

Extending the “Right to Identity” to Donor-Conceived Children in Ireland: A Jurisdictional Case Study

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This article considers the “right to identity” provisions in the *Children and Family Relationships Act 2015* and their adequacy in guaranteeing to the donor-conceived child the right to access identifying donor information in this jurisdiction. The article engages in a comparative analysis of a number of key jurisdictions prohibiting donor anonymity, with reference to the relevant international law, for the purposes of exploring mechanisms through which Ireland might extend its current legislative protections for donor-conceived adults to donor-conceived children. The principal research method used in this article is doctrinal in nature, with empirical research being drawn upon as a complement to the doctrinal research.

I – Introduction

This article engages in a comparative analysis of a number of key jurisdictions prohibiting donor anonymity, for the purposes of exploring mechanisms through which Ireland might extend its protections for donor-conceived adults to donor-conceived children. The comparative approach to legal research methodology is frequently utilised in order to assess how legal problems have been addressed in other jurisdictions, to identify themes or patterns in legal responses across jurisdictions, and thereby to inform the development of domestic law.¹ The jurisdictional case studies presented below have been formulated through a reliance upon traditional doctrinal sources of black letter law, as well the transcripts of interviews and email correspondences conducted by the author with legal professionals, academics, government officials, donor conception organisations and medical professionals in those core jurisdictions under examination. The article begins by providing an overview of the Irish legislative context, as well as a brief examination of the relevant international law,

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¹ G. Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing, 2014); M. Reimann & R. Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008); K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3rd ed. (Oxford University Press, 1983); A. Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974).

prior to a detailed examination of those key jurisdictions for the purposes of the comparative analysis.

II – The *Children and Family Relationships Act 2015*

The Irish government has recognised the donor-conceived person’s “right to identity” through the *Children and Family Relationships Act 2015 (2015 Act)*, which will prohibit the practice of anonymous donation in Ireland.² Section 24 of the *2015 Act* provides that the operator of a “D.A.H.R. facility”, that is, a fertility clinic, private medical practice or hospital which offers donor conception treatments,³ must acquire certain information in tandem with the acquisition of donor gametes or embryos. Therefore, the following information about the gamete donor must be provided: the donor’s name; date and place of birth; nationality; date on which, and the place at which, they provided the gamete; and their contact details.⁴ The operator will also be under an obligation to provide donor information to the Minister for the purposes of entering this onto a central register. Section 33 of the *2015 Act* thus provides for the establishment of a “National Donor-Conceived Person Register” which will store information about the child and the intending parents, as well as identifying and non-identifying information about the donor.

The *2015 Act* provides that the donor-conceived person may access identifying information about their donor where certain conditions are met. One condition is that the age of 18 must have been obtained before they will be entitled to access information which identifies the donor, that is, the date of birth and contact details of the relevant donor, as recorded in the Register.⁵ Non-identifying donor information will be accessible by the donor-conceived person upon reaching 18, or by the parent or guardian of the donor-conceived child who is under the age of 18.⁶ The donor-conceived person who has attained the age of 18 will also be entitled to obtain identifying and/or non-identifying information about donor siblings under certain conditions.⁷ In so prescribing, the *2015 Act* primarily vindicates the rights of donor-conceived adults in Ireland. Therefore, prior to engaging in a comparative analysis, the

² The provisions of the *2015 Act* relating to donor conception have not yet been commenced.

³ *2015 Act*, s. 4.

⁴ *Ibid.*, s. 24(3).

⁵ *Ibid.*, s. 35(1).

⁶ *Ibid.*, s. 34(1)(a).

⁷ A system of Voluntary Registration will be established under ss. 36-38 of the *2015 Act*. It should be noted further that s. 39 of the *2015 Act* will provide for “annotations” to be attached to births certificates of donor-conceived people, which will be accessible by the donor-conceived person upon attaining the age of 18.

following sections will discuss the extent to which the Irish legislation conforms to the requirements of the United Nations Convention on the Rights of the Child (C.R.C.) and the European Convention on Human Rights (E.C.H.R.).

