SHOULD I LIE TO YOU? A REVIEW OF VICTORIA'S LAW REGARDING DISCLOSURE OF SURROGACY ARRANGEMENTS TO THE CHILDREN THEY PRODUCE: IS IT COMPLIANT WITH THE *CONVENTION ON THE RIGHTS OF THE CHILD*?

MEGHAN BUTTERFIELD

This paper discusses the rights of children born via surrogacy arrangements ('surrogate children') in Victoria to be given information about the existence of the surrogate. Relevant provisions of the Assisted Reproductive Treatment Act 2008 *(Vic) are analysed to show that donor-conceived children and surrogate children are treated differently when it comes to access to information regarding their heritage and birth which is based on a narrow conceptualisation of genetics and biology. By failing to take reasonable measures to ensure intended parents of surrogate children inform those children of the existence of the surrogate, it is argued that Victoria fails to comply with its obligations under arts 3, 7 and 8 of the* Convention on the Rights of the Child.

I INTRODUCTION

In terms of assisted reproduction, much has been written about the rights of donor-conceived children in Victoria under international human rights law to access information regarding their genetic heritage. Similarly, a great deal of literature[1] has been dedicated to the morality and legality of 'compensated' (also referred to as 'commercial') surrogacy from the perspective of the rights of the child — most notably, whether such a surrogacy arrangement involves the 'sale' of a child in contravention of art 35 of the *Convention on the Rights of the Child*

1 See, eg, Jenni Millbank, 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12(3) *Journal of Bioethical Inquiry* 477; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (Report, April 2016); John Tobin, 'To Prohibit or Permit: What Is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63(2) *International and Comparative Law Quarterly* 317 ('To Prohibit or Permit'); Ronli Sifris, Karinne Ludlow and Adiva Sifris, Castan Centre for Human Rights Law, Submission No 19 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Surrogacy Arrangements* (8 February 2016).

('*CRC*')[2] and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.[3] However, there appears to be a gap in the literature which warrants examination — what are the rights of a child born to a 'gestational surrogate' in Victoria (where donor eggs or sperm are not used) to be given information about the nature of their conception? A 'gestational surrogate' (also known as a 'gestational carrier') is a woman who carries a pregnancy and gives birth to a child for another woman or couple, who are often known as the 'intended parent/s' or 'commissioning parents'.[4] (The term 'intended parents' ('IPs') will be used in this paper).[5] The pregnancy is conceived with the surrender of the child as its core aim. For a woman to act as a gestational surrogate, an embryo, created by the process of in vitro fertilisation ('IVF') is implanted in her womb.[6] A gestational surrogate does not have a genetic relationship to the embryo she carries. The embryo may have been created by gametes[7] from the IPs or from donors. This paper is concerned only with surrogacy involving a child who is the product of gametes from the IPs. Put simply, this paper will examine the rights of children who are genetically related to their IPs and were born with the assistance of a gestational surrogate. For descriptive ease, such children will be referred to as 'surrogate children'.

By way of background, this paper will examine the laws of Victoria relating to surrogacy. It will also look at relevant Victorian law pertaining to donor-conceived children, as there is significant overlap in the issues from a child rights perspective. Specifically, the paper will address the differences in which parentage is recognised and achieved for children born via surrogacy as distinct from donor-conceived children, together with the recording and availability of information relating to their conception and heritage. Essentially, this examination will reveal that donor-conceived children are treated very differently to children born via a gestational carrier when it comes to access to information. It seems the law draws significant distinctions based on 'biology'. Emerging evidence of the role played by gestation in the biological development of a child will also be explored.

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

3 *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).

4 Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Interim Report of the Independent Review of Assisted Reproductive Treatment* (Report, October 2018) <https://www2.health.vic.gov.au/hospitals-and-health-services/patient-care/perinatal-reproductive/assisted-reproduction/regulatory-review> ('*ART Interim Report*'). Recommendation 16 stated: '[I]t is recommended that references to "commissioning parents" in the [*Assisted Reproductive Treatment Act 2008* (Vic)] be replaced with the term "intended parents"': at 87.

5 Melissa Conrad Stöppler, 'Medical Definition of Gestational Carrier', *MedicineNet* (Web Page, 30 October 2019) <https://www.medicinenet.com/script/main/art.asp?articlekey=125276>.

6 Ibid.

7 'Gamete' is the general term used for a reproductive cell. The male gamete is sperm and the female is an egg or ovum (ova in the plural).

This paper will then analyse the relevant articles of the *CRC* to argue that Victoria has a positive obligation to ensure children born via gestational surrogacy are informed of the nature of their conception and that this information should come from their parents.[8] The implications of this for Victorian law and the manner in which these obligations may be operationalised will be addressed. In essence, it is the thesis of this paper that Victoria's current surrogacy laws, insofar as they relate to disclosure to resultant children regarding the nature of their conception, do not comply with arts 3, 7 and 8 of the *CRC*. In light of this, the paper considers what changes could be made to ensure compliance.

II THE LAW RELATING TO SURROGACY IN VICTORIA

A *Is Surrogacy Legal?*

Surrogacy has been practised since biblical times.[9] In its 'traditional' form, the surrogate mother used her own egg. More recently, and with advancements in assisted reproductive techniques and the possibilities that have been generated by infertility treatment,[10] the nature of surrogacy has evolved, and the genetic material of IPs can be used in place of the surrogate mother's own egg. These technological developments have generated an enormous amount of debate regarding whether surrogacy should be legal. Most of the debate has centred around the 'evils' of compensated surrogacy in terms of possible exploitation of the surrogate and whether surrogacy amounts to the sale of a child, contrary to international human rights law.[11]

The myriad issues surrounding surrogacy have been teased out in painstaking detail in various forums over recent years, including in law reform commissions and other inquiries, in what has been described as a 'paroxysm of inquiry and reform'.[12] As much as entering into a discussion surrounding the merits and pitfalls

8 The term 'parents' in this context means IPs. This presumes that the legal status of the IPs has been recognised in accordance with Victorian law. The legal requirements leading to this recognition are discussed in detail in Part II(C) of this paper.

9 In the 'Book of Genesis', the story of Sarah and Abraham speaks about Sarah, who was unable to conceive a child of her own, turning to her servant Hagar to be the mother of Abraham's child: 'From the Bible to Today: The History of Surrogacy', *Surrogate.com* (Web Page) <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy>.

10 Prior to IVF developments, the surrogate was impregnated via intercourse or using self-insemination techniques: see 'What Is Traditional Surrogacy?', *Surrogate.com* (Web Page) <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-traditional-surrogacy>.

11 For a taste of the opposing views regarding this debate, see Tobin, 'To Prohibit or Permit' (n 1); Sifris, Ludlow and Sifris, Castan Centre for Human Rights Law (n 1).

12 Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35(1) *Melbourne University Law Review* 165, 166.

of surrogacy generally is enticing, it is outside the ambit of this paper.[13] Suffice to say that, in Victoria, the upshot of the various inquiries was the enactment of the *Assisted Reproductive Treatment Act 2008* (Vic) ('*ART Act*'), which included surrogacy provisions in pt IV. The *ART Act* commenced on 1 January 2010. The state body responsible for administering various aspects of the *ART Act* is the Victorian Assisted Reproductive Treatment Authority ('VARTA').[14]

Legislative competence in respect of surrogacy arrangements remains with states and territories. Essentially, 'altruistic' surrogacy is legal, and compensated surrogacy is prohibited in Victoria (as in all Australian states and territories except Northern Territory which has no legislation regarding surrogacy).[15] However, as an aside, some scholars argue that this binary analysis is fallacious as, though compensated, most surrogates are primarily motivated by a desire to help others build their family.[16]

Despite the prohibition on 'compensated' surrogacy arrangements, money can still change hands under 'altruistic' arrangements in Victoria, as reimbursement of prescribed costs incurred as a direct result of surrogacy arrangements is permitted.[17]

Under Victorian law, 'altruistic' surrogacy arrangements (which fit a prescribed model as detailed below) are *legal* but not *enforceable*. Hence, if a gestational surrogate changes her mind and refuses to surrender the baby, IPs are without legal recourse. Alternatively, IPs cannot be compelled to take the child if they choose to renege on the arrangement.

As gestational surrogacy implicitly involves the use of an egg from a woman other than the surrogate herself, assisted reproductive treatment ('ART') is imperative to the process. Under the *ART Act*, 'a registered ART provider may carry out a treatment procedure on a woman under a surrogacy arrangement only if the surrogacy arrangement has been approved by the Patient Review Panel' ('PRP').[18]

13 However, the author does note that children born to international commercial surrogacy arrangements are especially disadvantaged from a child rights perspective in that the courts in Australia have been reluctant to recognise the legal status of their IPs: see, eg, *Bernieres v Dhopal* (2017) 324 FLR 21. There is strong argument to say that this approach contravenes a child's right to have their best interests furthered as well as respect for identity, family and private life. However, as already stated, a discussion of these issues is outside the scope of this paper.

14 Information regarding the role of VARTA can be found at *VARTA: Victorian Assisted Reproductive Treatment Authority* (Web Page) <https://www.varta.org.au>.

15 'Commercial' surrogacy arrangements are explicitly prohibited in all states and territories (except NT): see *Assisted Reproductive Treatment Act 2008* (Vic) ('*ART Act*'); *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Family Relationships Act 1975* (SA); *Surrogacy Act 2012* (Tas); *Surrogacy Act 2008* (WA).

16 Sifris, Ludlow and Sifris, Castan Centre for Human Rights Law (n 1) 18.

17 *Assisted Reproductive Treatment Act 2008* (Vic) s 44. Recommendation 14 of the *ART Interim Report* recommends expanding payment beyond the prescribed categories of reimbursable items to allow reimbursement of 'reasonable costs that are incurred by the surrogate where the costs would not have been incurred but for the surrogacy arrangement': see *ART Interim Report* (n 4) 86.

18 *ART Act* (n 15) s 39.

