

REMOVING DONOR ANONYMITY: WHAT DOES IT ACHIEVE? REVISITING THE WELFARE OF DONOR-CONCEIVED INDIVIDUALS

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On 1 March 2017, all donor-conceived individuals ('DCIs') in Victoria were given an unfettered legal right to access identifying information about their donors despite previous assurances of donor anonymity at the time of donation. At the heart of the debate over release of donor information is the welfare of DCIs. In this article, I argue retrospective removal of donor anonymity is neither necessary nor appropriate and may create more problems than it solves. The debate over release of donor information has been dominated by harm-based and human rights approaches to the welfare of DCIs, neither of which justifies retrospectively removing donor anonymity. I offer an alternative relational approach for evaluating the welfare of DCIs alongside the interests of other relevant parties and conclude the previous consent model in Victoria for disclosing identifying donor information provides a more effective way of accommodating the various interests at stake than the new model.

I INTRODUCTION

On 1 March 2017, new legislation in Victoria gave all donor-conceived individuals ('DCIs') an unfettered right to access identifying information about their donors irrespective of whether those donors were promised anonymity at the time of donation.¹ This disclosure model (the 'new model') goes a significant step further than previous amendments to donor conception legislation, which came into force in 2015.² The 2015 amendments allowed all DCIs access to identifying donor information *subject to donor consent for donations made before 1998* when anonymity was the norm (the 'consent model'). In her second reading speech, the Victorian Minister for Health declared that the

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1 *Assisted Reproductive Treatment Amendment Act 2016* (Vic) ('ART Amendment Act 2016'), amending *Assisted Reproductive Treatment Act 2008* (Vic) ('ART Act').

2 *Assisted Reproductive Treatment Further Amendment Act 2014* (Vic) ('ART Further Amendment Act 2014').

2017 legislative amendments would ‘remedy a fundamental inequity of access to information’.³ Some commentators have praised the Victorian government for showing ‘moral leadership’ and ‘bravery in leading the way’ in donor conception laws,⁴ whereas others have criticised the new law as ‘disrespectful’ and ‘immoral’.⁵

At the heart of the debate about the release of donor information is the welfare of DCIs. Specifically, advocates for greater access place significant weight on the potential negative impacts on the identity of DCIs who are unable to obtain such information.⁶ Over the last five years, successive Victorian governments have deliberated over how to promote the welfare of DCIs without unduly infringing the privacy of donors who were guaranteed anonymity at the time of donation and acknowledging the interests of parents who may not have told their children that they are donor-conceived. In this article, I challenge some of the assumptions underlying the 2017 amendments to donor conception laws and argue that the retrospective removal of donor anonymity is neither necessary nor appropriate and may in fact create more problems than it solves.

Whilst the welfare of persons born in assisted reproduction is paramount under the *Assisted Reproductive Treatment Act 2008* (Vic) (*‘ART Act’*),⁷ evaluating the welfare of DCIs is a complex task particularly as evidence about the impacts on DCIs is still emerging. The debate over the release of donor information has been dominated by harm-based and human rights approaches to the welfare of DCIs. A detailed examination of these approaches, however, reveals no clear justification for retrospectively removing donor anonymity. Moreover, these two approaches often lead to the interests of DCIs being viewed in competition with those of donors and recipient parents. In this article, I offer an alternative relational approach for evaluating the welfare of DCIs alongside other relevant parties. Acknowledging the relational nature of donor conception interests, I contend that the previous consent model provides a more effective way of accommodating the various interests at stake than the new model that came into force on 1 March 2017.

In Part II of this article, I briefly outline the history of donor conception laws in Victoria. I then highlight the key features of the consent model under the 2015 reforms and the new model under the 2017 amendments. In Part III, I evaluate the prevailing harm-based and human rights approaches to the welfare of DCIs and conclude that neither approach supports the retrospective release of identifying information. In Part IV, I propose an alternative relational approach to evaluating the welfare of persons born as a result of assisted reproduction and

3 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 2015, 4973 (Jill Hennessy, Minister for Health).

4 Eric Blyth and Marilyn Crawshaw, ‘Retrospective Removal of Donor Anonymity: Respectful, Fair, Grateful and Moral? An Evidence-Based Argument’, *BioNews* (online), 21 March 2016 <http://www.bionews.org.uk/page_630716.asp>.

5 Guido Pennings, ‘Disrespectful and Immoral: Retrospective Legislation on Donor Anonymity’, *BioNews* (online), 14 March 2016 <http://www.bionews.org.uk/page_627606.asp>.

6 Sonia Allan and Damian Adams, ‘All Donor-Conceived People in Victoria Now Have the Right to Donor Information’, *BioNews* (online), 29 February 2016 <http://www.bionews.org.uk/page_621487.asp>.

7 *ART Act* s 5(a).

highlight the benefits of such an approach in the context of donor conception. In particular, viewing the welfare of DCIs through a relational lens provides a more realistic welfare assessment by acknowledging the interrelated interests at stake. I then explore the various interests in donor conception in more detail. In Part V, I argue the previous consent model better addresses the interests of DCIs and all other relevant stakeholders – including parents of DCIs, donors and their families – than the new model. In particular, I highlight some problems the new model poses, which may in fact hinder any potential relationship between DCIs and their donors. I also discuss how the consent model provides the best opportunity for DCIs to obtain relevant and contemporaneous donor information.

II HISTORY OF DONOR CONCEPTION LAWS IN VICTORIA

Victoria was the first jurisdiction in Australia to address the needs of DCIs to access information about their donor heritage. Although sperm donation procedures have taken place in Australia since the 1940s,⁸ donations were treated as anonymous and there was no legal requirement for doctors to record donor information. The following section provides a brief history of the development of donor conception laws in Victoria. As discussed below, several other inquiries on donor information have also taken place in Australia.

A History of Donor Conception Regulation

1 Victoria

Prior to 1988, assisted reproductive treatment in Victoria was unregulated and a ‘culture of secrecy’ surrounded donor-conception, which was thought crucial in order to ‘maintain the integrity of the family unit’.⁹ On 1 July 1988, the *Infertility (Medical Procedures) Act 1984* (Vic) (‘1984 Act’) gave DCIs access, at age 18, to information about their donors with the donor’s consent. Following recommendations of the Waller Committee,¹⁰ the 1984 Act introduced record-keeping requirements and established the Central Register for recording information about donors, recipients and children born as a result of donor treatment procedures. The Health Commission of Victoria had responsibility under the 1984 Act to maintain the Central Register. The 1984 Act also mandated counselling of donors and recipients of donor gametes.

Donor-conception practices were fundamentally changed on 1 January 1998 by the *Infertility Treatment Act 1995* (Vic) (‘1995 Act’), which prohibited anonymous donations. In particular, donors were specifically advised that any

8 Karin Hammarberg et al, ‘Proposed Legislative Change Mandating Retrospective Release of Identifying Information: Consultation with Donors and Government Response’ (2014) 29 *Human Reproduction* 286, 287, citing Arthur Hill, ‘Experiences with Artificial Insemination’ (1970) 10 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 112.

9 Law Reform Committee, Parliament of Victoria, *Inquiry into Access by Donor-Conceived People to Information about Donors* (2012) 26 (‘2012 Committee Report’).

10 Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, Parliament of Victoria, *Report on Donor Gametes in IVF* (1983) 26–8.

children conceived from their donation could obtain identifying information about the donor as of right at age 18. The *1995 Act* also provided for the establishment of the Voluntary Register to record personal information voluntarily lodged by a donor, DCI or a recipient parent. The Voluntary Register enabled the exchange of information between donors and DCIs. However, DCIs could only access donor information through the Voluntary Register if their donor knew about it and voluntarily registered information. The *1995 Act* established the Infertility Treatment Authority ('ITA'), whose functions included maintaining both the Central and Voluntary Registers. The responsibility for maintaining these registers was transferred to the Registry of Births, Deaths and Marriages ('BDM') on 1 January 2010 when the *ART Act* came into force and the Victorian Assisted Reproductive Treatment Authority ('VARTA') replaced the ITA.

The *ART Act* did not otherwise make any substantive changes to the rights of donor conception stakeholders. Essentially three separate regimes regulated access by DCIs to information about their donors under the *ART Act*. People conceived from gametes donated from 1998 onwards were legally entitled to obtain both identifying and non-identifying information about their donors from the Central Register when they reached adulthood. People conceived from gametes donated between July 1988 and December 1997 could obtain non-identifying donor information from the Central Register but could only access identifying information with the donor's consent. They could also potentially obtain identifying donor information if their donors provided that information on the Voluntary Register. Finally, people conceived from gametes donated prior to July 1988 had no legislated right to obtain identifying information.¹¹ However, they could potentially access non-identifying or identifying donor information if their donors provided that information to the Voluntary Register.¹²

Changing attitudes to donor conception over time and increased public discussion around the rights of donor-conceived people led the Victorian government in 2011 to inquire into access by all donor-conceived people to information about their donors. In 2012, a Parliamentary Law Reform Committee made various recommendations for establishing a mechanism for DCIs to access information about their donors.¹³ The key recommendation was to introduce legislation to allow *all* DCIs access to identifying information about their donors, irrespective of the circumstances under which the donations were made.¹⁴ In its interim response to the report of the Committee, the Victorian government noted that providing retrospective access to identifying donor information involved the balancing of 'competing rights, interests and expectations'.¹⁵ Given the Committee heard from only nine donors in its inquiry, the government

11 *ART Act* div 3, later amended by *ART Further Amendment Act 2014* pt 2.