III – The C.R.C.

Two primary C.R.C. Articles recognise the right to identity, Articles 7 and 8. Article 7(1) provides as follows: “[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, *the right to know* and be cared for by *his or her parents*.”⁸ Freeman suggests that the term “parents” in Article 7 includes not only social or legal parents, but also biological or genetic parents.⁹ Article 8 of the Convention further provides:

1. States 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.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing his or her identity.

It has been pointed out that, taken together, Articles 7 and 8 provide a strong argument in favour of a right to know for those who have been adopted, and, by extension, for donor-conceived people:

the arguments for children born by AID [assisted insemination by donor] to have access as children to the name of the genetic donors are similar to the rights of adopted children to have access to the identity of their biological parents are equally compelling. It would be inconsistent to argue for the rights of adopted children and against the rights of those born by AID.¹⁰

⁸ Emphasis added.

⁹ M. Freeman, “The New Birth Right? Identity and the Child of the Reproductive Revolution” (1996) 4 Int’l. J. Child. Rts. 273.

¹⁰ G. Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1995) at 126.

The U.N.I.C.E.F. Implementation Handbook¹¹ suggests that “a reasonable assumption is that, as far as the child’s right to know his or her parents is concerned, the definition of ‘parents’ includes genetic parents”.¹²

The Committee on the Rights of the Child (Committee) has commented on the right to know in Articles 7 and 8 through its Concluding Observations. The Committee has made a number of statements regarding Articles 7 and 8 and their application to assisted reproduction specifically. Each has highlighted the importance of recognising the right of the donor-conceived child to access information about their genetic origins. In its Concluding Observations on Norway, for example, the Committee stated the following:

[c]oncerning the right of the child to know his or her origins, the Committee notes the possible contradiction between this provision of the Convention with the policy of the State Party in relation to artificial insemination, namely in keeping the identity of sperm donors secret.¹³

The Committee, in its 1995 Concluding Observations on reports submitted by Denmark, noted that national legislation did not recognise the right of the donor-conceived person to access information about the donor, and thus stated as follows: “[c]oncerning the right of a child to know his or her origins, the Committee notes a possible contradiction between this provision of the Convention [Article 7] and the policy of the State party with respect to artificial insemination.”¹⁴

Moreover, in its 2002 Concluding Observations on reports submitted by the United Kingdom, the Committee has made it clear that the right to identity extends to children born through assisted reproduction:

¹¹ The Handbook is a “well-known practical tool used by governments, U.N.I.C.E.F. and other United Nations agencies, as well as non-governmental organizations, human rights institutions and academics, to guide them on the implementation of the Convention”. R. Hodgkin & P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd ed. (U.N.I.C.E.F., 2007) at Foreword [hereinafter Hodgkin & Newell]. U.N.I.C.E.F. and the Committee on the Rights of the Child work closely together in practice, and thus the interpretations of the Convention’s provisions outlined in the Handbook will also have been endorsed by the Committee. United Nations Children’s Fund, “UNICEF and the CRC” (30 May 2014), available <www.unicef.org/crc/index_action.html> (date accessed: 4 October 2016).

¹² Hodgkin & Newell, *ibid.* at 105-106.

¹³ Committee on the Rights of the Child, *Concluding Observations: Norway*, C.R.C./C/15/Add. 23 (1994) at para. 10.

¹⁴ Committee on the Rights of the Child, *Concluding Observations: Denmark*, C.R.C./C/15/Add. 33 (1995) at para. 11.