B *What Are the Requirements to Have a Surrogacy Arrangement Approved by the PRP?*

Before approving a surrogacy arrangement, the PRP must be satisfied that a number of requirements have been met:

> (a) that a doctor has formed an opinion that—
>
> (i) in the circumstances, the commissioning parent is unlikely to become pregnant, be able to carry a pregnancy or give birth; or
>
> (ii) if the commissioning parent is a woman, the woman is likely to place her life or health, or that of the baby, at risk if she becomes pregnant, carries a pregnancy or gives birth;
>
> (ab) that the surrogate mother's oocyte [ovum] will not be used in the conception of the child;
>
> (ac) that the surrogate mother has previously carried a pregnancy and given birth to a live child;
>
> (b) that the surrogate mother is at least 25 years of age;
>
> (c) that the commissioning parent, the surrogate mother and the surrogate mother's partner, if any, have received counselling and legal advice …
>
> (d) that the parties to the surrogacy arrangement are aware of and understand the personal and legal consequences of the arrangement;
>
> (e) that the parties to the surrogacy arrangement are prepared for the consequences if the arrangement does not proceed in accordance with the parties' intentions …
>
> (f) that the parties to the surrogacy arrangement are able to make informed decisions about proceeding with the arrangement.[19]

Additionally, the IPs and the surrogate must have undergone child protection and criminal record checks.[20]

Furthermore, the *ART Act* prohibits any form of advertising from IPs or potential surrogates stating they are willing to engage in a surrogacy arrangement (albeit altruistic).[21] Criminal penalties including a term of imprisonment attach to advertising

19 Ibid s 40.

20 Ibid s 42.

21 Ibid s 45.

prohibitions.[22] These provisions create many 'hoops' through which IPs must first jump before any surrogacy arrangement may be approved. Once these numerous hurdles have been overcome and a baby is born via a surrogacy arrangement, what does Victorian law then say about who is the 'parent' of the child?

C *How Is the 'Parentage' of a Child Born via a Surrogate Arrangement Determined?*

Upon birth, the gestational surrogate and her partner (if any) are the legal parents of the child,[23] even where the gametes were provided by the IPs. In order to be legally recognised as parents, the IPs must apply to the County or Supreme Court of Victoria[24] ('the court') for a 'substituted parentage order' ('SPO').[25] This application must be made no less than 28 days and no more than 6 months after the child is born.[26] In order to be eligible for a SPO, the IPs must show that they have complied with the requirements under the *ART Act*.[27]

The *Status of Children Act 1974* (Vic) ('*SOC Act*') then imposes further requirements to be satisfied before the court may recognise the IPs' status as legal parents:

- that the SPO is in the best interests of the child;[28]
- that the PRP approved the surrogacy arrangement before it was entered into;[29]
- that the child was living with the IPs at the time of the application to the court;[30]
- that the surrogate mother and her partner (if any) consent to the SPO;[31]
- that the surrogate mother and her partner (if any) received no material benefit.[32]

It is only once all of the above requirements have been met that the IPs can be legally acknowledged as 'parents' via the SPO.

22 240 penalty units or two years imprisonment: ibid.
23 *Status of Children Act 1974* (Vic) s 19 ('*SOC Act*').
24 Ibid s 18.
25 Ibid s 20(1).
26 Ibid s 20(2)(a).
27 Ibid s 22(1)(b).
28 Ibid s 22(1)(a).
29 Ibid s 22(1)(b).
30 Ibid s 22(1)(c).
31 Ibid s 22(1)(e).
32 Ibid s 22(1)(d).

D *Practically, How Is the Transfer of Parentage Effected?*

Ordinarily, upon the birth of a child in Victoria, the birth must be registered within 60 days by the parents sending a 'Birth Registration Statement' (issued by the hospital) to the Registry of Births, Deaths and Marriages ('BDM Registry').[33] Upon receipt of the information, the birth is recorded by the registry. The generation of a birth certificate is not automatic, however one may be created when ordered by the parent or, upon the attainment of 18 years, the child.[34]

Where the child is born via a surrogacy arrangement, the process is necessarily varied due to the requirements noted above regarding parentage. The surrogate mother (and her partner, if any) must submit the Birth Registration Statement using her own details. The IPs (between 28 days and 6 months after the child's birth) apply to the court for the SPO.[35] If the application is successful, the court sends a copy of the SPO to the BDM Registry[36] which creates a surrogacy reference[37] and notifies the IPs that the SPO has been received and noted. The IPs, when so notified by the BDM Registry, register the birth, quoting the surrogacy reference.[38] The BDM Registry will close the original birth record and create a new one showing the IP/s as the child's parent/s.[39] The IPs can then order a birth certificate showing the child's 'new' parents.[40] No mention of the surrogate or the surrogacy arrangement appears on the birth certificate.[41]

E *What Is Recorded about the Arrangement?*

As the preceding discussion shows, at least four state government organisations, being the PRP, the court, VARTA and the BDM Registry, will have records of the surrogacy arrangement. The PRP and court 'files' contain relevant filed

33 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 18(1) ('*BDMR Act*').

34 Conversation with the Registry of Births, Deaths and Marriages (Meghan Butterfield, 6 December 2018).

35 *SOC Act* (n 23) s 20(2)(a).

36 Ibid s 31(1)(a).

37 *BDMR Act* (n 33) s 19A(1)(a).

38 Conversation with the Registry of Births, Deaths and Marriages (Meghan Butterfield, 6 December 2018).

39 *BDMR Act* (n 33) s 19A(1)(b).

40 Conversation with the Registry of Births, Deaths and Marriages (Meghan Butterfield, 6 December 2018).

41 Ibid. There are similarities and differences in the legislation between the UK and Victoria. When a surrogate child is born in the UK, the birth mother is the legal mother of the child, as is the case in Victoria. The IPs must obtain a Parental Order, making them the legal parents of the child, with the birth mother's consent — again, as is the case in Victoria. However, in the UK, when this occurs, the child's birth will be re-registered as an entry in the Parental Order register. The Parental Order register contains the particulars of the Parental Orders made by the court. A 'full' birth certificate based on the Parental Order register supersedes the original birth certificate and shows only the re-registered details of the person. It has no information that relates back to the original birth entry. However, anyone can search the Parental Order register, including a child in certain prescribed circumstances. In this way, information about the surrogacy arrangement may be uncovered. This varies to the situation in Victoria which will be discussed Part II(E) of this paper. For the birth certificate requirements in the UK, see *Deed Poll Office* (Web Page) <www.deedpolloffice.com>.

documents and orders made approving the surrogacy arrangement and any parentage orders flowing therefrom. What about the BDM Registry? Under s 19A of the *Births, Deaths and Marriages Registration Act 1996* (Vic) ('*BDMR Act*'), once the court has provided a sealed copy of the SPO to the BDM Registry, the BDM Registry must record the prescribed particulars of the surrogacy in a Surrogate Birth Register and mark the Register with the words 'closed-surrogate' against the original birth entry. However, as noted above, no note is made on the birth certificate itself. But what about VARTA? VARTA keeps and manages a central register in accordance with the ART legislation.[42] Under s 49 of the *ART Act*, a registered ART provider must keep records in relation to, inter alia:

- 'each woman on whom the registered ART provider carries out a treatment procedure and the woman's partner, if any';[43]
- 'any treatment procedure carried out on a woman by the registered ART provider';[44] and
- 'the use of gametes or an embryo in a treatment procedure carried out by the registered ART provider'.[45]

However, there is no requirement under the *ART Act* that this information be provided to VARTA for inclusion in the central registry. That is, in relation to gestational surrogacy particulars, these records will be held in the rooms of various participant doctors, but there is no mandate for the records to become part of VARTA's registry.

F *How Many Surrogacy Arrangements Are Approved in Victoria?*

Given the complexities of the state's surrogacy laws and the risks relating to issues around parentage, unsurprisingly, few surrogacy arrangements have been submitted to and approved by the PRP. Since 2010 numbers have, however, been increasing. In 2010, five surrogacy arrangements were approved by the PRP. In 2015, there were 27 and in 2016, 30 such arrangements received approval.[46] Of these figures, it is not noted whether applicants were heterosexual or same-sex

42 *ART Act* (n 15) s 53.

43 Ibid s 49(1)(d).

44 Ibid s 49(1)(e).

45 Ibid s 49(1)(f).

46 'Patent Review Panel: Statistics and Previous Decisions', *Health.vic* (Web Page) <https://www2.health.vic.gov.au/hospitals-and-health-services/patient-care/perinatal-reproductive/assisted-reproduction/statistics-and-decisions>. At the time of writing this paper, the 2017, 2018 and 2019 statistics had not been published on the Department of Health and Human Resources ('DHHS') website and a request was made for these figures but no response was received.

couples (or indeed, single applicants).[47] This is relevant to the issue of disclosure to a child born to a surrogate as the issue is impossible to hide from children where the IPs are a male same-sex couple.

Although restrictive state laws are causing many infertile couples to pursue surrogacy overseas,[48] there are still a number of children born each year in Victoria via gestational surrogacy arrangements and hence, an examination of their right to information is called for. In 2016–17, 13 children were born to surrogacy arrangements in Victoria.[49] Given only gestational surrogacy arrangements are permitted in Victoria, it is implicit that none of these children had a genetic connection to the surrogate. It is argued that all children born to a surrogacy arrangement, whether traditional or gestational have a right to information regarding the surrogate however, children born via gestational surrogacy arrangements are overlooked given the lack of genetic connection between the surrogate and child. It seems the Victorian legislature places importance on a genetic connection. This can be illustrated by the way in which Victoria's laws relating to donor-conceived children differ from those relating to children born under local surrogacy arrangements.

III THE LAW RELATING TO DONOR-CONCEPTION IN VICTORIA — HOW IS IT DIFFERENT?

A *What Is Donor-Conception?*

Donor conception involves the use of donor gametes (sperm or eggs) and embryos to conceive a child. Donor sperm has been used to treat couples with male infertility since at least the 1960s, whereas egg and embryo donation became possible with the advent of IVF some 25 years ago. Until the 1980s, 'a culture of secrecy about using donor sperm prevailed and gamete donation was anonymous'.[50]

47 This information is retained by the DHHS but not published. A request was made for this information but a response was not received.

48 Statistics indicate that 92% of Australians engaging in surrogacy do so outside Australia: Sam G Everingham, Martyn A Stafford-Bell and Karin Hammarberg, 'Australia's Use of Surrogacy' (2014) 201(5) *Medical Journal Australia* 270, 270.

49 VARTA: Victorian Assisted Reproductive Treatment Authority, *Annual Report 2018* (Report, 2018) 30.

50 Louise Johnson and Kate Bourne, Victorian Assisted Reproductive Treatment Authority and Karin Hammarberg, Maggie Kirkman and Jane Fisher, Monash University, *Consultation with Donors Who Donated Gametes in Victoria, Australia before 1998: Access by Donor-Conceived People to Information about Donors* (Report, May 2013) 8 <https://www.varta.org.au/resources/publications/donor-consultation-report>, citing Louise Johnson, Kate Bourne and Karin Hammarberg, 'Donor Conception Legislation in Victoria, Australia: "Time to Tell" Campaign, Donor-Linking and Implications for Clinical Practice' (2012) 19(4) *Journal of Law and Medicine* 803, 804.