12 *ART Act* s 72.

13 2012 Committee Report, above n 9, xxv–xxviii.

14 *Ibid* 76 (Recommendation 1).

15 Parliament of Victoria, 'Whole of Government Interim Response to the Parliament of Victoria Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about Donors' (Interim Government Response, 11 October 2012).

considered it ‘critical to properly consider and assess the views of the community, in particular the views of donors’ before finalising its response.¹⁶

2 Other Australian Jurisdictions

The Victorian government inquiry did not occur in isolation. In New South Wales (‘NSW’), a Parliamentary Committee on Law and Safety conducted two similar inquiries into donor information in 2012 and 2013.¹⁷ As in Victoria, NSW had a history of anonymous donor conception practices. Prior to 2010, there were no central registration requirements for gamete donors and DCIs had to approach their parents’ infertility clinics to obtain non-identifying donor information. The *Assisted Reproductive Technology Act 2007* (NSW) (the ‘*NSW Act*’) gave all DCIs conceived after 2010 the right to access information about their genetic history. The *NSW Act* established a Central Register for donor conception information, which is managed by the NSW Department of Health. The Central Register contains identifying information about donors and recipients, and DCIs can access this information at age 18. The *NSW Act* also established a Voluntary Register to hold information about donors and DCIs.

In contrast to Victoria, the NSW Parliamentary Committee rejected the proposal to retrospectively remove donor anonymity. Following the parliamentary inquiries, the NSW government implemented a consent model for the release of identifying donor information to DCIs conceived prior to 2010. The NSW government was of the view that ‘[t]his model strikes a balance between the needs of donor-conceived people to learn about their biological origins, and the wishes of anonymous donors who donated under a different system’.¹⁸ It also made legislative amendments to enable the Registry of Births, Deaths and Marriages to record donor-conceived status in the register of births.

At a federal level, the Legal and Constitutional Affairs Reference Committee (‘LCAR Committee’) conducted an inquiry into donor conception practices in Australia and the rights of DCIs. In 2011, the LCAR Committee recommended that donor-conception legislation remain state-based but consistent regarding the prohibition on donor anonymity.¹⁹ Although the Committee recommended DCIs be provided with rights to access identifying and non-identifying information, it did not recommend DCIs be given retrospective access to identifying donor information and left this to the states to decide.²⁰

16 Ibid.

17 Legislative Assembly Committee on Law and Safety, Parliament of New South Wales, *Inclusion of Donor Details on the Register of Births* (2012); Legislative Assembly Committee on Law and Safety, Parliament of New South Wales, *Managing Donor Conception Information* (2013).

18 Parliament of New South Wales, ‘NSW Government Response to NSW Legislative Assembly Committee on Law and Safety Inquiries into Donor Conception’ (Government Response, 16 April 2014) 2.

19 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Donor Conception Practices in Australia* (2011) xi [7.65], [7.69] (Recommendations 1 and 5).

20 Ibid xiii [7.74] (Recommendation 10).

B 2015 Amendments: Consent Model

In 2013, the Victorian government ‘carried out a comprehensive literature review and a detailed human rights analysis of the interests of all stakeholders’ in relation to access to donor information.²¹ These stakeholders included donor-conceived individuals, recipient parents, donors and their families. In addition, the government commissioned VARTA to consult more broadly with pre-1998 donors, particularly in relation to the retrospective release of identifying information. VARTA interviewed 42 donors, who provided a range of views on the recommendation about access to identifying information.²² The government concluded that, ‘balancing the rights of all donor conception stakeholders’, DCIs should have access to identifying information about their donors *subject to the consent of the donor*.²³ This consent model, which came into force in 2015, brought the access rights of individuals conceived prior to July 1988 in line with those conceived between July 1988 and December 1997.

Predicating the disclosure of identifying information on the consent of the donor represented a compromise between the rights and interests of various donor conception stakeholders. In addition to implementing the consent model, several other key amendments to the *ART Act* addressed specific concerns of DCIs about access to information more generally that were raised in the 2012 Committee Report. These included: allowing for the exchange of medical information that may save a person’s life or warn about a harmful genetic or hereditary condition;²⁴ securing access to and preserving donor treatment records;²⁵ improving access to information about siblings for DCIs;²⁶ and expanding counselling and donor linking services available for a wide array of donor conception stakeholders.²⁷ The overall objective of these amendments was to facilitate and enhance the exchange of information between DCIs, their donors and siblings. Under this model, VARTA assumed the primary role of donor linking involving a ‘letterbox’ service whereby parties could communicate confidentially with one another using VARTA as an intermediary. Counselling was also provided to support all parties during the linking process.²⁸

C 2017 Amendments: New Model

Following a change in government in Victoria in November 2015, the Liberal Government fulfilled its election promise to give *all* DCIs the same right of

21 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 December 2013, 4549 (Mary Wooldridge, Minister for Mental Health).

22 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’ (Report, May 2013) (‘VARTA Report’).

23 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 December 2013, 4549 (Mary Wooldridge, Minister for Mental Health).

24 *ART Further Amendment Act 2014* pt 2, s 16.

25 *ART Further Amendment Act 2014* pt 2, ss 5–6.

26 *ART Further Amendment Act 2014* pt 2, s 12.

27 *ART Further Amendment Act 2014* pt 2, ss 13, 20–21.

28 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 December 2013, 4551 (Mary Wooldridge, Minister for Mental Health).

access to identifying donor information. New amendments came into force on 1 March 2017 giving all people conceived in Victoria from egg and sperm donation the right to identifying information about their donor regardless of when they were born. Although donor consent is not required for the release of identifying information, donors must be given notice prior to release.²⁹ Before identifying information is released, donors will be offered counselling and given an opportunity to lodge contact preferences about whether they want contact and the terms of any contact. Contact preferences are legally enforceable and it is a statutory offence for a DCI to contact a donor who has not lodged a contact preference.³⁰ The 2017 amendments also transferred responsibility for the Central and Voluntary Registers from BDM to VARTA, which now provides ‘a “one door in” support and information service to donors, donor-conceived people, parents of donor-conceived people, and the families of all’.³¹

Central to the 2017 amendments is the right of DCIs to access *identifying* information about their donors. It is therefore important to clarify from the outset what this covers. ‘Identifying information’ is defined in the *ART Act* as ‘information that will or may disclose the identity of a person’.³² Identifying information recorded on the Central Register includes the donor’s name,³³ unique donor identifier,³⁴ date of birth³⁵ and place of birth.³⁶ Other forms of identifying information, such as a photograph and current address, are not presently available on the Central Register. Donors, DCIs, recipient parents or relatives may provide other personal information (including identifying information) to the Voluntary Register.

‘Non-identifying information’ is, not surprisingly, defined in the *ART Act* as ‘information other than identifying information’.³⁷ This includes details of past medical and family history, genetic test results, details of physical characteristics, marital status, religion, occupation and interests. The line between identifying and non-identifying information is, however, not always clear. As Ravitsky points out, ‘nonidentifying personal information about donors can and often does lead to identification when given some “detective work”, especially when it utilizes the power of social networks and other Web-based tools’.³⁸

While the intentions behind the new amendments are honourable and strongly influenced by the welfare of DCIs,³⁹ the devil lies in the detail.

29 *ART Act* ss 60, 62, as inserted by *ART Amendment Act 2016* pt 2, ss 19, 22.

30 *ART Act* s 63G, as inserted by *ART Amendment Act 2016* pt 2, s 23.

31 Victorian Assisted Reproductive Treatment Authority, *Victorian Donor Conception Laws Have Changed* <<http://www.varta.org.au/regulation/legislation-and-guideline-overview/legislative-updates>>.

32 *ART Act* ss 3, 64.

33 *ART Act* ss 51(2)(b), 53. See also *Assisted Reproductive Treatment Regulations 2009* (Vic) sch 5(5)(a) (*‘ART Regs’*).

34 *ART Regs* sch 5(5)(c).

35 *ART Regs* sch 5(5)(e).

36 *ART Regs* sch 5(5)(f).

37 *ART Act* s 3.

38 Vardit Ravitsky, ‘Conceived and Deceived: The Medical Interests of Donor-Conceived Individuals’ (2012) 42(1) *Hastings Center Report* 17, 18.

39 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 2015, 4972 (Jill Hennessy, Minister for Health).

