit organisations, community support groups and family members on both sides may be unaware of the significant penalties they could expose a donor-conceived child to, if they act in good faith in bringing together a donor and donor-conceived individual by imparting information that the individual might act upon instantaneously, without thinking about first notifying VARTA.

Furthermore, the proposed use of enforceable undertakings carries with it insensitive and disempowering connotations of similar conditional contact management regimes for persons engaged with the justice system, such as family violence¹⁵ and child protection.¹⁶ This is likely to place further mental burden on donor-conceived individuals going through the contact initiation process.

The proposed fine will not be an infringement penalty or ‘on-the-spot’ fine under the *Infringements Act 2006* (Vic), but rather one that requires VARTA or the Department of Health and Human Services to prosecute the donor-conceived individual through the courts. Such measures could well cause psychological harm and trauma to both the donor-conceived individual and the donor. Furthermore, the recording of a conviction against donor-conceived

¹⁵ For example, *Family Violence Protection Act 2008* (Vic), Pt 4, Div 5.

¹⁶ For example, the *Children, Youth and Families Act 2005* (Vic). See sections 272-273.

individuals will carry untold prejudicial and discriminatory affects, including, for example, limiting their future employment prospects.¹⁷ The Castan Centre recommends that the possibility of exposing donor-conceived individuals to the criminal justice system should be removed from the proposed reforms.

3.2.2 The need for a diverse range of enforcement options for VARTA

The prospective harm that the penalty seeks to ameliorate is undue interference or contact by donor-conceived individuals with their donors. As noted above, the threat of a fine is inappropriate in the circumstances. Even if it is to be retained as a potential penalty, it should be the last option rather than the only option. A more nuanced approach to enforcing the regulation of contact is required.

One option is to utilise the measures contained in existing contact and relationship management laws, such as the *Personal Safety Intervention Orders Act 2010* (Vic). VARTA could retain a statutory discretion to take regulatory action to prevent contact through obtaining a specific court order tailored to the needs of donor related contact when it reasonably suspects that a donor-conceived individual may go outside the contact preference regime. This proposed framework has the benefit of utilising the decision-making expertise of the courts, as well as providing an enforceable safeguard against further breaches by the applicant.

3.3 Relationship with other Victorian laws

The legitimacy of the proposed contact preference method requires that any changes to the *Assisted Reproductive Treatment Act 2008* (Vic) must be analogous with parent/child contact laws currently operating in Victoria.

The *Adoption Act 1984* (Vic) prohibits a parent intentionally contacting an adopted child against their wishes expressed in a current contact statement.¹⁸ However, it also explicitly states that no offence is committed if it is the adopted person who initiated contact with their biological parent.¹⁹ Thus the *Adoption Act 1984* (Vic) respects the wishes of persons who expressed a desire for no contact or only certain type of contact, but does recognise that where the breach is by a person struggling to make sense of their origins and identity, the imposition of criminal penalties is not appropriate. For the sake of consistency, and because it is an appropriate model, the *Assisted Reproductive Treatment Act 2008* (Vic) should replicate the approach in the *Adoption Act 1984* (Vic).

¹⁷ An 'irrelevant criminal record' is not a protected attribute under the *Equal Opportunity Act 2010* (Vic) meaning that current and future employers are free to engage in discrimination on this basis.

¹⁸ See *Adoption Act 1984* (Vic) s 127A.

¹⁹ *Ibid*, s 127A(3).

The imposition of a penalty, as proposed in the Discussion Paper, not only contradicts the approach in the *Adoption Act 1984* (Vic) – a parallel legislative regime – but also subverts the stated guiding principle that that ‘*welfare and interests of persons born or to be born as a result of treatment procedures are paramount*’, and undercuts the core guiding principle behind this reform that ‘*children born as a result of the use of donated gametes have a right to information about their genetic parents.*’²⁰ It is thus, at odds with the legislative intent, to grant a right, but simultaneously impose criminal sanctions upon a person for wanting to pursue that right.

4. Conclusion

The Castan Centre commends the Victorian Government for its commitment to facilitating access to donors by donor-conceived individuals, and finds the proposed approach is largely consistent with international human rights norms. However, the Castan Centre recommends that the Government not proceed with the proposed penalty provisions as they are incompatible with the human rights framework underpinning this regime, and inconsistent with the legislative approach used to address similar concerns in relation to adopted children seeking contact their biological parent.

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²⁰ *Assisted Reproductive Treatment Act 2008* (Vic) ss 5(a) & (c).