B *Is Donor-Conception Legal?*

Conception through donor gametes is legal in Victoria (and all Australian jurisdictions). In Victoria, the use of donor gametes is regulated under the *ART Act*. Section 16 provides for donor gametes to be used provided the donor consents to their use, taking into account that information regarding donor identity may be provided to children conceived as a result of the donation.[51]

C *How Is the 'Parentage' of a Child Born via Donor-Conception Determined?*

Under the *SOC Act*, the genetic link between donor and child is severed and parentage is instead endowed on the IPs via statutory presumption.[52] That is, where a donor ovum is used, notwithstanding that the birth mother has no genetic connection to the child she carries, she is presumed to be the legal parent of that child. Hence, no application for a SPO is required.

D *What Is Recorded about the Conception?*

As noted earlier, ART providers must keep records about donor-conceived children. However, unlike surrogate children, ART providers have a statutory obligation to provide prescribed information regarding the conception to VARTA.[53] VARTA manages a central register to store this information.[54] The register records a variety of identifying information (ie name, date of birth, telephone number) and non-identifying information (eg hair colour, interests, occupation, education or gender, month and year of birth of people born from the same donor).[55]

There has been significant law reform in this area in recent years following countless reviews by various bodies regarding what information should be available to donor-conceived children.[56] Following extensive examination of the issues, ground-breaking Victorian laws were introduced so that all donor-conceived people are entitled to receive identifying information (name, date of

51 *ART Act* (n 15) ss 16–19.

52 *SOC Act* (n 23) ss 10D–10E.

53 *ART Act* (n 15) s 51.

54 Ibid s 53.

55 'The Central Register', *VARTA: Victorian Assisted Reproductive Treatment Authority* (Web Page) <https://www.varta.org.au/information-support/donor-conception/donor-conception-register-services/donor-conception-registers-0>.

56 Most notably, see Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Donor Conception Practices in Australia* (Report, February 2011); Law Reform Committee, Parliament of Victoria, *Inquiry into Access by Donor-Conceived People to Information about Donors* (Interim Report, September 2010).

birth and donor code) regarding their donor.[57] Donors who donated before 1998 can lodge a contact preference specifying the type of contact they are prepared to have with donor offspring, which may include a preference for no contact. Contact preferences create legal obligations on the donor-conceived person. The new legislation covers people born before 1988, when sperm and egg donations in Victoria were made anonymously, and those born from egg, sperm or embryos donated between 1988 and 1998, when donor's consent was needed before their offspring could access information about them.[58]

The rationale for the provision of information about a person's history is largely based on the need for a person to know of any genetic issues that may be relevant to their health and well-being, as well as the need for awareness of the existence of relatives or family members. Although donors, whenever conceived, now enjoy an 'even playing field' in relation to the accessibility of information, there are restrictions on who may apply to access the information held on VARTA's central registry. A donor-conceived person, the parent or descendant of a person so conceived or a donor may apply for access to the information held on the register.[59] If the donor-conceived person is a child at the time of the application, information may be disclosed with parental consent or, where that consent is not forthcoming, the child may receive the information if a counsellor has provided counselling and is of the view that the child 'is sufficiently mature to understand the consequences of the disclosure'.[60] In that way, the *ART Act* provides an alternative mechanism for donor-conceived children finding out information about their donor, in the event that parents are adverse to it.

So, what then is recorded by the BDM Registry in relation to a donor conceived child? In accordance with the *BDMR Act*, the words 'donor conceived' must be entered against the child's birth in the Registry.[61] Additionally, when a birth certificate is requested certifying the birth particulars contained in the registry, 'the Registrar must attach an addendum to the certificate stating that further information is available about the entry'.[62]

57 *Assisted Reproductive Treatment Amendment Act 2016* (Vic) ('*Amending Act*') which came into force on 1 March 2017.

58 For a useful summary of the recent legislative changes, see Karin Hammarberg and Louise Johnson, 'Victoria's World-First Change to Share Sperm or Egg Donors' Names with Children', *The Conversation* (online, 1 March 2017) <https://theconversation.com/victorias-world-first-change-to-share-sperm-or-egg-donors-names-with-children-72417>.

59 *ART Act* (n 15) s 56.

60 Ibid s 59(b)(ii).

61 *BDMR Act* (n 33) s 17B(1).

62 Ibid s 17B(2).

E *How Do the Rules Differ for Surrogate and Donor-Conceived Children?*

Although the *ART Act* provides an avenue by which offspring of donors may access information regarding their conception and genetics (by virtue of donor information), even prior to these children turning 18, no such pathway exists for children born under a surrogacy arrangement. VARTA is not obliged to keep a register of information relating to surrogacy arrangements in the same way that it does information pertaining to donor conception. The BDM Registry records information regarding donor conception and surrogacy arrangements, however only donor-conceived children are given an addendum noting that the registry holds further information pertaining to their birth. In this way, only donor conceived children are 'tipped off' to the fact that their conception may not be 'the norm'.

Fundamentally, the Victorian legislation places greater importance on donor-conceived children having access to information regarding their conception and 'biology' than children born via a gestational surrogate. Although the *ART Act* governs both surrogacy and donor conception, the guiding principles of the legislation state only that 'children born as the result of the use of donated gametes have a right to information about their genetic parents'.[63] Further, VARTA plays an active role in educating parents of donor-conceived children of the importance of 'openness' and disclosure. The VARTA website has a generous library of written and video resources to assist parents of donor-conceived children to talk to their children about their conception.[64] 'Genes', it would seem, are central to the entitlement to information. However, it may be overly simplistic to draw this line in the sand and to categorise surrogate and donor children in such binary terms, particularly in light of the emerging evidence discussed in Part IV of this paper.

IV THE EMPHASIS ON BIOLOGY

In February 2016, the Victorian Parliament passed legislation enabling all donor-conceived children to receive identifying information about their donors.[65] Referred to as 'Narelle's law', the legislation acknowledged the death of Narelle

63 *ART Act* (n 15) s 5(c).

64 See, eg, Ken Daniels, 'Contact between the Parties: What the Research Is Beginning to Tell Us' (Speech, Melbourne Donor Linking Symposium, December 2011) <https://www.varta.org.au/resources/research/contact-between-parties-what-research-beginning-tell-us>.

65 *Amending Act* (n 57).

Grech who died in 2013 of heritable bowel cancer.[66] Ms Grech had searched for her donor for 15 years and lobbied extensively for legislative change for donor-conceived people to know their biological heritage.[67] A further impetus for the 2016 legislative amendments was the desire for donor-conceived children to know their 'diblings'[68] in part, in order to avoid sexual relationships inadvertently forming between them.[69]

The way in which the Parliament approached 'the problem' it sought to solve in the *Assisted Reproductive Treatment Amendment Act 2016* (Vic) is problematic for at least two reasons which are pertinent to the argument this paper makes. The first — it drew upon a particular, narrow conceptualisation of biology and biological effects. The second — it emphasised biology to the exclusion of culture and the importance of a child's 'narrative'.

A *Is 'Biology' as Narrow as the Victorian Parliament Supposes?*

Scientific advancements continue to provide us with a greater understanding about how our genes express themselves to shape us. The age-old 'nature versus nurture' debate lives on and gathers momentum as scientific inquiry becomes increasingly refined. When human genome sequencing[70] was completed in 2003, the scientific community thought the problem of genetic diseases had been overcome[71] however, studies on identical twins continued to highlight differences which could not be explained by the genome map alone.[72] These studies revealed that 'genetic information can be read in different ways, meaning that some parts of genetic material can be blocked (silenced) and others can be promoted (expressed)'.[73] These differences became known as 'epigenetics' a term

66 Sonia Allan, 'Donor Identification: Victorian Legislation Gives Rights to All Donor-Conceived People' [2016] (98) *Family Matters* 43, 43, citing Farrah Tomazin, 'Sperm Donor Daughter Dies after Reunion', *The Age* (online, 7 April 2013) <https://www.theage.com.au/national/victoria/sperm-donor-daughter-dies-after-reunion-20130406-2hdvd.html>.

67 Ibid.

68 'Diblings' is a slang term to describe children who are biologically connected through donated sperm or eggs: 'Dibling', *FertilitySmarts* (Web Page, 22 February 2018) <https://www.fertilitysmarts.com/definition/1553/dibling>.

69 Allan (n 66) 44, citing Senate Legal and Constitutional References Committee, Parliament of Australia, *Donor Conception Practices in Australia* (Report, February 2011).

70 Genome (all of a living thing's genetic material) sequencing refers to the process whereby the order of DNA nucleotides (or bases) in a genome — the order of As, Cs, Gs and Ts that make up an organism's DNA — is determined. The human genome is made up of over three billion of these genetic letters: see Sarah DeWeerdt, 'What's a Genome?', *Genome News Network* (Web Page, 15 January 2003) <http://www.genomenewsnetwork.org/resources/whats_a_genome>.

71 Liliana Burlibaşa and Carmen Daniela Domnariu, 'Epigenetic Landscape of Human Diseases' (2018) 23(2) *Acta Medica Transilvanica* 33, 33.

72 Ibid.

73 Ibid.

that describes the space that could not be explained by conventional science.[74] Essentially, distinct epigenetic markers decide those genes that will be expressed and those that will be silenced — '[o]nce established, epigenetic patterns are stable and are transferred to the next generation of somatic cells'.[75]

Recent years have brought with them increased activity in this field with multiple studies focussing on 'the interaction between environment and genome via epigenetic regulation'.[76] By way of example, one study showed a correlation between pre-natal exposure to environmental tobacco smoking and impaired respiratory function, respiratory infections and asthma in young children and teenagers.[77] Rudimentarily, the study illustrated that passive smoking during pregnancy resulted in genetic developmental reprogramming and imprinting which impacted the child's likelihood of developing asthma in adolescence.[78]

Notwithstanding, recognition of the gestational-genetic interface is missing in the *ART Act* — as one author states in the context of prohibition on a surrogate using her own egg, it 'entirely ignores the biological impact of the surrogate on the resulting child's genes'.[79] Law reform committees seem to have ignored this, as has the Parliament in legislation relating to surrogate children.[80]

Gestation may affect when or if genes 'trigger' later in life. Further, cells of the surrogate quite literally meld with that of the child in utero in a process known as chimerism during pregnancy.[81] In 1969, a *Lancet* paper published by Janina Walknowska, Felix Conte and Melvin Grumbach described 'finding cells with Y chromosomes circulating in the blood of women who were pregnant with male foetuses' as early as the 14th gestational week.[82] Further studies showed that

74 Ibid.

75 Ibid.

76 Ibid 35.

77 Rosa Alati et al, 'In Utero and Postnatal Maternal Smoking and Asthma in Adolescence' (2006) 17(2) *Epidemiology* 138, 138, cited in Lucian Gavrila et al, 'Epigenetics in Relation to Environmental Pollution, Nutrition and Pathogenesis' (2009) 14(6) *Romanian Biotechnological Letters* 4769, 4770–1.