Retrospectively removing donor anonymity under the new model raises a number of concerns around expectations, implementation and effectiveness. First, the new model undermines the legitimate expectations of privacy of those donors who were assured anonymity at the time of donation. Legislation that retrospectively removes rights has the potential to erode public confidence in Parliament and the rule of law. Secondly, safeguards in the form of contact preferences may not adequately protect donors from unwanted exposure or contact from DCIs through unregulated social media sites. Moreover, legally enforceable instruments are arguably not the most appropriate mechanism for managing the various expectations of DCIs, donors and their families. A model of retrospective release of identifying information subject to contact preferences, enforceable through civil penalties seems counterintuitive to promoting good relationships.

Thirdly, there are no guarantees about the availability or accuracy of identifying information from 30 years ago. Record-keeping at that time was inconsistent, some records were destroyed and others are likely to be out of date.⁴⁰ Finally, for DCIs searching to fill the gaps in their personal narrative (which is ongoing), contemporaneous information from a donor is arguably more relevant than a name, date of birth and address. A process that facilitates information sharing, rather than forcing the hand of donors, is likely to be more conducive to the provision of relevant contemporaneous information. As the United Kingdom ('UK') Nuffield Council on Bioethics ('Nuffield Council') concluded, the interests of DCIs who desire identifying information:

would not in fact be promoted in any significant way if the state were to provide the identifying details of a donor who was not open to further information exchange or ongoing contact ... such willingness is simply not something that can be created through legislation.⁴¹

Before drawing any conclusions about the most appropriate model for the release of donor information, it is important to first unpack the welfare concerns raised by DCIs seeking access to identifying information. In the next Part, I examine both harm-based and human rights approaches to the welfare of DCIs, which have dominated the debate over access to donor information.

III WELFARE CONCERNS FOR DCIS

A Introduction

The first guiding principle in the *ART Act* states that 'the welfare and interests of persons born or to be born as a result of treatment procedures are paramount'.⁴² In the context of donor conception, the welfare and interests of persons born have generally been evaluated using both harm-based and human rights frameworks. The decision to allow all DCIs access to identifying donor

40 2012 Committee Report, above n 9, 29–31.

41 Nuffield Council on Bioethics, 'Donor Conception: Ethical Aspects of Information Sharing' (Report, April 2013) xxvi.

42 *ART Act* s 5(a).

information was based on both the potential harm suffered by DCIs who are unable to access identifying information about their donor and the rights of all DCIs to donor information on an equal basis.

In relation to harm, several key concerns have been expressed by DCIs. Many raised the importance of knowing their biological background and genetic medical history. Some DCIs mentioned a genuine fear of unknowingly forming consanguineous relationships with half siblings. Although the actual risk of this occurring might be very small, the fear associated with this risk is very real.⁴³ Finally, many DCIs expressed frustration with the process of seeking information about their donors. These concerns were addressed by the 2015 amendments to the *ART Act*, as discussed in Part II(B).

A continuing concern, however, has been raised about the potential harm that may be caused to the identity of DCIs who are unable to access *identifying* information about their donor parent. In her second reading speech introducing the new model under the Assisted Reproductive Treatment Amendment Bill 2015 (Vic), the Minister for Health claimed that the Parliamentary Committee ‘found that donor-conceived people may suffer a fractured sense of identity when they cannot obtain *identifying* information about their biological parents’.⁴⁴ It is worth noting that the specific finding by the Committee on this issue was in fact more general and did not explicitly refer to *identifying* information. The Committee found 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’.⁴⁵ This distinction is not merely a semantic one. Evidence about the full impacts on donor-conceived individuals is still emerging and the debate over access to *identifying* information has, at times, glossed over what is actually known in this complex area, particularly in relation to the causal nexus between fractured identity and access to identifying information. I discuss the current evidence on the impacts of being donor-conceived in more detail below.

The Minister also addressed concerns about human rights by stating that under the new model ‘all donor-conceived people have the same right to obtain available identifying information about their donors, irrespective of when their gametes were donated’.⁴⁶ The Parliamentary Committee found, following its discussion of the rights of DCIs and the inequity of a situation where some DCIs cannot access identifying information when others can, that ‘[a]ll donor-conceived people should have access to identifying information about their donors’.⁴⁷ The Committee also noted that adopted people have unqualified access to identifying information about their birth parents and found that ‘[t]he circumstances of donor-conception and adoption with regard to a person’s right

43 Nuffield Council on Bioethics, above n 41, 67.

44 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 2015, 4972–3 (Jill Hennessy, Minister for Health) (emphasis added).

45 2012 Committee Report, above n 9, 41 (Finding 1).

46 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 2015, 4973 (Jill Hennessy, Minister for Health).

47 2012 Committee Report, above n 9, 76 (Finding 9).

to identifying information are largely comparable'.⁴⁸ In making this finding, the Committee prioritised the right of DCIs to know their biological heritage over the rights of donors (who were assured anonymity at the time of donation) to privacy. As discussed below, although individuals conceived from gametes donated before 1998 did not previously have the same rights to access identifying information as those conceived after that date or adoptees, this is not necessarily inequitable under a substantive human rights assessment given the circumstances surrounding their conception.

B Harm-Based Approach

1 Outline

Empirical evidence in the field of donor conception is limited and there is considerable controversy over the weight that should be attributed to it in recommending reform.⁴⁹ Current information about harm to DCIs who are unable to obtain donor information consists of anecdotal evidence from donor-conceived people, parents and donors, and some limited qualitative research on the impacts of knowledge of donor conception and access to donor information on DCIs. In 2013, the Nuffield Council described current evidence on the impacts on DCIs who are unable to obtain information about their donors as 'patchy'.⁵⁰ Harm caused specifically by a lack of access to *identifying* information is unclear, at times speculative and often extrapolated from adoption scenarios, which may not provide accurate analogies.

2 Evidence

Anecdotal reports from DCIs in Australia reflect a broad range of perspectives on access to donor information. During its inquiry in 2012, the Parliamentary Committee obtained submissions from seven donor-conceived individuals about their individual experiences in relation to accessing donor information. Over half of this group expressed a desire to have access to identifying information.⁵¹ A similar consultation process was carried out in the UK around the same time by a Working Party of the Nuffield Council, which revealed a broad spectrum of views. The Nuffield Council reported that some DCIs had a strong desire to obtain identifying donor information; others had an interest in basic non-identifying donor information, medical history and motivation; and some reported little or no interest about their donor.⁵² While

48 2012 Committee Report, above n 9, 62 (Finding 5).

49 See, eg, Guido Pennings, 'Disclosure of Donor Conception, Age of Disclosure and the Well-Being of Donor Offspring' (2017) 32 *Human Reproduction* 969; Susan Golombok, Letter to the Editor, 'Disclosure and Donor-Conceived Children' (2017) 32 *Human Reproduction* 1532; Lauri A Pasch et al, Letter to the Editor, 'Donor-Conceived Children: The View Ahead' (2017) 32 *Human Reproduction* 1534; Marilyn Crawshaw et al, Letter to the Editor, 'Disclosure and Donor-Conceived Children' (2017) 32 *Human Reproduction* 1535; Guido Pennings, Letter to the Editor, 'Reply: Disclosure and Donor-Conceived Children' (2017) 32 *Human Reproduction* 1537.

50 Nuffield Council on Bioethics, above n 41, 54.

51 2012 Committee Report, above n 9, 37.

52 Nuffield Council on Bioethics, above n 41, 67.

these personal accounts provide a valuable insight into some of the varied perspectives and experiences of some DCIs, they do not represent DCIs' experiences more broadly nor do they provide a clear picture about harm to DCIs.

The Parliamentary Committee also had regard to some qualitative research on the experiences of DCIs. It is noteworthy that the findings of the Committee about adverse impacts on DCIs are carefully qualified. For instance, after reviewing the evidence available to it, the Committee concluded: 'Evidence received by the Committee strongly indicates that the provision of identifying information *may* provide, for *some* donor-conceived people, a means to cope with the trauma of discovery'.⁵³

The qualified nature of this statement reflects the fact that evidence is limited in this area and it is difficult to obtain a clear understanding of how being donor-conceived impacts on DCIs. Although access to identifying information was a critical aspect of the Parliamentary Committee's inquiry, other aspects of donor-conception, including how and when a DCI is advised about their conception, are potentially more relevant to the welfare of DCIs. Notably, the finding by the Parliamentary Committee that all DCIs should have access to identifying information about their donors appears to be based, at least in part, on evidence from a particular group of DCIs who learnt of their donor-conceived status later in life. Thus, circumstances around disclosure appear to be a significant factor in the welfare of DCIs.

According to Turner and Coyle, people who discover their donor-conceived status in adolescence or later may experience some fracturing of their identity and a corresponding desire to learn more about their donor.⁵⁴ The identity framework applied to the experiences of DCIs draws on the notion of 'genealogical bewilderment' identified in adoption cases.⁵⁵ Some commentators caution against drawing analogies between donor conception and adoption when evaluating the welfare of DCIs as the circumstances in both cases are quite different.⁵⁶ Turner and Coyle report that donor-conceived people who were obstructed in their attempts to search for and obtain identifying information about their donors reported a sense of 'loss and grief' about being unable to know

53 2012 Committee Report, above n 9, 75 (emphasis added).

54 A J Turner and A Coyle, 'What Does it Mean to Be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy' (2000) 15 *Human Reproduction* 2041.