[w]hile noting the recent Adoption and Children Bill (2002), the Committee is concerned that children born out of wedlock, adopted children, or children born in the context of a medically assisted fertilization do not have the right to know the identity of their biological parents.¹⁵

In recommending the inclusion of a provision recognising the right of a child to access information concerning genetic identity in the *2015 Act*, the Joint Committee on Justice, Defence and Equality placed an emphasis on the right to identity as laid down in the C.R.C.¹⁶ Since the C.R.C. is an international treaty dealing specifically with the rights of children, that is, individuals below the age of majority, and since the C.R.C. grants donor-conceived children the right to access donor information, Ireland has arguably failed to meet its C.R.C. obligations through the *2015 Act*. Indeed, regarding the appropriate age of access to donor information, the Ombudsman for Children’s Office (O.C.O.) has noted the existence of a “sufficient maturity” test in Sweden and Victoria,¹⁷ and asserted that “[t]his approach is more in keeping with the principles set out in the Convention, specifically those respecting the evolving capacities of the child and respect for the views of the child”¹⁸ but this particular aspect of the O.C.O.’s advice was not implemented by the government in formulating the relevant provisions of the *2015 Act*. The requirements of the E.C.H.R. in this regard will be explored in the following Part.

IV – The E.C.H.R.

Article 8 of the E.C.H.R. recognises a right to respect for private and family life. The text of the Article is as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹⁵ Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, C.R.C./C/15/Add. 188 (2002) at para. 8. As discussed below, legislation has since been introduced in the U.K. providing for access to identifying donor information by the donor-conceived person on attaining the age of 18.

¹⁶ Joint Committee on Justice, Defence and Equality, *Report on Hearings in Relation to the Scheme of the Children and Family Relationships Bill* (31/JDAE/015, 2014) at 3, 38, 39.

¹⁷ The approaches adopted in both Sweden and Victoria will be explored in more detail below.

¹⁸ Ombudsman for Children’s Office, *Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014* (O.C.O., May 2014) at 14.

While Article 8 does not contain any express reference to identity, the European Court of Human Rights (E.Ct.H.R.) has interpreted the Article as incorporating the concept of personal identity, including the interest in obtaining information about the identity of one's parents. In *Gaskin v. U.K.*, for example, the E.Ct.H.R. held that Article 8 requires that every person should be able to establish the details of their identity as individual human beings.¹⁹ In *Mikulić v. Croatia* the E.Ct.H.R. found that the domestic court had been inefficient in deciding the applicant's paternity claim and thereby infringed her right to private and family life.²⁰ However, the Court was also respectful of the national margin of appreciation, pointing out that in the absence of an obligation for presumed fathers to submit themselves to a D.N.A. test, the criterion for considering legal restrictions on the right compatible with Article 8 was that the system provides "alternative means enabling an independent authority to determine the paternity claim speedily".²¹

Access to information about one's genetic parents is therefore engaged by Article 8. However, in balancing the competing rights of the genetic parent(s) to privacy, the E.Ct.H.R. has not developed a consistent line of jurisprudence in favour of the rights of those seeking information about their genetic origins. For example, in *Odièvre v. France* the Court was requested to consider whether it was compatible with a woman's Article 8 rights that she be denied the right to trace her birth mother who had placed her for adoption under a procedure designed to preserve the mother's anonymity.²² The Grand Chamber rejected the applicant's complaint, holding that the French legislation (which permitted the withholding of information where the birth mother's consent could not be obtained) struck the correct balance between the competing interests of both parties. The E.Ct.H.R.'s decision in *Odièvre* was heavily criticised and it has been suggested by some that it would not be decided along the same lines today.²³ In *Jäggi v. Switzerland* the Court considered that Article 8 was engaged in granting the applicant permission to obtain post-mortem D.N.A. sampling of his presumed

¹⁹ *Gaskin v. U.K.*, [1989] 12 E.H.R.R. 36.

²⁰ *Mikulić v. Croatia*, App. no. 53176/99 (E.Ct.H.R., 7 February 2002).

²¹ *Ibid.* at para 64. For a discussion of *Mikulić v. Croatia*, see S. Besson, "Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights" (2007) 21 Int'l. J. Law, Pol'y. & Fam., at 151 [hereinafter Besson].

²² *Odièvre v. France* (2004) 38 E.H.R.R. 43 [hereinafter *Odièvre*]. For a commentary on *Odièvre*, see T. Callus, "Tempered Hope? A Qualified Right to Know One's Genetic Origin: *Odièvre v France*" (2004) 67(4) M.L.R. 658; N. Lefaucher, "The French 'Tradition' of Anonymous Birth: The Lines of Argument" (2004) 18 Int'l. J. Law, Pol'y. & Fam. 319.