78 Alati et al (n 77) 138; see also Gavrila et al (n 77).

79 Karinne Ludlow, 'Genes and Gestation in Australian Regulation of Egg Donation, Surrogacy and Mitochondrial Donation' (2015) 23(2) *Journal of Law and Medicine* 378, 387.

80 See Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (Report No 38, May 2009); Investigation into Altruistic Surrogacy Committee, Parliament of Queensland, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland* (Report, October 2008); Social Development Committee, Parliament of South Australia, *Inquiry into Gestational Surrogacy* (Report No 26, 13 November 2007); Legislative Council Select Committee on Surrogacy, Parliament of Tasmania, *Report on Surrogacy* (Report, July 2008); Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption* (Final Report, March 2007); Department of Health (Western Australia), *Review of the Surrogacy Act 2008* (Report, November 2014). The 'NSW Attorney-General is also currently undertaking a statutory review of the NSW Act': Ludlow (n 79) 389 n 101.

81 '*Chimerism* refers to the intermingling of cells from two or more genetically distinct organisms': Susan Elizabeth Kelly, 'The Maternal-Foetal Interface and Gestational Chimerism: The Emerging Importance of Chimeric Bodies' (2012) 21(2) *Science as Culture* 233, 234 (emphasis added).

82 Ibid 239, citing Janina Walknowska, Felix A Conte and Melvin M Grumbach, 'Practical and Theoretical Implications of Fetal/Maternal Lymphocyte Transfer' (1969) 293(7606) *Lancet* 1119.

these cells stayed in the maternal tissue long after the pregnancy, sometimes for decades.[83] Subsequent studies suggested that 'foetal cells may enter the maternal blood stream and travel to diseased tissues in her body, and that these may be stem cells, capable of differentiating into fat, muscle, nerves and bone'.[84]

Cells 'of apparently maternal origin have also been found in the [tissue] of children'.[85] That is, there is a growing body of research that suggests a cellular *exchange* takes place.[86] Researchers in 2005 reported 'finding Y chromosome-bearing cells in the livers of female children and foetuses' and concluded the likelihood that 'the cells had not only been transmitted by the mother, but acquired by her from an earlier pregnancy or her own foetal life'.[87] Hence, 'the maternal-foetal interface may [result in cell transmission] from one sibling to another (horizontal transmission) as well as between generations (vertical transition)'.[88] Maternal and foetal cells not only migrate and circulate across a 'porous boundary; they maintain critical markers of subject identity'.[89] As one commentator puts it, according to this evidence, 'the boundaries between bodies are messy indeed!'[90]

Scientific evidence regarding epigenetics and chimerism was led in the 2013 Irish case of *MR v An tArd Chlaraitheoir*[91] to dispute that the IPs in a gestational surrogacy arrangement were, in fact, the genetic parents of twins. Please note, this paper does not advocate 'the science' being used for that purpose, however the case does provide a thorough examination of the biological issues addressed above.

Initially, it was contemplated that the utility in such knowledge was in prenatal diagnostics — that is, that testing on a foetus could be done via a maternal blood

83 Kelly (n 81) 240, citing Diana W Bianchi, 'Fetal DNA in Maternal Plasma: The Plot Thickens and the Placental Barrier Thins' (1998) 62(4) *American Journal of Human Genetics* 763.

84 Keelin O'Donoghue and Nicholas M Fisk, 'Fetal Stem Cells' (2004) 18(6) *Best Practice and Research in Clinical Obstetrics and Gynecology* 853 and Diana W Bianchi, 'Fetomaternal Cell Trafficking: A Story That Begins with Prenatal Diagnosis and May End with Stem Cell Therapy' (2007) 42(1) *Journal of Pediatric Surgery* 12, cited in Kelly (n 81).

85 Kelly (n 81) 243, citing J Lee Nelson, 'Your Cells Are My Cells' (2008) 298(2) *Scientific American* 72.

86 See Kalindi Vora, 'Re-Imagining Reproduction: Unsettling Metaphors in the History of Imperial Science and Commercial Surrogacy in India' (2015) 5(1) *Somatechnics* 88; Robert Martone, 'Scientists Discover Children's Cells Living in Mothers' Brains: The Connection between Mother and Child Is Even Deeper than Thought' (4 December 2012) *Scientific American*; Myra J Hird, 'The Corporeal Generosity of Maternity' (2007) 13(1) *Body and Society* 1.

87 Kelly (n 81) 243, citing Catherine Guettier et al, 'Male Cell Microchimerism in Normal and Diseased Female Livers from Fetal Life to Adulthood' (2005) 42(1) *Hepatology* 35.

88 Kelly (n 81) 243.

89 Ibid 245.

90 Ibid 243.

91 [2013] IEHC 91 (High Court of Ireland).

test rather than amniocentesis[92] — but science has redirected the focus to its potential impact on stem-cell treatment and postnatal development of diseases. One study examined the potential benefits of this cell transmission — whilst examining the role of maternal cells migrating to the foetal pancreas, researchers found maternal cells producing insulin in the pancreases of diabetics and non-diabetics alike.[93] The results suggested that the 'maternal cells in the pancreases of diabetics *try to regenerate* the diseased organ'.[94] This study highlighted the possibility of microchimerism and microchimeric cells as targets for therapeutic intervention.

The above research highlights the problem with the narrow view of biology emphasised by the Victorian Parliament. It fails to recognise the role gestation may play in the long-term health of a surrogate child. It also understates and delegitimises the bio-genetic intimacies shared between a pregnant woman and the child she carries.[95]

B *More than Just Biology — What about Culture?*

By focussing only on biology, the cultural importance of gestation is ignored. The notion of a 'blood' connection does not appear to have value in a Western context. This is not similarly viewed in other parts of the world. The 'idea of blood … has a long history in Europe where notions of … lineage … and kinship are inextricably linked'.[96] In India, 'the circulation of blood takes as much authority in defining the mother-child relationship as the modern science of genetics' in the West.[97] As noted by one author, '[e]ven though the life sciences have debunked the idea that biological relatedness runs through blood, in many Euro-American contexts, the idiom of blood still remains a dominant paradigm in defining kinship'.[98] This may be of significance to children born via surrogacy arrangements in Victoria to parents of diverse cultural backgrounds or to children who later decide to

92 Amniocentesis is a prenatal procedure performed on a pregnant woman to withdraw a small amount of amniotic fluid from the sac surrounding the foetus. The procedure is commonly used to detect the sex of the baby or physical abnormalities such as Down syndrome or spina bifida. The procedure is more invasive than a blood test although statistically, results in spontaneous abortion in less than one per cent: 'Pregnancy Test Amniocentesis', *Better Health Channel* (Web Page, June 2016) <https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/pregnancy-tests-amniocentesis>.

93 Nelson (n 85) 75.

94 Ibid (emphasis added).

95 For a more thorough examination of this theme, see Sonja van Wichelen, 'Postgenomics and Biolegitimacy: Legitimation Work in Transnational Surrogacy' (2016) 31(88) *Australian Feminist Studies* 172.

96 van Wichelen (n 95) 176, citing Marilyn Strathern, *Kinship, Law and the Unexpected: Relatives Are Always a Surprise* (Cambridge University Press, 2005).

97 van Wichelen (n 95) 176.

98 Ibid, citing Sarah Franklin, 'Science as Culture, Cultures of Science' (1995) 24 *Annual Review of Anthropology* 163, 171 and Marilyn Strathern, 'Cutting the Network' (1996) 2(3) *Journal of the Royal Anthropological Institute* 517.

examine and adopt other cultural influences.[99]

C *What about the Child's 'Story'?*

Irrespective of the importance or otherwise of blood, genetic or biological connectedness, the manner in which a baby is born forms part of his or her 'story'. Imagine for a moment that IPs choose to raise their child without disclosing the nature of their birth.[100] In practice, what would this look like? Would it involve the intended mother telling manufactured, fallacious stories of when she was pregnant? Would it mean discussion of the specific circumstances of the child's birth was avoided at all costs? These possibilities are not inconceivable — adoption stories from past decades tell us of such mechanisms of deceit.[101] A child's narrative undoubtedly helps shape their identity and sense of self. Hence, it is argued that an accurate narrative is imperative to a healthy development, as will be discussed later in this paper.

Emerging scientific evidence compels us to broaden our conceptualisation of biology. Further, the importance of culture and a child's 'story' compel us to look beyond biology in terms of what makes up a child's identity. Biology, in its narrow form, is not the 'be all and end all' and cannot justify such disparate treatment of donor-conceived and surrogate children.

V THE ISSUE

Whilst the importance of the surrogate in terms of a child's biology and narrative is difficult to deny, what are we really talking about here? We are talking about a child's right to *know,* or at least, *know of*, the surrogate's existence. The VARTA website inaccurately states that, '[e]ngaging an Australian surrogate has the benefit of legal protections that ensure that she is known to your potential child and to you'.[102] The requirements under the *ART Act* help ensure that the surrogate

99 However, the author concedes that, IPs who place greater emphasis on the 'blood connection' their child has with the gestational surrogate are more likely to willingly volunteer information of the surrogate's involvement.

100 The author concedes that, given the restrictions on advertising in Victoria, the likelihood of the surrogate being a close family member or friend of the IPs is extremely high. It is therefore likely that the surrogate may be involved in the child's life and the fact of their involvement in the birth will be difficult to hide. This is less so where a compensated international surrogacy arrangement is in place, where it is conceivable that some IPs may be in the position to, and choose to, conceal their child's gestational history. It should also be noted that secrecy may have more broad reaching consequences for children in international surrogacy arrangements where the child is born to a gestational surrogate overseas because that child would potentially have foreign citizenship rights.

101 See, eg, D Marianne Brower Blair, 'The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination' (2001) 22(4) *Michigan Journal of International Law* 587; John Triseliotis, 'In Search of Origins: The Experience of Adopted People' (Routledge and Kegan Paul, 1973).

102 'Surrogacy in Australia', *VARTA: Victorian Assisted Reproductive Treatment Authority* (Web Page) <https://www.varta.org.au/information-support/surrogacy/commissioning-parents/surrogacy-australia>.

is known to the IPs, *not the child*. The link between the child and the surrogate must be made by the IPs. Indeed, it is conceded that, given advertising bans and other prescriptive provisions of the *ART* and *SOC Acts*, it is more likely that the surrogate will be a participant in the child's life but neither this, nor the knowledge of her very existence, is guaranteed. Various government records exist regarding surrogacy arrangements in Victoria, however how is the child to know to access them if he or she is not informed of his or her surrogate birth? Of course, this is equally true of donor children however, as noted in Part III(E), there are some significant differences in the way donor children are treated.