55 Ibid 2042. The term 'genealogical bewilderment' was coined by H J Sants in 1964: H J Sants, 'Genealogical Bewilderment in Children with Substitute Parents' (1964) 37 *British Journal of Medical Psychology* 133.

56 See, eg, F Shenfield, 'Filiation in Assisted Reproduction: Potential Conflicts and Legal Implications' (1994) 9 *Human Reproduction* 1348; F Shenfield and S J Steele, 'What are the Effects of Anonymity and Secrecy on the Welfare of the Child in Gamete Donation?' (1997) 12 *Human Reproduction* 392; Iain Walker and Pia Broderick, 'The Psychology of Assisted Reproduction – or Psychology Assisting Its Reproduction?' (1999) 34 *Australian Psychologist* 38. Most notably, DCIs are very much wanted by the recipient parents even before conception and may not feel the weight of 'abandonment' that some adoptees feel about their birthparents. Turner and Coyle argue there are still sufficient parallels between the two scenarios to use adoption research as a useful starting point in exploring the experiences of DCIs: Turner and Coyle, above n 54, 2042.

their biological origins or have a proper relationship with their donors.⁵⁷ They emphasise the importance to DCIs of talking about their experiences and highlight the therapeutic benefit of counselling reported by individuals in these circumstances. Interestingly, Ravitsky suggests that identifying information is only necessary where a DCI seeks a relationship with their donor,⁵⁸ a point I will return to below. Other studies reveal that ‘not all donor-conceived people will want to know their donor’s identity’.⁵⁹ For example, a Belgian study of DCIs born to lesbian mothers who had anonymous donors and were told of their donor status when they were toddlers revealed that only a quarter wanted to know identifying information about their donor.⁶⁰

Empirical research also reinforces the anecdotal evidence obtained by the Parliamentary Committee and Nuffield Council that there is significant variation in the *kind* of information sought by DCIs. One Australian study found that the three most important types of biographical information sought by DCIs about their donors are health status, name and family information.⁶¹ A Swedish study of donor-conceived adolescents who were able to obtain their donor’s identity from age 18 revealed that the adolescents were most interested in knowing what their sperm donor was like as a person, their appearance and whether they could meet them, with all but one wanting a photograph.⁶² Other reasons reported include a desire by DCIs to learn more about themselves, their ancestry and family medical history.⁶³ A UK study into the motivations of donor-conceived persons in searching for their donors found that the most common reason was curiosity about the characteristics of the donor, followed by wanting to meet the donor and medical reasons.⁶⁴ Wanting to find the donor did not necessarily mean that offspring wanted to form a relationship with them, with one participant wanting simply to exchange photos or letters.⁶⁵

3 Summary

Whilst there is evidence to suggest that some donor-conceived people have experienced negative outcomes, existing qualitative research into the psycho-

57 Turner and Coyle, above n 54, 2050.

58 Vardit Ravitsky, “‘Knowing Where You Come From’: The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness” (2010) 11 *Minnesota Journal of Law, Science & Technology* 665, 668.

59 Ruth McNair, ‘Outcomes for Children Born of ART in a Diverse Range of Families’ (Occasional Paper, Victorian Law Reform Commission, August 2004) 42.

60 K Vanfraussen, I Ponjaert-Kristoffersen and A Brewaeys, ‘An Attempt to Reconstruct Children’s Donor Concept: A Comparison between Children’s and Lesbian Parents’ Attitudes Toward Donor Anonymity’ (2001) 16 *Human Reproduction* 2019, 2023.

61 I S Rodino, P J Burton and K A Sanders, ‘Donor Information Considered Important to Donors, Recipients and Offspring: An Australian Perspective’ (2011) 22 *Reproductive Biomedicine Online* 303, 308.

62 J E Scheib, M Riordan and S Rubin, ‘Adolescents with Open-Identity Sperm Donors: Reports from 12–17 Year Olds’ (2005) 20 *Human Reproduction* 239, 245–6.

63 Ibid. See also D R Beeson, P K Jennings and W Kramer, ‘Offspring Searching for Their Sperm Donors: How Family Type Shapes the Process’ (2011) 26 *Human Reproduction* 2415.

64 Vasanti Jadvia et al, ‘Experiences of Offspring Searching for and Contacting Their Donor Siblings and Donor’ (2010) 20 *Reproductive Biomedicine Online* 523, 528–9.

65 Ibid 529.

social impacts on DCIs is limited and current findings have been described by researchers as providing ‘tentative insights’ rather than being conclusive.⁶⁶ Turner and Coyle expressly acknowledge that ‘recruitment through support networks can lead to bias towards participants who needed to talk and resolve identity issues’ and that sharing of ideas within networks may also influence the emphasis given to particular experiences.⁶⁷ It is also important to bear in mind that most studies only provide a ‘snapshot’ in time; there are no longitudinal studies of the impacts of donation on donors and their families, and most studies relate to individuals conceived from donor sperm rather than eggs or embryos.⁶⁸ At this stage there is insufficient robust empirical evidence to fully understand the impact donor anonymity has on DCIs or even whether a statistically significant number of DCIs want to know identifying information about their donor.⁶⁹ Some commentators contend the limited empirical research obtained to date ‘should not form the basis of public policy-making’ but ‘can be used to inform policy and practice’.⁷⁰

C Human Rights Approach

1 Outline

The Parliamentary Committee placed significant weight on the ‘right’ of DCIs to know donor information to support its recommendation that all DCIs have access to identifying information about their donors.⁷¹ The recent amendments attempt to address the perceived inequity of a situation where only DCIs conceived after 1998 have unfettered access to identifying information about their donors. Referring to the consent model under the previous 2015 amendments, the Minister for Health stated that ‘continuing a system involving different rights of access to information was inequitable’.⁷² However, a substantive human rights analysis does not necessarily support the retrospective removal of anonymity that is required to give all DCIs equal access to identifying donor information.

Those who advocate for the retrospective release of donor information rely on the guiding principles in the *ART Act* and contemporary human rights instruments, which promote an individual’s right to know their genetic identity (as a subset of the right to privacy) and right to be free from discrimination. These rights are not, however, absolute and a substantive human rights analysis requires a careful balancing of the rights of DCIs with the rights of donors and recipient parents who would be directly affected by the retrospective release of identifying donor information. In particular, donors have a right to privacy and recipient

66 Turner and Coyle, above n 54, 2048.

67 Ibid.

68 Nuffield Council on Bioethics, above n 41, 54.

69 Ravitsky, ‘Conceived and Deceived’, above n 38, 18–19.

70 Eric Blyth et al, ‘Donor-Conceived People’s Views and Experiences of Their Genetic Origins: A Critical Analysis of the Research Evidence’ (2012) 19 *Journal of Law and Medicine* 769, 788.

71 2012 Committee Report, above n 9, xix, 52–64.

72 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 2015, 4973 (Jill Hennessy, Minister for Health).

parents have a right to protection of their family under international law. I briefly outline these rights in the following section before discussing how they have been addressed to date by international law in the context of donor conception.

1 Rights of Donor-Conceived Persons, Donors and Recipient Parents

(a) Rights of Donor-Conceived Persons

The current regulatory framework for donor conception in Victoria emphasises the right to know your genetic identity. In addition to the first guiding principle in the *ART Act* outlined above, the third guiding principle specifically acknowledges the right of *children* born as the result of donor conception to *information* about their genetic parents.⁷³ It is important to note that this principle expressly refers to ‘children’ rather than ‘persons’ born⁷⁴ and does not specify whether the right to information includes ‘identifying’ information. The third guiding principle is consistent with the *United Nations Convention on the Rights of the Child* (‘UNCRC’), which confers a right to know your parents and a right to the preservation of identity of *children*.⁷⁵ Tobin argues that these rights do *not* extend to *adults*.⁷⁶ The third guiding principle does not therefore clearly establish that *persons* born from gametes donated prior to 1988 (who are now adults) are entitled to retrospective access to *identifying* information.

The basis of a right to know your genetic identity can also be found under human rights law as an extension of the right to privacy and reputation, which is contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘*Victorian Charter*’) as well as international instruments.⁷⁷ The High Court of England and Wales (Queen’s Bench, Administrative Court) held in the case of *Rose v Secretary of State for Health* that the right to privacy encompasses the right of a donor-conceived individual to obtain information about their biological origins but made no finding about whether a refusal by the state to release identifying information would constitute a violation of this right.⁷⁸ More recently, a German case provided further support for the right of donor-conceived offspring to know their genetic identity.⁷⁹ Whether or not any right of donor-conceived people to know their genetic identity extends to access to *identifying* information about their donors involves balancing the rights of all relevant parties. In the UK, the government has taken the view that the interests of both donors and recipient parents are engaged when considering whether to disclose

73 *ART Act* s 5(c).

74 Cf *ART Act* s 5(a), which refers more broadly to ‘persons born’.

75 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 7–8.

76 John Tobin, ‘Donor-Conceived Individuals and Access to Information about Their Genetic Origins: The Relevance and Role of Rights’ (2012) 19 *Journal of Law and Medicine* 742, 747.