Presuming it is beneficial for a surrogate child to know the circumstances of his or her birth, by whom should she or he be informed? If our imagination is unleashed, potentially scarring scenes — of Department of Health and Human Services employees, files under arm, arriving on the doorsteps of surrogate children to enlighten them about their births — can be conjured. Imagine school teachers, on behalf of the state, telling kids of their gestational history at morning recess. Of course, common sense would dictate that this sensitive information *must* be imparted by IPs. These issues will be canvassed further in Part VII(A) of this paper. An underlying question is — why might parents choose to keep this information from their child? It may be argued that one unfortunate by-product of the intense debate about possible exploitation in the realm of international commercial surrogacy is the ripple effect — any surrogacy may be viewed as morally bankrupt and consequently, stigma attaches.[103] 'Baby Gammy'[104] became a household name and influenced many in their assessment of the issues relating to surrogacy more broadly. Parents may be keen to spare their children from the cloak of shame and the judgement of others — why should it be worn by their child? Or parents may just want to spare their child from potential ridicule for having a 'different' story. Given these considerations, what does the evidence say? What should the state's response be and what are its obligations under international human rights law?

103 For an in-depth discussion on stigma, see the seminal publication: Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Prentice-Hall, 1963).

104 Gammy was a twin, born with Down syndrome and a congenital heart condition in Thailand to a Thai gestational surrogate for Australian IPs but who was ultimately raised by the surrogate. Gammy's twin was brought to Australia to be raised by the IPs. It was widely reported by the media that the IPs had abandoned Gammy however, the Family Court of Western Australia made a finding that this was not the case. For a commentary on the case, see 'Baby Gammy: Surrogacy Row Family Cleared of Abandoning Child with Down Syndrome in Thailand', *ABC News* (online, 14 April 2016) <https://www.abc.net.au/news/2016-04-14/baby-gammy-twin-must-remain-with-family-wa-court-rules/7326196>.

VI WHAT ARE VICTORIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS IN RELATION TO A SURROGATE CHILD'S RIGHT TO BE TOLD ABOUT THEIR BIRTH?

Australia has ratified the *CRC*, which is the most widely ratified treaty in the history of international human rights law. To date, 196 parties have ratified the *CRC* — the only nation not to accept its obligations is the United States of America ('USA').[105] As a matter of international law, treaties can only bind *nation* 'states' and hence, the federal government of Australia is bound by the provisions of the *CRC* and has accepted a duty to perform its obligations under the convention in good faith.[106] In the strict sense, Victoria is not 'bound' to comply with the provisions of the *CRC*. There is no Victorian or federal legislation that has brought the obligations under the *CRC* into domestic effect.[107] Whilst not strictly binding, the *CRC*, 'by virtue of its near universal acceptance … remains a significant document by which to ascertain the rights of children'.[108] Members of the High Court of Australia have opined that Australia's ratification of the *CRC* is not to be dismissed as 'a merely platitudinous or ineffectual act, particularly when [it] evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children'.[109]

Further, it has been argued that international human rights law is an 'expression of a particular moral framework to assist in the resolution of complex ethical issues'[110] and, to take international human rights obligations into account, at a state level, 'would [be] … consistent with the growing trend to use human rights as a proxy for the language of ethics'.[111] The Victorian government appears to be increasingly interested in a rights-based approach to legislation as evidenced by the enactment of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ('*Victorian Charter*') and other significant Acts of Parliament[112] and it would

105 See 'Convention on the Rights of the Child', *UN Treaty Collection* (Web Page) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4>.

106 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26.

107 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*') may have some limited application and will be briefly discussed later in this paper.

108 John Tobin, 'The Convention of the Rights of the Child: The Rights and Best Interests of Children Conceived through Assisted Reproduction' (Occasional Paper for the Victorian Law Reform Commission, Melbourne Law School, University of Melbourne, August 2004) 2.

109 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J) (citations omitted), quoted in ibid.

110 John Tobin, 'Donor-Conceived Individuals and Access to Information about Their Genetic Origins: The Relevance and Role of Rights' (2012) 19(4) *Journal of Law and Medicine* 742, 745 ('Donor-Conceived Individuals').

111 Ibid.

112 See, eg, *Mental Health Act 2014* (Vic) which evidences a shift towards a rights-based focus when compared to the earlier *Mental Health Act 1986* (Vic).

be in keeping with this trend for the government to be cognisant of its obligations under the *CRC*, including when contemplating local surrogacy arrangements and their impact. Hence, there is strong argument for the proposition that Victoria's 'rules' as they relate to children born to domestic surrogacy arrangements should be compliant with the *CRC* and other international treaty obligations.[113] The *CRC* applies to all children and a 'child' is defined as a human under the age of 18, unless majority is attained earlier.[114] In Victoria, the age of majority is 18[115] and hence, it is advanced that the *CRC* applies to people under 18 years of age in this State.

What does the *CRC* have to say that would impact upon this discussion? What are the relevant provisions of the *CRC* that inform the State's obligations, if any, to ensure children born to a gestational surrogate are informed of her existence? Very little has been written about whether Victoria's surrogacy laws comply with the *CRC*. However, much has been written about the rights of donor-children to access donor information. Given significant parallels in the issues, that literature is useful to inform the current discussion.

VII WHAT ARE THE RIGHTS OF THE CHILD UNDER THE *CRC* WHICH MAY COME INTO PLAY?

Four broad themes within the *CRC* may be relevant to surrogate children including: the best interests of the child;[116] the right to know one's parents;[117] respect for identity, family and private life;[118] and access to information.[119] In relation to children's rights, this paper will focus on those most implicated — the rights under arts 3, 7 and 8.

A *Best Interests of the Child — Article 3*

Article 3 establishes the general principle that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.[120] It should be noted that art 3 states that the child's best interests are *a* primary interest, not *the* primary interest and

113 For example, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'), to be examined further.

114 *CRC* (n 2) art 1.

115 *Age of Majority Act 1977* (Vic) s 3.

116 *CRC* (n 2) art 3(1).

117 Ibid art 7(1).

118 Ibid arts 8(1), 16(1).

119 Ibid art 17.

120 Ibid art 3(1).

hence, it cannot be relied upon to give children any special degree of priority in relation to other rights holders' interests. However, the *ART Act* takes this notion further, stating that 'the welfare and interests of persons born or to be born as a result of treatment procedures are *paramount*'.[121] Hence, it can be argued that, where conflict exists with rights enjoyed by adult rights holders, the effect of the *ART Act* is to prioritise the rights of surrogate children in Victoria.[122] However, irrespective of which rights prevail in a balancing act, what does the evidence say about what is in the best interest of a child regarding disclosure pertaining to their gestation?

A great deal is now known about the impact upon a child of secrecy or misinformation about their genesis because of past experience, initially with adoption and later, with gamete donation. Decades ago, the humiliation of an unmarried, pregnant teenager meant that informal adoptions within families were not uncommon — a teenager's baby was often raised by the teenager's own mother, so essentially, the teenager's baby thought her biological mother was her sister. Commonly, formal adoptions were concealed from adopted children.[123] The first evidence of the damaging impact of these secrets came to light in the early 1970s.[124] Unsurprisingly, a wealth of evidence regarding disclosure to surrogate children of their gestational history does not exist. The only study to date that has 'sought the perspectives of donor-conceived and [surrogate children] raised in heterosexual, two-parent families is the UK Longitudinal Study of Assisted Reproductive Families' ('the study').[125] Fundamentally, in an 'Up Series'[126] fashion, this study longitudinally follows 22 surrogate and 22 donor-conceived children to evaluate attitudes towards their conception and their surrogate or donor. The surrogate children have been followed by researchers since 2000 and came from families who had used genetic surrogacy where the mother had used her own egg and gestational surrogacy. Semi-structured interviews were carried

121 *ART Act* (n 15) s 5(a) (emphasis added).

122 This view is not without criticism: see *ART Interim Report* (n 4) 19, quoting Michelle Taylor-Sands, 'Removing Donor Anonymity: What Does It Achieve? Revisiting the Welfare of Donor-Conceived Individuals' (2008) 41(2) *University of New South Wales Law Journal* 555, 577, where, in the context of donor conceived children, Dr Michelle Taylor-Sands is quoted as saying, '[r]ather than viewing the interests of donor-conceived individuals 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 sometimes conflict'.

123 'Overview of Forced Adoption Practices in Australia', *National Archives of Australia* (Web Page) <https://forcedadoptions.naa.gov.au/content/overview-forced-adoption-practices-australia>.

124 Triseliotis (n 101), cited in Eric Blyth and Abigail Farrand, 'Anonymity in Donor-Assisted Conception and the UN Convention on the Rights of the Child' (2004) 12(2) *International Journal of Children's Rights* 89, 90.

125 S Zadeh et al, 'The Perspectives of Adolescents Conceived Using Surrogacy, Egg or Sperm Donation' (2018) 33(6) *Human Reproduction* 1099, 1100, citing V Jadva et al, 'Surrogacy Families 10 Years On: Relationship with the Surrogate, Decisions over Disclosure and Children's Understanding of Their Surrogacy Origins' (2012) 27(10) *Human Reproduction* 3008 ('Surrogacy Families 10 Years On').

126 The 'Up' series, commencing in 1964 with the '7 Up' episode is a famous British documentary series which involves longitudinal interviews with people (who were seven-year-old children when the series commenced) regarding a range of family and social issues. Participants, now aged 61, continue to be interviewed every seven years. The premise of the study was the Jesuit maxim: 'Give me a child until he is seven and I will give you the man', that is, that a child's first seven years fundamentally shape and inform the child's life. For a discussion on the series, see Rebecca Mead, 'What "56 Up" Reveals' (9 January 2013) *The New Yorker*.

out with the children when they were aged 7, 10 and 14 years. Researchers hope the subjects will continue to participate into adulthood.

When their child was aged one, all IPs had planned to tell their child of their surrogate birth. By age 10, 91% of children had been so informed. When surrogate children were aged 7 and 10, questions were asked to gauge the child's understanding of surrogacy and their feelings towards the surrogate. The study was the first to examine the views and experiences of surrogacy from the perspective of the children themselves. It revealed that most children who were aware of their surrogacy conception were able to show some understanding of surrogacy by age seven. This was in contrast to data relating to donor-conceived children who showed little understanding by that age,[127] suggesting that surrogacy may be easier to understand than gamete donation for children under the age of seven. The study found that, prior to the age of seven, most children felt either indifferent or positive about their birth using surrogacy[128] and that, by age 10, most children's narratives of their birth were likely to be explained by the way in which their parents explained surrogacy to them.[129] The children were followed up in adolescence as that developmental stage is 'characterized by increased cognitive capabilities and marked identity development'[130] and, was thought to be a time when previously held positive attitudes may be reformulated and may potentially collapse.

Although the fledging assumption behind the study was that these children would feel negatively about their origins, it was ultimately found that by adolescence, the majority were indifferent about, interested in or enjoyed positive relations with the surrogate.[131] None of the adolescents were distressed about the circumstances of their conception or birth. The findings, obtained first-hand from a sample of surrogate children followed from infancy to adolescence, suggest that the concern that children born to surrogacy arrangements 'would be distressed about their origins in adolescence is unfounded, and that children who are informed when young of their conception … are accepting of this' in their teenage years.[132]

Interestingly, 'adolescents' lack of concern about their method of conception was consistent with their high levels of psychological wellbeing and the quality of their

127 L Blake et al '"Daddy Ran out of Tadpoles": How Parents Tell Their Children That They Are Donor Conceived and What Their 7-Year-Olds Understand' (2010) 25(10) *Human Reproduction* 2527.

128 Jadva et al, 'Surrogacy Families 10 Years On' (n 125) 3012.

129 Ibid 3013.

130 Zadeh et al (n 125) 1104.

131 Ibid.

132 Ibid.

relationship with their mothers at this age'.[133] Hence, it would seem that wellbeing is strongly dependent upon the strength and health of the child's relationship with his or her intended mother. In order for this relationship to be strong, it should be built upon a foundation of candour and transparency — a theme that will be revisited. Arguably, from the child's perspective, it is difficult to enjoy a healthy relationship with a parent who fails to tell you the truth about your conception. The finding that 'none of the adolescents described feeling negatively about their origins is perhaps [best] explained by the fact that almost all of them had been told about their conception before the age of 7'.[134] Whilst some adolescents reported feeling ambivalent about their conception, it should also be noted that some were particularly positive.[135]

Given that all surrogate children taking part in the study had been informed of their gestational history at a young age, it tells us little about the cost, if any, to a child's wellbeing of being denied disclosure or of being told at a later age. For that information, it *may* be helpful to look to the experience of donor-conceived or adopted children and extrapolate the findings.[136] The overwhelming message from the limited research relating to surrogate children is 'tell them and tell them early' and this indeed accords with the research regarding adopted and donor-conceived children. There seems to be an abundance of wisdom in the adage, 'a child should never … remember a time when they didn't know'.[137] In relation to adopted children, research has found that 'the communicative attitudes and behaviours of the adopters (that is to say, their openness) were more predictive of the adoptee's adjustment than the type of arrangement that existed between the adoptive and birth families (open versus confidential adoption)'.[138] One thing we do know in the context of donor conceived children is that heterosexual couples generally tell their children about their conception at a *later stage* than do single women or lesbian couples,[139] undoubtedly because the fact of the donation can be concealed with heterosexual couples. The research has also demonstrated that 'people involved in donor conception and in the general public support disclosure

133 Ibid, citing Susan Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14' (2017) 53(10) *Developmental Psychology* 1966, 1974 and Elena Ilioi et al, 'The Role of Age of Disclosure of Biological Origins in the Psychological Wellbeing of Adolescents Conceived by Reproductive Donation: A Longitudinal Study from Age 1 to Age 14' (2017) 58(3) *Journal of Child Psychology and Psychiatry* 315, 321.

134 Zadeh et al (n 125) 1104, citing Ilioi et al (n 133). For further information about this finding, see Ilioi et al (n 133).

135 Zadeh et al (n 125) 1104.

136 The author concedes that children who are donor-conceived, adopted or born via a surrogate may experience different feelings related to their conception and birth and that this comparison is only helpful to a degree.

137 Daniels (n 64) 0:17:46.

138 Jesús Palacios and David Brodzinsky, 'Adoption Research: Trends, Topics, Outcomes' (2010) 34(3) *International Journal of Behavioural Development* 270, 276, citing David Brodzinsky, 'Family Structural Openness and Communication Openness as Predictors in the Adjustment of Adopted Children' (2006) 9(4) *Adoption Quarterly* 1, 12.

139 Vasanti Jadva et al, 'The Experiences of Adolescents and Adults Conceived by Sperm Donation: Comparisons by Age of Disclosure and Family Type' (2009) 24(8) *Human Reproduction* 1909, 1917.

of the donor origin to donor conceived children'[140] and that this increases the likelihood of parents disclosing the use of donor gametes to their children.[141] That is, as stigma is reduced, a culture of openness is fostered.

In summary, what is the optimal path to promote the wellbeing of surrogate children whose best interests, it is argued, are to be considered above any competing interests held by other rights-bearers, namely — IPs? The evidence highlights that heterosexual couples are less likely to tell their child of a surrogacy arrangement than single or same-sex counterparts. If they do tell, it is likely to be when their child is older. The evidence indicates that this is counter to the best interests of the child, whose wellbeing is enhanced by early disclosure. It is further argued that, in order to comply with obligations under art 3 of the *CRC* and to accord with the aims of the *ART Act*, states have an obligation to ensure surrogate children are told at a young age of the circumstances of their birth.

B *Right to Know One's Parents — Article 7*

Article 7 provides the child with the right *'as far as possible* … to know … and be cared for by his or her *parents*'.[142] The *CRC* places importance on the parent-child relationship but offers no definition of 'parent' where the exercise of this right clearly hinges on that definition. The answer to the question of who are 'parents' is clear-cut in the case of a 'traditional' family — a heterosexual couple who has children without ART. However, the picture becomes more complex where gamete donors and surrogates are involved. It would seem that 'international law accommodates and recognizes diverse family formations'[143] and hence, the meaning of 'parent' must be stretched to accommodate new family structures.

In the context of donor-conceived children, it has been argued that donors are never parents at law.[144] As discussed in Part III(A) of this paper, by operation of statutory presumptions in Victoria, any 'parental' rights and responsibilities on donors are extinguished at the time of the donor child's birth. This is not the case with surrogate children. As discussed in Part II(D), at the time of their birth, a

140 Karin Hammarberg et al, 'Proposed Legislative Change Mandating Retrospective Release of Identifying Information: Consultation with Donors and Government Response' (2014) 29(2) *Human Reproduction* 286, 287 ('Proposed Legislative Change'). See also Karin Hammarberg et al, 'Gamete Donors' and Recipients' Evaluation of Donor Counselling: A Prospective Longitudinal Cohort Study' (2008) 48(6) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 601.

141 Hammerberg et al, 'Proposed Legislative Change' (n 140) 287.

142 *CRC* (n 2) art 7(1) (emphasis added).

143 Tobin, 'To Prohibit or Permit' (n 1) 326. See Committee on the Rights of the Child*, Report on the Fifth Session*, 5th sess, 130th mtg, UN Doc CRC/C/24 (8 March 1994) annex V ('*The Role of the Family the Promotion of the Rights of the Child*') 63 [2.1]: 'When considering the family environment the Convention reflects different family structures arising from the various cultural patterns and emerging familial relationships. In this regard, the Convention refers to the extended family and the community and applies to situations of nuclear family, separated parents, single parent family, common law family and adoptive family', quoted in Tobin, 'To Prohibit or Permit' (n 1) 324 n 29.

144 For further discussion on this point, see Blyth and Farrand (n 124).

surrogate child's 'parents' are the surrogate and her partner (if any). Although this has been criticised as being deeply problematic, it is arguable that, on current Victorian law, 'parent' includes the surrogate as at the time of the child's birth the law considers her to be so, even though the SPO ultimately displaces that.[145] That is, at least*, at a point in time*, the current Victorian law recognises that the surrogate is a parent. Further, some scholars argue that where a child's conception involves a contribution from multiple people (for example, a surrogate, an egg donor and IPs) many people may simultaneously be considered a 'parent'. That is, the categorisation of the IPs as 'parents' at law need not exclude the surrogate or egg donor also being recognised as such.[146]

Under a surrogacy arrangement which, at its core lies the relinquishment of the surrogate's parental rights and responsibilities, art 7 does not insist upon the surrogate caring for the child as it anticipates only that care be provided so *far as possible*. 'This qualification is a concession to the reality that, however defined, a child's parents may … have no desire to care for the child'.[147] Hence, it is arguable that, given the surrogate does not wish to raise the child, no violation of art 7 has taken place since this outcome would not be possible.[148]

However, it would be possible for the child to *know of* and possibly, *know* his or her surrogate. This knowledge could be retained as it is reasonable for the state to insist that records are kept relating to surrogacy arrangements[149] — this is already being done in Victoria. Scholars have argued that the phrase *as far as possible*, exists 'as recognition of the potential that the identity of a parent may be unknown for a variety of reasons and it may simply be *impossible* for a child to know [his] or [her] parent or … indeed … parents',[150] however, this is not the case here. In Victoria, given who and where a surrogate is likely to be, it is highly possible for a child to *know of* and *know* that person. Even if the surrogate is a 'friend of a friend', and not a close friend or relative of the IPs, given the stringency of Victorian requirements, she is likely to live within, or in close proximity to, Victoria.[151] Hence, it is arguable that there is an obligation on states to ensure a surrogate child knows or knows of the surrogate. It follows that failing to take reasonable steps to progress that aim constitutes a violation of art 7.

145 Some commentators argue that, when looking at international commercial surrogacy arrangements where no such parentage laws apply, a gestational surrogate is a 'parent' for the purposes of art 7: see Tobin, 'To Prohibit or Permit' (n 1) 327.

146 Julie Wallbank, 'Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child' (2002) 10(3) *Medical Law Review* 271.

147 Tobin, 'To Prohibit or Permit' (n 1) 327.

148 Ibid.

149 For discussion of this argument in the context of international commercial surrogacy, see ibid.

150 Tobin, 'Donor-Conceived Individuals' (n 110) 749.

151 *SOC Act* (n 23) s 20(1)(a) states that, in order for an SPO to be granted in a surrogacy arrangement, the child must have been conceived as a result of assisted conception in Victoria and hence, it is likely that the surrogate lives in or proximate to Victoria.

C *Right to Identity — Article 8*

Article 8 provides that 'State Parties undertake to respect the right of the child to preserve his or her *identity*, including nationality, name and family relations as recognized by law without unlawful interference'.[152] Again, in the context of donor children, many reported that the motivator in their quest for identifying information about their donors was a desire to obtain a fuller understanding of themselves and their identity.[153] Some donor children felt that this could not be achieved without knowing who their donor was, even when that person never intended to have a parental role.[154] In the context of international surrogacy, it has been argued that states are obliged to ensure that children have access to information about their biological and/or gestational 'parents' 'by virtue of the right to preserve their identity'.[155] Some have even argued that a surrogate is analogous to a woman who has given her child up for adoption and that information and knowledge about her is crucial to the state's welfare obligations as it goes to the heart of a child's sense of identity.[156] Whilst some may view this analogy as a bridge too far, knowledge of 'her identity remains important and relevant to the child's origins and sense of self'[157] — '[t]o find otherwise would be to marginalize her significant role in bringing the child into being, which is surely a vital element of the child's identity'.[158]

Biology has provided a strong justification for donor identity disclosure as the link between the notion of biology and the shape of identity is compelling. In light of dawning awareness of the implications of epigenetics, as investigated in Part IV of this paper, increased weight should be given to the importance of gestation in realising a child's identity. Moreover, it has been contended that the right to identity 'is a right not to be deceived about one's true origins'.[159] The fabric of a child's life should not be woven with fabrication. A lack of information could be seen as promoting deception and family secrets that may themselves generate tension and stress within families. A family home built on a foundation of lies flies in the face of the Preamble to the *CRC*, which encourages child rearing 'in a family environment, in an atmosphere of happiness, love and understanding'.[160] To be complicit in this deception is most certainly contrary to a state's obligations under the *CRC*.