77 *Victorian Charter* s 13; UNCRC art 13; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17 (‘ICCPR’).

78 [2002] 2 FLR 962.

79 The German regional appeals court ruled that Sarah P had a legal right to find out the identity of her biological father: Petra Thorn, ‘Court Decision in Germany Supports Rights of the Donor Conceived to Access Their Donor’s Identity’, *BioNews* (online), 18 February 2013 <http://www.bionews.org.uk/page_257189.asp>.

identifying information about a donor to a DCI and that a fair balance must be struck between these competing interests.⁸⁰ The UK Government's current position is that the right of DCIs to privacy does not create a right for DCIs to know the identity of their biological parents.⁸¹ I discuss this right in the Australian regulatory context below.

Those who argue for the retrospective release of identifying information also rely on the right to protection against discrimination. Under the consent model, people conceived from gametes donated prior to 1998 only had access to identifying information with the consent of the donor. The fact people conceived after this date (and adoptees) have an unfettered right of access to identifying information about their donor (or, in the case of adoptees, biological parent) potentially limits the rights of DCIs conceived before 1998 to protection against discrimination and equality before the law. These rights are contained in the *Victorian Charter* as well as the ICCPR.⁸² As noted above, the analogy with adoptees is problematic. Furthermore, the British Columbian Court of Appeal decision in *Pratten v British Columbia (Attorney-General)* ('*Pratten*') casts doubt on whether a regime that creates different rights of access to donor information based on historical factors breaches the right against discrimination.⁸³

In *Pratten*, Ms Pratten argued that Canadian legislation enabling adoptees to access information about their biological origins discriminated against DCIs who were not given the same rights, contrary to the *Canadian Charter of Rights and Freedoms*.⁸⁴ The Court of Appeal rejected this argument on the basis that a targeted ameliorative program is not discriminatory simply because it does not cover all disadvantaged groups. It held that 'it is open to the legislature to provide adoptees with the means of accessing information about their biological origins without being obligated to provide comparable benefits to other persons seeking such information'.⁸⁵ The Court of Appeal in *Pratten* relied on the Canadian Supreme Court's decision in *Alberta (Aboriginal Affairs and Northern Development) v Cunningham* ('*Cunningham*'), which held that 'governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities'.⁸⁶ In *Cunningham*, a distinction made between two groups of Aboriginal people in terms of the application of an ameliorative program was justified on the 'historic, social and governance differences' between the two groups.⁸⁷ The Supreme Court of Canada dismissed Ms Pratten's application to appeal the decision of the Court of Appeal on 30 May 2013.

80 Joint Committee on Human Rights, *Legislative Scrutiny (Fifteenth Report)*, House of Lords Paper No 81, House of Commons Paper No 440, Session 2007–08 (2008) 116.

81 Nuffield Council on Bioethics, above n 41, 30–1.

82 *Victorian Charter* s 8; ICCPR arts 3, 26.

83 [2012] BCCA 480.

84 *Ibid* [4]–[5] (Frankel J); *Canada Act 1982* (UK) c 11, sch B, pt I, s 15 ('*Canadian Charter of Rights and Freedoms*').

85 *Pratten* [2012] BCCA 480, [42] (Frankel J).

86 [2011] 2 SCR 670, 690 [41] (McLachlin CJ).

87 *Ibid* 693 [51] (McLachlin CJ).

Applying the reasoning in *Pratten*, the different rights afforded to adoptees and DCIs in Australia is arguably justified based on the ‘historical, social and governance differences’ between these groups. Given the significant differences in the culture of gamete donation prior to 1998, there is also support for the different extent to which identifying information is accessible by donor-conceived people based on when they were born and the circumstances of the donation, particularly when the potentially competing rights of others are involved.

(b) Rights of Donors and Their Families

Donors have a right to privacy and reputation, which extends to the control of personal information, including medical records.⁸⁸ A donor does not have an absolute right to anonymity but any disclosure of information must be lawful and not arbitrary.⁸⁹ Donors also have the right not to have their reputation unlawfully attacked.⁹⁰ Given that disclosing identifying information about a donor who donated gametes on the condition of anonymity would interfere with a donor’s right to privacy, consideration must be given to the purpose of disclosure.

Donor families also have a right to protection under the *Victorian Charter* and international human rights law.⁹¹ The right to protection of family in this context is principally concerned with family unity. The release of identifying information about donors who have not revealed their donor status to their family has the potential to destabilise existing family relationships between donors, partners and their children. The public consultation carried out by VARTA in 2013 revealed that some donors fear the release of identifying information could impact adversely on their family relationships. For example, one donor asserted that the release of identifying information would be ‘severely detrimental to him and his family’.⁹²

(c) Rights of Recipient Parents

Finally, recipient parents have a right to protection of their family unit. Exactly how this right is likely to be affected by retrospective removal of donor anonymity is, however, unclear. Some recipient parents suggested to the Parliamentary Committee that increasing access by donor-conceived people to information about their donors would assist them in telling their children about their conception.⁹³ However, the choice by recipient parents to reveal donor insemination origins to their children is highly complex, particularly as common

88 Tobin, ‘Donor-Conceived Individuals’, above n 76, 747, citing Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193.

89 *Victorian Charter* s 13(a); ICCPR art 17(1).

90 *Victorian Charter* s 13(b); ICCPR art 17(2).

91 *Victorian Charter* s 17(1); ICCPR art 23(1).

92 VARTA Report, above n 22, 18.

93 2012 Committee Report, above n 9, 82.

practice at the time (before 1998) dictated secrecy. Research suggests that many recipient parents are in favour of donor anonymity.⁹⁴

3 *Balancing the Various Rights at Stake*

From the discussion above, there is support for the claim that DCIs have a right to know their genetic identity. However, whether this extends to access to *identifying* information about their donors involves balancing the competing rights of donors, recipient parents and their families. Retrospectively removing donor anonymity is clearly a breach of a donor's right to privacy. As noted above, although this right is not absolute, any interference must be lawful and not arbitrary. According to Tobin, 'within the international human rights interpretive community ... these requirements are underpinned by the requirement of reasonableness ... [which involves] two broad considerations'⁹⁵ First, any interference must be pursuant to a legitimate aim and, secondly, the measures used must be proportionate.⁹⁶

There appear to be legitimate aims behind the release of identifying information to donor-conceived people. For instance, donor-conceived people arguably have a right to know their genetic identity, and obtaining access to identifying information about their donor would facilitate this. However, Tobin argues that providing *retrospective* access to identifying information about a donor who was guaranteed anonymity at the time of donation constitutes a 'serious interference with the donor's right to privacy',⁹⁷ which is arguably not proportionate to the aim. This would involve:

substituting a contemporary understanding of the right to privacy (which includes a right of access to information about an individual's genetic identity) for the understanding of this right at the time when the donation was made – a time when it was never contemplated that the right to privacy should be extended to include access to information about an individual's genetic identity.⁹⁸

According to Tobin, '[t]his retrospectivity is deeply problematic from a human rights perspective'.⁹⁹ A context-sensitive human rights assessment should therefore require a consideration of the understanding of the right to privacy *at the time* donations were made. Given the prevailing culture around donor conception prior to 1998 was one of secrecy, the balance more firmly sits with protecting the privacy of donors and protecting recipient parents and donor families from unjustified interference.

Moreover, there are other less restrictive measures that could be taken to address the legitimate concerns raised by donor-conceived people. Providing DCIs with non-identifying information, including medical information, and encouraging openness through education, awareness, counselling and donor

94 Pia Broderick and Iain Walker, 'Donor Gametes and Embryos: Who Wants to Know What about Whom, and Why?' (2001) 20 *Politics and the Life Sciences* 29, 39.

95 Tobin, 'Donor-Conceived Individuals', above n 76, 751.

96 Ibid.

97 Ibid 754.

98 Ibid.

99 Ibid.

linking services arguably better addresses the concerns of DCIs, whilst minimising interference with donors' right to privacy and donor and recipient families. It is particularly important to explore other measures given the current lack of robust evidence about the link between the welfare of DCIs and access to identifying donor information. If, as at least some research suggests,¹⁰⁰ the desire for DCIs to obtain identifying information is linked to a need to meet or form a relationship with donors, then retrospectively removing donor anonymity but preventing contact by way of contact preferences arguably does little to promote, and may in fact hinder, the interests of DCIs. In the UK, the Nuffield Council took the view that *encouraging* rather than *imposing* information sharing is a more proportionate way of promoting the rights of DCIs.¹⁰¹ I argue below that a facilitative and relationship-focused model is more appropriate in the donor conception context than one that unilaterally removes donor anonymity.