152 *CRC* (n 2) art 8(1) (emphasis added).

153 Blyth and Farrand (n 124) 95.

154 Ibid.

155 Tobin, 'To Prohibit or Permit' (n 1) 328.

156 Wallbank (n 146) 292.

157 Ibid, cited in Tobin, 'To Prohibit or Permit' (n 1) 329.

158 Tobin, 'To Prohibit or Permit' (n 1) 329.

159 Michael Freeman, 'The New Birth Right? Identity and the Child of the Reproductive Revolution' (1996) 4(3) *International Journal of Children's Rights* 273, 291, quoted in Tobin, 'To Prohibit or Permit' (n 1) 329.

160 *CRC* (n 2) Preamble para 6.

VIII WHAT IS THE POSITION OF THE UN COMMITTEE ON THE RIGHTS OF THE CHILD ('UNCRC')?

The UNCRC has commented frequently on the issue of donor conception and of commercial versus altruistic surrogacy, but the issue of the right to information for a child born to a surrogacy arrangement appears not to have been a focus of the UNCRC's attention. Despite this, some helpful comments have been made due to the requirements of art 44 of the *CRC*. Under art 44, state parties must submit reports to the UNCRC about action taken to fulfil their obligations under the *CRC* every five years.[161] Following the reporting and subsequent meeting process, the UNCRC publishes 'concluding observations'. In certain concluding observations, the UNCRC, as early as 2002, welcomed measures enabling donor-conceived people to learn the identity of their donor[162] and has noted 'a "possible contradiction" between' arts 3 and 7 and 'the maintenance of donor anonymity'.[163]

In addition to the issue of whether compensated surrogacy amounted to the sale of a child, the UNCRC has looked at other issues relating to surrogacy arrangements concerning the right of a child to know his or her identity. The UNCRC, with brevity, recommended that children born through surrogacy 'have access to information about their origins'.[164]

What about in regional treaties? The European Court of Human Rights ('ECHR'), in two decisions against France,[165] decided that a child's right 'to establish details of their identity as individual human beings, which includes the legal parent-child relationship',[166] forms a part of the right to respect of private life enshrined

161 With the exception of the first report, post ratification, which must be provided following two years: *CRC* (n 2) art 44(1)(a).

162 Blyth and Farrand (n 124) 97, citing *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Switzerland*, 30th sess, 804th mtg, UN Doc CRC/C/15/Add.182 (13 June 2002) 7 [29].

163 Blyth and Farrand (n 124) 9, citing Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: France*, 6th sess, 156th mtg, UN Doc CRC/C/15/Add.20 (25 April 1994), Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Norway*, 6th sess, 156th mtg, UN Doc CRC/C/15/Add.23 (25 April 1994) 2 [10], Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Denmark*, 8th sess, 208th mtg, UN Doc CRC/C/15/Add.33 (15 February 1995) 2 [11] and Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties under Article 44 of the Convention: Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 31st sess, 833rd mtg, UN Doc CRC/C/15/Add.188 (9 October 2002) 8 [32].

164 Committee on the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel*, 63rd sess, 1815th mtg, UN Doc CRC/C/ISR/CO/2-4 (4 July 2013) 9 [34].

165 See *Mennesson v France* [2014] III Eur Court HR 255 ('*Mennesson*') and *Labassee v France* (European Court of Human Rights, Chamber, Application No 65941/11, 26 June 2014) ('*Labassee*'). In *Mennesson*, the applicants were husband and wife and French nationals who had twins the in the USA pursuant to a surrogacy arrangement. US courts had ordered that the applicants were the legal parents. Despite this, the French authorities refused to enter the children in the French birth register. The ECHR found that France had violated art 8 concerning the children's right to respect for their private life.

166 *Mennesson* (n 165) 288.

in art 8 of the *European Convention on Human Rights*.[167] Although this case is not strictly on point, it provides helpful obiter.[168] It has been noted that emerging jurisprudence regarding the right and respect for privacy further suggests that children born via a surrogacy arrangement are entitled to know the identity of the persons involved in their creation, however a discussion of the evolving parameters of this right is outside the ambit of this paper.[169] Suffice to say that international human rights bodies appear to support the right of a child to access information regarding gestational history.

IX WHAT RIGHTS OF THE IPS MAY COME INTO PLAY?

Presuming IPs are all above the age of 18, they will not attract the protections afforded under the *CRC*. Hence, it is necessary to look to other international treaties to see what, if any, obligations states owe to IPs that may help to inform this discussion. The most apposite right is found under art 17 of the *International Covenant on Civil and Political Rights* ('*ICCPR*').[170]

A *Right to Privacy and Family*

Article 17 of the *ICCPR* states that '[n]o one shall be subjected to arbitrary or unlawful interference with his *privacy, family, home* or correspondence'.[171] Some may argue that this article entitles IPs to 'run their family' as they see

167 Ibid 290. See also *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8 ('*European Convention on Human Rights*').

168 There have been a number of more recent cases which have of addressed some of the same issues as those dealt with by the court in *Mennesson* (n 165) and *Labassee* (n 165). Most recently in *Paradiso v Italy* (2017) 65 EHRR 2, the ECHR looked at art 8 of the *European Convention on Human Rights* (n 167). The case involved an elderly Italian couple who were delivered a child via a surrogate in Russia. The child bore no genetic relationship to either IP (although the IPs argued that the intended father's sperm was supposed to have been used but due to a mix up in the IVF process this had not occurred). The couple obtained a Russian birth certificate for the child which declared the IPs to be the child's parents. Given the lack of genetic relatedness between the IPs and the child the Italian State Counsel's office sought to alter the civil status of the child by virtue of a forged birth certificate. The IPs argued that they should be allowed to adopt the child. The domestic Youth Court ruled that the child be removed and he was placed in a children's home and had no identity for two years. He was subsequently placed in a foster home and adopted by another couple. The IPs were charged with forgery and with bringing a child who was not theirs into Italy. After exhausting domestic remedies the IPs ultimately argued before the Grand Chamber of the ECHR that the removal of the child amounted to a breach of art 8. The Grand Chamber considered that the immediate and irreversible separation of the child from the parents was tantamount to interference of the *private life* (right to personal development through their relationship with the child). Nevertheless, it also considered that the opposite scenario would have meant legalising the situation created by the IPs which was in breach of important Italian law. Hence, in the national interests to prevent illegality and protect public order, the court held that those national interests prevailed over the IPs' rights and hence, there had not been a violation of art 8. This case does not add to the present discussion however, it may be of general interest to readers interested in the developments of international law relating to surrogacy arrangements.

169 For further discussion of this issue, see Tobin, 'To Prohibit or Permit' (n 1) 329–30.

170 It is noted that the rights of the surrogate also warrant discussion however, regrettably, this is outside the scope of this paper.

171 *ICCPR* (n 113) art 17.1 (emphasis added).

fit, including choosing when or if at all to tell their surrogate children about the circumstances of their birth. However, the right to privacy and family life is not absolute. Article 17 only protects IPs against *arbitrary* or *unlawful* interference by the state. The rights protected by art 17 are derogable and are hence, open to restriction provided the restrictions are compliant with the *Sirasuca* principles.[172] The *Siracusa* principles are international laws which outline the manner in which derogable human rights may be legally restricted — that is, which limitations are lawful and which are not.[173] These principles state that any potential restrictions on human rights must be:

- provided for by law;
- in the interest of a legitimate objective;
- necessary to achieve the intended aim;
- the least restrictive way in which the aim may be achieved; and
- based on evidence and not imposed arbitrarily.[174]

Hence, it is open to the Victorian government to restrict the rights of IPs to privacy and to take action to ensure disclosure is forthcoming from parents, provided the restrictions are:

- provided for by appropriate legislation;
- in the interest of upholding the rights of surrogate children, as taking into account the rights of others is considered a legitimate aim under international law. The competing rights of surrogate children which aim to be protected have been extensively examined in Parts VII(A)–(C) above;
- necessary to ensure that parents inform their surrogate children of the circumstances of their birth;
- the least restrictive way this aim may be achieved. In Part X(C) of this paper, various means to achieve this aim will be explored with emphasis placed on the least restrictive means in which to satisfy the goal of achieving well-informed surrogate children; and
- based on the evidence. The preponderance of evidence regarding the best interests of surrogate children in regard to their sense of identity and wellbeing has been explored in Parts VII(A)–(C) above.

172 *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN ESCOR, 41st sess, UN Doc E/CN.4/1985/4 (28 September 1984) annex.

173 Ibid.

174 Ibid.

Given the Victorian government has essentially overlooked the rights of children to know or know of their surrogate, it is contended that current legislation is not compliant with *CRC* obligations. In light of this, it is argued that the *ART Act* may also be in conflict with provisions of the *Victorian Charter*[175] however, a full exploration of this is beyond the scope of this paper.

The case for disclosure by parents has been well made out. The issue then becomes how the balance may be struck to incentivise parents to disclose without 'riding roughshod' over their right to privacy and their freedom to relate to their own child in a manner not *unlawfully and arbitrarily* regulated by the state. In an arena that has been criticised for being overly prescriptive, further regulation may seem abhorrent. However, it is a matter of striking the right balance. Reforms that aim to do just that are discussed below.

X HOW MAY THE SURROGATE CHILD'S RIGHT TO KNOWLEDGE OF THEIR GESTATIONAL HISTORY BE OPERATIONALISED — THE CARROT OR THE STICK?

Accepting that Victoria has an obligation to ensure surrogate children receive information about their birth from IPs, what measures are *reasonable* to operationalise that aim? The key, in accordance with the *Siracusa* principles, is to strike the right balance to ensure state-sanctioned methods are not *disproportionate* to the aim of enabling the rights of surrogate children, that is — that implementation tools are not too heavy-handed.

A *The Carrot — Education*

A great deal of state resources have been dedicated to educating parents of donor-conceived children of the benefits for those children in being informed of the donor's existence. The VARTA website contains numerous printable and video resources detailing the relevant evidence and giving parents practical advice on when and how to tell children of their donor conception.[176] However, minimal resources are offered to parents of surrogate children. It is presumed that IPs wish to act in the best interests of their children,[177] however, they may be unsure as to whether disclosure would be beneficial. Further, if they wanted to tell their children, they may be uncertain as to the best manner in which to communicate the message or when the message should be conveyed. Commercial surrogacy

175 In particular, see the 'best interests' of children provision in s 17(2) of the *Victorian Charter* (n 107).

176 *VARTA: Victorian Assisted Reproductive Treatment Authority* (n 14).