4 Summary

Arguments in support of retrospective removal of donor anonymity seem to be based on a confused methodology for balancing human rights.¹⁰² This can be seen in the reasoning of the Parliamentary Committee. In finding that the rights of donor-conceived people should prevail over the rights of donors, the Committee appears to conflate the first guiding principle in the *ART Act* with the test for balancing rights under a substantive human rights analysis.¹⁰³ The principle that the welfare of persons born is paramount does not mean that the rights of donor-conceived people necessarily take priority over the rights of donors and other stakeholders. As discussed above, a substantive human rights assessment suggests it does not. Whilst a human rights framework is not the only lens to evaluate the welfare of the DCIs, when working within this framework, an appropriate methodology for balancing human rights must be applied. In the next Part, I propose an alternative relational framework for evaluating the welfare of DCIs, which I argue is more appropriate in the context of donor conception.

IV A RELATIONAL APPROACH TO THE WELFARE OF DCIS

In contrast to harm-based and human rights approaches, which focus on the individual, a relational approach offers a more nuanced framework for evaluating the welfare and interests of DCIs *in connection with* the interests of donors, their families and recipient parents. A relational approach to the welfare of the child

100 Ravitsky, 'Knowing Where You Come From', above n 58, 668; Jadva et al, 'Experiences of Offspring', above n 64, 528–9.

101 Nuffield Council on Bioethics, above n 41, 30.

102 Tobin uses the term 'superficial rights-based approach' to describe a discourse where human rights are identified and relied on to resolve an issue, but where the engagement with rights discourse remains superficial due to a failure to consider the scope and nature of the rights in question, or a lax assessment of how they must be balanced against competing considerations: John Tobin, 'To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63 *International & Comparative Law Quarterly* 317, 323.

103 2012 Committee Report, above n 9, 58, 63, 74.

involves viewing the child within the social context of the family into which they are born.¹⁰⁴

Relational theory has evolved over the last 20 years as a result of attempts by feminist and communitarian scholars to put the ‘relational’ into the moral realm. Some feminists have revised traditional moral concepts to take account of the relational nature of the self. For example, Mackenzie and Stoljar’s account of ‘relational autonomy’ reconceptualises autonomy from a feminist perspective.¹⁰⁵ According to Nedelsky, there is a social component embedded into the very meaning of autonomy.¹⁰⁶ Held has developed an alternative moral paradigm, based on Gilligan’s work on moral psychology and the ethics of care.¹⁰⁷ In contrast to predominant ethical theories that treat individuals as rational, independent and autonomous, the ethics of care views persons ‘as relational and as interdependent’.¹⁰⁸

Communitarian theory has also influenced the debate over how the welfare of the child is conceptualised. Sherman emphasises the importance of collective endeavour or ‘affiliation’ to human flourishing.¹⁰⁹ As family members have certain shared interests that cannot easily be separated, the welfare of a child is inextricably connected with the welfare of the intimate collective that is their family. Other commentators argue that the child to be born should be viewed as part of a ‘social circle of shared relationships’.¹¹⁰ Drawing on these different theoretical approaches, I have argued elsewhere that the welfare of children born as a result of assisted reproduction should be analysed through a relational lens that views the interests alongside those of other family members.¹¹¹

The discussion in Part III of harm-based and human rights approaches to the welfare of DCIs provides some valuable insights upon which we can draw in applying a relational approach to donor conception interests. Although there is currently insufficient evidence to support the claim that a significant proportion of DCIs are harmed by lack of access to identifying information about their donors, emerging research on harm reveals the nature of the various interests underlying the desire by DCIs for identifying donor information. Similarly, although a human rights approach is arguably not the most appropriate way to

104 Michelle Taylor-Sands, *Saviour Siblings: A Relational Approach to the Welfare of the Child in Selective Reproduction* (Routledge, 2013) 26.

105 See, eg, Mackenzie and Stoljar’s account of ‘relational autonomy’ in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives of Autonomy, Agency, and the Social Self* (Oxford University Press, 2000).

106 See Anne Donchin, ‘Autonomy and Interdependence: Quandaries in Genetic Decision Making’ in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives of Autonomy, Agency, and the Social Self* (Oxford University Press, 2000) 236, 242.

107 Virginia Held, *The Ethics of Care: Personal, Political, and Global* (Oxford University Press, 2006) 71. See also Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1993).

108 Held, above n 107, 46.

109 See, eg, Nancy Sherman, ‘The Virtues of Common Pursuit’ (1993) 53 *Philosophy and Phenomenological Research* 277.

110 Erica Grundell, ‘Tissue Typing for Bone Marrow Transplantation: An Ethical Examination of Some Arguments Concerning Harm to the Child’ (2003) 22(4) *Monash Bioethics Review* 45, 49.

111 Taylor-Sands, above n 104.

address interests that are inextricably interwoven with others, it is helpful to explore the interests behind the rights claimed. In the remainder of this Part, I tease out the various interests of DCIs, donors, their families and recipient parents before outlining how a relational approach might manage these interests.

A Relevant Interests in Donor Conception

1 *Interests of DCIs*

Although anecdotal evidence reveals a strong desire by some DCIs to access identifying information, individual experiences vary greatly. The existing empirical research on the experiences of DCIs discussed in Part III reveals a range of interests behind the desire by DCIs for donor information, which may assist in determining how to effectively address the interests of DCIs. First, the desire for *identifying* information is associated with a broad range of interests related to identity that range from simply wanting to know one's biological background, curiosity about one's donor, understanding one's individual origin story, further information-sharing with a donor, contact with a donor, to developing a meaningful relationship with a donor. According to Turner and Coyle, at the heart of the search by donor-conceived individuals for *identifying* information (irrespective of the level of connection sought) is the need to construct one's own personal narrative, which is essential to the formation of identity.¹¹² Secondly, access to medical history is a key issue for many DCIs. Thirdly, some DCIs worry about unknowingly forming consanguineous relationships with half siblings. Fourthly, many DCIs have found the process of seeking information about their donors frustrating. Finally, some donors who are unable to access identifying donor information have reported the therapeutic benefit of counselling.

2 *Interests of Donors and Their Families*

There is limited empirical research on the views, needs and experiences of donors.¹¹³ The views of donors about the release of information are fluid and may change over time according to a UK survey of past donors from one London clinic.¹¹⁴ While the majority of donors surveyed supported moves to increase the release of information, there was a strong sense from many of the need to feel in control over their involvement.¹¹⁵ Another study found that some donors wish to know the outcome of their donation, including identifying information about their donor-conceived offspring.¹¹⁶ The impact of donor linking may also extend beyond donors to their partner and family, according to a United States study of

112 Turner and Coyle, above n 54, 2049.

113 U Van den Broeck et al, 'A Systematic Review of Sperm Donors: Demographic Characteristics, Attitudes, Motives and Experiences of the Process of Sperm Donation' (2013) 19 *Human Reproduction Update* 37.

114 Marilyn A Crawshaw, Eric D Blyth and Ken D Daniels, 'Past Semen Donors' Views about the Use of a Voluntary Contact Register' (2007) 14 *Reproductive Biomedicine Online* 411, 415.

115 *Ibid* 415–16.

116 V Jadva et al, 'Sperm and Oocyte Donors' Experiences of Anonymous Donation and Subsequent Contact with Their Donor Offspring' (2011) 26 *Human Reproduction* 638.

sperm donors who were recruited anonymously but who are now open to, or have had contact with, their offspring.¹¹⁷

In Australia, some donors who were given assurances of anonymity at the time of their donation strongly oppose the release of identifying information. Of the nine donors who gave evidence before the Parliamentary Committee, three were opposed to any release of identifying information.¹¹⁸ Two of the three expressed concerns that they may become the subject of ‘fishing expeditions’ or that their donor-status may be revealed and publicised through the internet and social networking sites.¹¹⁹ The VARTA Report on donor perspectives commissioned by the Government in 2013 revealed a wide range of views about the release of identifying information. ‘All participating donors acknowledged the profound significance of the decisions to be made about the release of donor information’, not only for themselves but also their families, and donor-conceived people.¹²⁰

A little more than half of the donors surveyed by VARTA opposed the Parliamentary Committee recommendation to introduce legislation to allow all donor-conceived people to obtain identifying information about their donors.¹²¹ Although the reasons provided were diverse and complex, a key objection was that it is unethical to change the rules retrospectively.¹²² These donors suggested that to do so would breach the terms of a contract, undermine trust in guarantees of privacy and confidentiality, and harm donors and their families.¹²³ Perceived harms to families included: unwanted contact; stalking of the donor’s children and extended family in person or through the internet; and demands or emotional blackmail from donor offspring.¹²⁴ Some donors said that to legislate ‘with retrospective effect would disrupt community confidence in Parliament and the rule of law’.¹²⁵ One donor suggested that if donors are compelled to lose their anonymity, parents should be compelled to tell their children if they were donor-conceived.¹²⁶

About half of the donors who opposed the retrospective removal of donor anonymity suggested a compromise of persuading donors voluntarily to release identifying information to donor-conceived people.¹²⁷ They were willing to supply information (often to the extent of being identified) to their donor offspring voluntarily but were unhappy with the mandatory release of identifying information. These donors advocated education and persuasion rather than

117 K R Daniels, W Kramer and M V Perez-y-Perez, ‘Semen Donors Who Are Open to Contact with Their Offspring: Issues and Implications for Them and Their Families’ (2012) 25 *Reproductive BioMedicine Online* 670.

118 2012 Committee Report, above n 9, 68.

119 *Ibid* 68–9; VARTA Report, above n 22, 17, 23–4.

120 VARTA Report, above n 22, 7.

121 *Ibid* 5, 19.

122 *Ibid* 17.

123 *Ibid* 5.

124 *Ibid* 17.

125 *Ibid* 18.

126 *Ibid* 6, 21.

127 *Ibid* 5.

compulsion. Many suggested that voluntary identification should encompass publicity urging donors to join the Voluntary Register and personal contact from an intermediary organisation seeking donor consent for release of identifying or non-identifying information to DCIs. Finally, some donors suggested the threat of releasing identifying information might dissuade them from providing non-identifying information to the Voluntary Register as this could leave a trail of identifying information.¹²⁸ This would, in turn, reduce the chances of accurate contemporaneous information release.

3 *Interests of Recipient Parents*

There is some evidence to suggest recipient parents may benefit from knowing the identity of their donor and this might encourage recipient parents to tell their children about their conception.¹²⁹ Some parents told the Parliamentary Committee that a major reason why they had not told their children was because they knew no information would be accessible and this could be very frustrating to their child.¹³⁰ There are, however, many factors that impact on disclosure decisions. Furthermore, research suggests that an intention to disclose does not necessarily translate into actual disclosure. A 2000 UK longitudinal study of donor-conceived children revealed that only half of the parents who said they would disclose when their child was one had in fact done so by the time their child was seven.¹³¹

Consultations carried out on behalf of the Nuffield Council in the UK revealed a very wide range of views by recipient parents about accessing donor information. Some had little or no interest in accessing information whereas others felt they needed detailed biological information to help their children understand themselves.¹³² A study of the Donor Sibling Registry in the UK reveals that some recipient parents of younger children have an interest in searching for their child's donor,¹³³ although the experiences of those who join a contact register may not represent the wider recipient community.¹³⁴ Reasons for searching include helping their child understand their identity, curiosity about the donor's characteristics, or to thank the donor. Knowing 'about' the donor appears to be more important than actually knowing the donor, whereas searching for and contacting donor siblings was rated very highly.¹³⁵

128 Ibid 24.

129 2012 Committee Report, above n 9, 82.

130 Ibid.

131 Jennifer Readings et al, 'Secrecy, Disclosure and Everything In-Between: Decisions of Parents of Children Conceived by Donor Insemination, Egg Donation and Surrogacy' (2011) 22 *Reproductive BioMedicine Online* 485, 488.

132 Nuffield Council on Bioethics, above n 41, 92.

133 T Freeman et al, 'Gamete Donation: Parents' Experiences of Searching for Their Child's Donor Siblings and Donor' (2009) 24 *Human Reproduction* 505.

134 Nuffield Council on Bioethics, above n 41, 68.

135 Ibid 69.

B Managing Interests under a Relational Model

It is clear from the discussion above that there are a variety of interests amongst donor conception stakeholders which become lost when the debate is framed in terms of human rights. It is also clear that much more research is needed in this area to make any solid claims about harm to DCIs. A relational approach to the welfare of DCIs is more appropriate than a human rights or harm-based approach, given existing evidence suggests that retrospective release of identifying information is likely to have a significant impact, not only on donor-conceived individuals, but also on recipients, donors and their families whose interests are intertwined. A careful evaluation of the various interests is essential to find a solution that is sensitive and responsive to the interests of all relevant parties, with a particular focus on the welfare of persons born by donor. A relational approach goes further than balancing individual rights under a human rights model as it acknowledges the *interrelationship* between the various interests at stake.

Although the welfare and interests of persons born are of paramount importance under the *ART Act*, the interests of a DCI are inevitably interconnected with those of their donor and recipient families. Referring to the consent model, the Parliamentary Committee openly ‘struggled to reconcile how the welfare and interests of a donor-conceived person can be in law both paramount *and* subordinate to donor anonymity’.¹³⁶ Rather than viewing the interests of DCIs in isolation and as outweighing all other interests, it is more accurate to view the donor-conception scenario as a complex web of interrelated interests that sometimes coincide and at other times conflict. A more nuanced framework is required to assess the welfare and interests of DCIs in the context of a broader set of interrelated interests.

A relational approach enables the interests of DCIs to be viewed in connection with the interests of donors, recipient parents and their families. As the Nuffield Council points out, many of the interests in donor conception ‘arise specifically in the context of the relationships (actual and potential) that may exist between the different parties’.¹³⁷ The Nuffield Council opted to consider the issues surrounding donor conception in terms of interests and values rather than rights for the following reasons:

the language of rights is often perceived as one of conflict: of asserting the claims of one individual against another, with the intention that the rights of one will be held to ‘trump’ or extinguish the rights of the other. It is also a language that encourages a focus on the individual: of one person’s rights being isolated and pitted against another’s. And yet ... a fundamental feature of all families (whether created through donor conception or otherwise) is that of complex, interweaving relationships, where action taken by one person, or impacting on one person, will have inevitable effects both on others and on the relationships between them. The language of ‘interests’, by contrast, offers a less adversarial tool for exploring what is at stake for the many different parties to donor conception and in the

136 2012 Committee Report, above n 9, 74 (emphasis in original).

137 Nuffield Council on Bioethics, above n 41, xix.

relationships that exist between them, and for identifying where interests coincide, as well as where they conflict.¹³⁸

The LCAR Committee on donor conception in Australia took a similar view, specifically acknowledging that ‘an approach that focuses on “rights” may not be of great assistance in this context’.¹³⁹ The NSW Legislative Assembly Committee on Law and Safety also took the view that ‘it was necessary to assess the needs and responsibilities of all parties to the donor conception arrangement on their own merit, rather than comparing them in terms of competing “rights”’.¹⁴⁰ In the analogous context of genetic parentage testing, the Australian Law Reform Commission (‘ALRC’) and the Australian Health Ethics Committee (‘AHEC’) proposed an alternative to a human rights approach, which involved ‘careful balancing of interests of mothers, fathers and children in different biological and social relationships with each other’.¹⁴¹

V WHY A CONSENT MODEL?

Legislative reform ought to be based on sound empirical evidence and a clear ethical framework, particularly when it operates retrospectively by removing donor anonymity. To date, the proportion of DCIs who specifically want identifying information about their donors is unknown. As noted above, many of the concerns raised by DCIs were addressed by the consent model in 2015 through the provision of non-identifying donor information, including medical history, donor characteristics, and details of half-siblings. Clearly some DCIs have a specific desire for identifying information about their donor, such as a name, date of birth and address. However, there is little evidence that this information, even if it were easily available, would satisfy the underlying interests of DCIs and justify the retrospective removal of donor anonymity.

The new model under the most recent reforms represents a binary approach to balancing the rights of DCIs to identifying information against the rights of donors and their families to privacy, with the former taking precedence over the latter. Not only is this approach unlikely to deliver what it promises but it also presents a genuine threat to the relationships between relevant stakeholders, which lie at the heart of donor conception. As the Nuffield Council observed:

donor conception is first and foremost about people ... ‘People’, in turn, do not exist in isolation but within a web of relationships with one another ... More broadly, of course, roles and relationships evolve and change over time in all families and communities.¹⁴²

138 Ibid 88.

139 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Donor Conception Practices in Australia* (2011) 88.

140 Legislative Assembly Committee on Law and Safety, *Managing Donor Conception*, above n 17, 50.

141 Australian Law Reform Commission and Australian Health and Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003) vol 2, 861–2 (emphasis altered).

142 Nuffield Council on Bioethics, above n 41, 87 (emphasis altered).

Viewing the welfare of DCIs through a relational lens enables their interests to be considered alongside those of donors and their families and recipient parents, thereby promoting the very relationships that are at stake in donor conception. A relational model also emphasises the need for a flexible approach to accommodate the longitudinal needs of individuals as their relationships change and evolve over time. Millbank recommends adapting ‘current structures into a more flexible and responsive system capable of operating both prospectively and retrospectively’.¹⁴³ The remainder of this Part outlines how a consent model better addresses the interrelated interests of all donor conception stakeholders than the new model.

A Limitations of New Model

The right of all DCIs under the new model to identifying donor information in the form of a name, date of birth and past address is unlikely to meet many or possibly even any of the underlying interests of DCIs. The interests of DCIs, donors and their families and recipient parents outlined above vary significantly, even within these discrete groups. Furthermore, while some interests between different groups potentially conflict, there is scope for convergence of those interests.

The evidence available about the interests of DCIs is limited and inconclusive. Not all DCIs want information about their donors and, for those who do, there is significant variance in the nature of information they are seeking. For those DCIs who specifically want identifying information, various reasons are cited in the anecdotal and qualitative research. The interests behind the desire of DCIs for identifying information range from mere curiosity about their donor to developing a meaningful relationship with their donor. A predominant thread running through the desire for identifying donor information is understanding one’s individual narrative, which some see as essential to the formation of their identity.