177 Indeed, art 18 of the *CRC* (n 2) states, inter alia, '[t]he best interests of the child will be their [parents'] basic concern'.

has been practised in California for decades[178] and consequently, many helpful resources have emerged to impart information in a manner appropriate for young children. Children's books that explain surrogacy in an age-appropriate manner are available and could (and it is argued, should) be disseminated via the VARTA website.[179] Education as to the benefits of early information is key. As briefly mentioned, media surrounding high profile international surrogacy cases such as Baby Gammy's case appear to have damaged public perception of surrogacy more broadly. As we have seen, a reduction in stigma promotes an environment of openness and thus, public education around the positive aspects of surrogacy is likely to have the ripple effect of increasing candour amongst IPs. Expanding education and resources in this realm would be helpful in fulfilment of Victoria's obligations.

B *The Stick — Orders*

State regulation is available along a spectrum from minimally to severely restrictive. To ensure the rights of children under the *CRC* are preserved through disclosure, some may argue that states should impose regulation towards the 'tighter' end of that range. If heavy-handedness is required, what could that look like in Victoria?

As detailed in Part II(C) of this paper, in order for their legal parentage to be recognised, IPs must apply to the court for a SPO no later than six months after the birth of the surrogate child. In order to be eligible for the SPO, IPs must satisfy the court that they have complied with the list of requirements under the *SOC* and *ART Acts*. It would be possible to insert, at this stage of the process, the requirement of an undertaking from the IPs to inform their child of the surrogate birth before the child turns seven. A return date seven years later could be scheduled to bring the matter back before the court.[180] The purpose of the return date is to ensure compliance. If the child has been informed, affidavit material of the IPs confirming this could be filed with the court as an administrative process and the return date could be vacated. Only non-compliant parents need appear before the court at the return date. A strict approach towards compliance is in force in Croatia in the context of donor-conceived children. Croatia mandates 'disclosure by parents to the child regarding [his or her] donor-conceived status no later than age 18', however, it is unclear how the provision is enforced.[181]

Of course, it may also be argued that the prosecution of a child's parents in the

178 See 'The History of Surrogacy in the United States', *Egg Donor and Surrogacy Institute* (Blog Post, 8 January 2018) <http://eggdonorandsurrogacy.com/history-surrogacy-united-states/>.

179 See, eg, Kimberly Kluger-Bell, *The Very Kind Koala: A Surrogacy Story for Children* (CreateSpace, 2013) which explains surrogacy in a manner suitable for children as young as 3 years of age.

180 In recognition of the notion that a child's 'formative years' are the first seven.

181 Allan (n 66) 52.

context of disclosure surrounding the circumstances of birth is not in the best interests of the child and hence, may contravene a state's obligations under art 3. Further, the *Siracusa* principles dictate that the measures taken by the state must be proportionate to the legitimate aim they seek to address. In other words, if less restrictive measures would equally achieve the aim, less restrictive measures must be employed. It is submitted that the following less restrictive means would be reasonable and proportionate measures by Victoria to encourage and hopefully, *ensure* parental disclosure.

C *The Carrot with a Looming Stick*

As noted above, counselling IPs about the psychological benefits of information provision is vital, but is it enough? Education has been a major part of the Victorian government's strategy in relation to donor-conceived children and although disclosure is increasing, many parents continue to choose not to inform children of the nature of their conception, though true figures are almost impossible to attain. Thus, there is a strong case for more forceful measures in relation to surrogate children.

1 *Birth Certificates*

As discussed in Parts III(D) and (E) of this paper, currently the BDM Registry contains an annotation of 'donor conceived' for donor children. Additionally, when a birth certificate is requested, the Registrar must attach an addendum stating that further information is available about the entry. As discussed in Part II(E) of this paper, in relation to surrogate children, the words 'closed surrogate' appear on the birth registry once the BDM Registry receives a copy of the SPO from the court. However, no annotation appears on the birth certificate itself nor is an addendum provided. Birth certificate annotations were examined at length in the context of donor-conceived children, however have been considered problematic in that, 'if you muck [around] with a birth certificate, you are labelling a child as a second class person'.[182] However, if the birth certificate was silent regarding the donor, the state could be seen as 'legislating … a fiction'.[183] Hence in Victoria, the balance reached between these competing considerations in relation to donor children has been to provide an addendum to the certificate, which discretely informs the bearer that further information exists on the registry.

182 Lord Hailsham endorsed the earlier views of Lord Mackay during debate in the House of Lords regarding whether to include birth certificate annotation in the *Human Fertilisation and Embryology Act 1990* (UK): United Kingdom, *Parliamentary Debates*, House of Lords, 13 February 1990, vol 515, col 1320 (Lord Hailsham), quoted in Eric Blyth et al, 'The Role of Birth Certificates in Relation to Access to Biological and Genetic History in Donor Conception' (2009) 17(2) *International Journal of Children's Rights* 207, 209.

183 Blyth et al (n 182) 208, quoting Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cm 9314, 1984) 26.

It is proposed that an addendum is also required in relation to surrogate children. 'Genetics' have long been touted as the underlying justification for disparate treatment between donor conceived and surrogate children, but this distinction is not clear-cut, as explored in Part IV of this paper. In relation to the provision of a birth certificate addendum, it is argued that the unequal treatment of these children cannot be justified from a child rights perspective. It is proposed that adequate protection of privacy may be achieved by an addendum that bears the same words as in the case of donor children.

The prospect of a surrogate child being 'tipped off' about his or her gestational history when he or she requests a copy of their birth certificate would provide further incentive for IPs to inform children before they reach adulthood.

2 *VARTA Register*

As discussed in Part III(E) of this paper, VARTA does not have an obligation to keep a register of information relating to surrogacy arrangements in the same way that it does information pertaining to donor conception. Although the *ART Act* provides an avenue by which offspring of donors may access information regarding their conception and genetics (by virtue of donor information), even prior to these children turning 18, no such pathway exists for children born under a surrogacy arrangement. It is proposed that in line with the arguments advanced in this paper, the *ART Act* should be amended to ensure ART providers forward data relating to surrogacy arrangements to VARTA for inclusion in the register. Further, the same mechanisms for access to that registry should be afforded to surrogate children as for donor children. Again, the prospect of surrogate children having access to this information will assist to incentivise disclosure by IPs.

3 *Education as Part of the Counselling Process*

As explored in Part II(B) above, in order for a surrogacy arrangement to proceed in Victoria, it must be approved by the PRP. Without such approval, a court cannot grant an SPO. As part of the PRP approval process, IPs must receive counselling so as to illustrate compliance with s 40(1)(c)–(f) of the *ART Act* — namely that they understand the consequences of the surrogacy arrangement falling through. Further, the *ART Act* and the *Assisted Reproductive Treatment Regulations 2009* (Vic) prescribe a list of matters about which IPs must be counselled.[184] These requirements include the implications of the surrogate's relinquishment of the child and her relationship with the child thereafter. However, it may be that the

184 The prescribed matters include the social and psychological implications of entering into the arrangement and the relationship between relevant parties, the possibility of medical complications for the surrogate mother or the child, the possibility of any party deciding not to proceed with the surrogacy, the attitudes of all parties towards the conduct of the pregnancy, the implications of the relinquishment of the child and the relationship between the surrogate and the child once it is born: *Assisted Reproductive Treatment Regulations 2019* (Vic) reg 10; *ART Act* (n 15) s 43.

IPs (and the surrogate) decide that the relationship should be non-existent and that the existence of the surrogate should remain a secret. At risk of overloading an already heavy catalogue of requirements, it would seem sensible that counselling focus on how essential knowledge of the surrogate is to the wellbeing of the child.[185]

It is also submitted that the state has an obligation to follow up to ensure surrogate children are told and told early. The case for early disclosure has been clearly made in Part VII(A). In order to affect this in a way that causes little restriction to IPs, it is proposed that a letter should be sent to IPs when the child turns five asking the IP to provide details of the information provided to their child regarding the surrogate. If disclosure has not been made, a further counselling session should be made, via VARTA. At this counselling session, age-appropriate materials should be provided to assist IPs in their disclosure. IPs should also be advised that a further letter will be sent when the child turns seven and, if disclosure has not been forthcoming in that time, an additional counselling session will be arranged with the child present. That is, the 'looming stick' is, 'tell, or we will'. If IPs fail to comply with any step in this process, provision can be made for the matter to be brought before the court who granted the SPO for orders for disclosure to be made. Whilst these measures are substantially more restrictive, significant opportunity and assistance is afforded to IPs to disclose before the court becomes involved. However, to strongly incentivise early disclosure by IPs, a 'gentle stick' approach is warranted if Victoria is committed to viewing the rights of surrogate children as *paramount*.

XI CONCLUSION

Whilst surrogacy remains a vexed issue for many, the Victorian government has committed to the legalisation of it in its own prescribed form. With that commitment comes an obligation to ensure the rights and protections under the *CRC* are afforded to surrogate children. Victoria's existing legislative approach to surrogate children underestimates the importance gestation bears upon who they are. It places unwarranted emphasis on a narrow conceptualisation of biology and ignores the cultural implications of gestation. The impact of gestation on genetics is only just beginning to be understood. To discount gestation as irrelevant to the health of a surrogate child later in life is premature. Victoria's current approach also ignores the fact that a child's gestational 'story' plays a role in their sense of self. The absence of legislative reference to a surrogate child's right to information ignores the state's obligations under the *CRC*.

185 Counselling provisions also exist under s 14(3) of the *Human Fertilisation and Embryology Act 2008* (UK). Under this Act such counselling must include providing information about the importance of informing children at an early age about donor conception. However, these provisions do not relate to surrogate children. Hence, this provision appears to treat donor-conceived and surrogate children differently, based on a narrow conceptualisation of genetics and biology in a similar way to the *ART Act*.

Many IPs who have gone through the surrogacy process in Victoria have indicated that whilst counselling was valuable, there was a lack of follow up once the surrogate child was born.[186] This follow up could be extended years beyond the birth, as proposed in Part X(C)(3) to ensure a surrogate child has an opportunity to know their surrogate and hence, have a better understanding of who they are and how they came to be. With some legislative and administrative 'tweaking', the Victorian government could better ensure surrogate children are raised 'in a family environment, in an atmosphere of happiness, love and understanding'.[187] At the very least, it could ensure surrogate children are not raised under a blanket of secrecy and deception.

186 See *ART Interim Report* (n 4) 90.

187 *CRC* (n 2) Preamble para 6.