Blunt instruments, such as a right of access to information and formal contact preferences, are arguably of limited value in this highly relational context of donor-conception and not conducive to good relationships. Retrospectively removing donor anonymity and curtailing the ability of donor-conceived persons to make contact with their donors under the threat of civil penalties (where a contact preference is lodged) frames the relationship between donors and their donor-conceived offspring as one of ‘angry and betrayed’ people and their ‘stalkers’.¹⁴⁴ Some donors have suggested that such a system would be too hard on the donor-conceived person or that donors would be demonised if they took legal action to prevent contact.¹⁴⁵ Moreover, the proliferation of social media creates difficulties in the enforcement of contact preferences.

143 Jenni Millbank, ‘Identity Disclosure and Information Sharing in Donor Conception Regimes: The Unfulfilled Potential of Voluntary Registers’ (2014) 28 *International Journal of Law, Policy and the Family* 223, 223.

144 These phrases were used by donors in the VARTA consultation: VARTA Report, above n 22, 27, 53.

145 *Ibid* 23–4.

Finally, identifying information may not be available as record keeping prior to 1988 was inconsistent. The Parliamentary Committee heard evidence that records were sometimes destroyed and that existing records might be incomplete and unreliable.¹⁴⁶ Thus, even if donor-conceived people are granted access to existing identifying information as of right, they may not receive sufficient and/or accurate information to understand their personal narrative. A supported and flexible approach to *information sharing* is likely to be more fruitful in the highly personal and emotionally charged area of donor conception.

B Benefits of Consent Model

The consent model outlined in Part II has the potential to address many of the underlying interests of DCIs without necessarily disclosing identifying information and whilst remaining sensitive to the interests of donors and their families and recipient parents. First, non-identifying information may be able to offer sufficient narrative information about a donor to help a DCI address identity issues, particularly with the support of a counsellor.¹⁴⁷ Furthermore, an individual's personal narrative is ongoing, which means that contemporaneous information is likely to be more important than identifying information such as a name, date of birth or address. Given past inconsistent record-keeping practices, the most effective way to obtain relevant contemporaneous information is by contacting donors directly. Even where information may have been accurately recorded at the time, it may be of limited benefit as donors are likely to have changed residence. Thus, donor-conceived people who are granted access to existing identifying information as of right have no guarantee that they will receive sufficient and/or accurate information to understand their personal narrative.

Secondly, respectful donor-linking services that are responsive to the interests of all relevant parties are more likely to encourage individuals to exchange information and potentially develop relationships organically, rather than being forced. Evidence from donors consulted by VARTA suggests that many who are opposed to the release of identifying information would be open to sharing information with their donor offspring if they are encouraged and supported, rather than forced. Experience under the previous consent model for 1988–97 donations suggests that most donors are likely to provide information once the motives of those seeking the information are explained.¹⁴⁸ In its submissions to the Parliamentary Committee, the Victorian Infertility Counsellors Group ('VICG') advised most donors who are given support and

146 2012 Committee Report, above n 9, 29–30.

147 Turner and Coyle, above n 54, 2050.

148 Louise Johnson, Kate Bourne and Karin Hammarberg, 'Donor Conception Legislation in Victoria, Australia: The "Time to Tell" Campaign, Donor-Linking and Implications for Clinical Practice' (2012) 19 *Journal of Law and Medicine* 803, 817. See also Victorian Infertility Counsellors Group, Submission No 64 to Law Reform Committee, Parliament of Victoria, *Inquiry into Access by Donor-Conceived People to Information about Donors*, 12 August 2011 ('VICG Submission'); Evidence to Law Reform Committee, Parliament of Victoria, Melbourne, 12 September 2011, 28 (Marianne Tome, Victorian Infertility Counsellors Group).

information about making decisions agree to give information even if they do not want to be identified.¹⁴⁹ The willingness of donors to provide information about themselves voluntarily was reinforced anecdotally in the evidence provided by donors to the Parliamentary Committee. Of the nine donors who made submissions to the Committee, eight supported providing non-identifying information and six were open to the release of identifying information.¹⁵⁰ This attitude towards providing information is reinforced by the fact that currently more donors are registered on the Voluntary Register than donor-conceived people.¹⁵¹

Finally, a key feature of the trauma experienced by DCIs who are unable to obtain identifying information about their donor is frustration with the process. Counselling offers therapeutic benefits for donors and DCIs who are navigating this difficult terrain. According to the VICG, the release of donor information should be handled in a 'respectful and confidential manner that acknowledges the context in which the donor originally consented to donation'.¹⁵² The VICG stressed that 'counselling ... should be available for all individuals involved throughout the linking process'.¹⁵³ Several studies have highlighted the importance of a third party in providing support to donor-conceived persons in their searches and for mediating contact with donors.¹⁵⁴ Process was also highlighted by VARTA's donor consultation, with some donors stating they would consent to the release of information if asked but felt that it was wrong for this information to be compelled by legislation.¹⁵⁵ Several donors specifically mentioned the previous donor-linking services model provided by the former ITA as a positive support service in relation to information exchange.¹⁵⁶

The consent model balances the interests of DCIs in accessing identifying information about their donor with the interests of donors in maintaining their privacy and also respecting the interests of recipients and donor families in being protected from potential unwanted interference. Moreover, offering donors counselling prior to the release of information increases the likelihood that DCIs will gain access to relevant contemporaneous information about their donor. Contemporaneous donor information is more likely to help DCIs understand their personal narrative and overcome identity issues than a name, date of birth and (potentially outdated) address. The focus of the consent model is to support all parties in the process of exchanging information through ongoing counselling. Donors who consent to the release of information could convey their views about contact without the need for legally enforceable contact preferences. Sensitive and responsive donor linking services enable parties to communicate with each

149 Evidence to Law Reform Committee, above n 148, 23 (Marianne Tome).

150 2012 Committee Report, above n 9, 68.

151 Johnson, Bourne and Hammarberg, above n 148, 816.

152 VICG Submission, above n 148.

153 Evidence to Law Reform Committee, above n 148, 23 (Marianne Tome).

154 Blyth et al, above n 70.

155 VARTA Report, above n 22, 19–21.

156 *Ibid* 31.

other in a confidential manner before identifying information is released, thereby promoting respect and trust.

VI CONCLUSION

In recent years there has been strong groundswell toward giving all DCIs equal access to identifying information about donors. In a world-first move to provide all DCIs with an unfettered right of access to identifying donor information, the Victorian government relied heavily on the report by the Parliamentary Committee. The Committee used human rights and harm-based approaches to evaluate the welfare of DCIs and justify retrospective removal of donor anonymity. In this article, I offer a third relational approach to the welfare of DCIs, which I contend is better suited to the highly relational donor conception context and enables a more realistic assessment of the various interests at stake. I argue that ultimately none of these approaches justify retrospective removal of donor anonymity on the evidence currently available.

A detailed examination of the evidence to date suggests that a consent model for the release of identifying donor information best serves the underlying interests of all parties. In particular, the various interests of DCIs are more likely to be satisfied by the exchange of contemporaneous information with donors on a voluntary basis through sensitive and supported donor linking services than by retrospectively removing donor anonymity under the new model that came into force in 2017. As the Nuffield Council concluded: ‘not only does retrospective legal change potentially damage the interests of some donors, it would also, in at least some cases, fail to achieve its objective of promoting the interests of donor-conceived adults’.¹⁵⁷

According to the Nuffield Council, ‘measures that aim to support, encourage and empower those making decisions are preferable to measures that seek to remove choice’.¹⁵⁸ Applying this reasoning, a consent model providing for donor education and awareness, offering counselling to all relevant parties, and establishing supportive donor linking services represents an optimal way forward in the relational minefield of information disclosure in the donor conception context.

Given the potential limitations and pitfalls associated with retrospectively releasing identifying donor information under the new model, it would be wise to proceed with caution. In particular, the efficacy and outcomes of the new model should be carefully monitored over the coming months and years. As the primary provider of donor linking services to key stakeholders, VARTA will play a central role in educating and supporting DCIs seeking information about their donors. Although all DCIs now have a right to access identifying donor information, the location of records created prior to the establishment of the Central and Voluntary Registers is unclear. This is likely to lead to frustration

¹⁵⁷ Nuffield Council on Bioethics, above n 41, 132.

¹⁵⁸ *Ibid* xxvi.

and disappointment for many DCIs. VARTA is currently coordinating research into the status of donor-conception records of clinicians, clinics and hospitals that carried out donor insemination in the 1970s and 1980s. This information should hopefully help DCIs navigate their way through the historical maze of donor conception prior to 1988.

Further empirical research is also needed to build a stronger understanding of the impacts of donor linking on DCIs, donors and their families, and recipient parents. This information should be used to critically evaluate current practices with a view to developing and improving donor linking law and policy in the future. Empirical investigations should be guided by what existing research reveals about the various underlying interests of DCIs, donors and recipient parents. This work should also be informed by a clear theoretical understanding of how the welfare of DCIs is conceptualised and assessed. This article argues that, based on current evidence about the interests of donor stakeholders, a relational approach to the welfare of DCIs is the most appropriate framework for addressing the complex and interrelated interests in donor conception.