²³ Besson, *supra* note 21 at 152.

father.²⁴ The E.Ct.H.R. in that case noted that the degree of a State’s margin of appreciation will depend not simply upon a right in the abstract, but also on the specific right in question and thus the interest to be protected in the particular case. The Court therefore found that the right to identity, and to know one’s genetic parents, was core to the right to private life in Article 8.²⁵

In the case of *Godelli v. Italy*, which concerned the system of anonymous adoptions in place in Italy, the Court found that Article 8 had been violated as the applicant did not have access to any information about her biological mother and birth family which would allow her to trace her roots.²⁶ Of particular concern to the E.Ct.H.R. was the fact that the applicant had not been permitted to access non-identifying information about her birth mother and that disclosure of the birth mother’s identity, even with the latter’s consent, was not permitted under the Italian legislative framework.²⁷

Considering the case law on Article 8 to date, it is clear that a right to information about genetic origins is recognised by the Court in the context of both traditional reproduction and adoption, but this right must be pragmatically balanced against the right to privacy of the birth parent, and there is no clear prioritisation in principle of the child’s right in the jurisprudence of the Court. Of particular importance for the present discussion is the fact that the E.Ct.H.R. has not considered the right to identity in the context of assisted reproduction.²⁸ There is therefore no clear indication that the right to identity in Article 8 applies to those born through donor conception.²⁹

²⁴ *Jaggi v. Switzerland* [2008] 47 E.H.R.R. 30.

²⁵ For commentary on the *Jaggi* case, see C. Choudhry & J. Herring, *European Human Rights and Family Law* (Hart Publishing, 2012).

²⁶ *Godelli v. Italy*, App. no. 33783/09 (E.Ct.H.R., 25 September 2012).

²⁷ For a discussion of *Godelli*, see A. Margaria, “Anonymous Birth: Expanding the Terms of Debate” (2014) 22(3) *Int’l. J. Child. Rts.* 552; W. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, 2015).

²⁸ The E.Ct.H.R. has handed down decisions in cases concerning assisted reproduction, but none have dealt with the right to identity in Article 8. See, for example, *Parrillo v. Italy*, App. no. 46470/11 (E.Ct.H.R., 27 August 2015); *Evans v. United Kingdom* [2007] 43 E.H.R.R. 21; *S.H. and Others v. Austria*, App. no. 57813/00 (E.Ct.H.R., 3 November 2011); *Costa and Pavan v. Italy*, App. no. 54270/10 (E.Ct.H.R., 28 August 2012); *Knecht v. Romania*, App. no. 10048/10 (E.Ct.H.R., 2 October 2012).

²⁹ Ronen has argued that the E.C.H.R. “contributes little to the definition of identity, beyond adopting a proactive approach to the duty of the state to protect family life”. Y. Ronen, “Redefining the Child’s Right to Identity” (2004) 18 *Int. J. Law, Pol’y. & Fam.* 147 at 159. Notwithstanding, the E.C.H.R. has been an influence in the domestic implementation of legislation prohibiting anonymity. See, for example, *Rose and Another v. Secretary of State for Health, and the Human Fertilisation and Embryology Authority* [2002] E.W.H.C. 1593 [hereinafter *Rose*]; [2002] 3 F.C.R. 731. The *Rose* case preceded and most likely influenced the introduction of the *Human Fertilisation and Embryology (Disclosure of Donor Information) Regulations* (No. 1511 of 2004), which recognise the general right of donor-conceived people (conceived from 1 April 2005) to access identifying information about their donors upon reaching the age of 18.

Naturally, the Court may indeed recognise this right at a later date, but for the purposes of the arguments presented in this article, it cannot be suggested that in recognising the right to identity in the *2015 Act*, the Irish State is in any way contravening its obligations under the E.C.H.R. Indeed, whereas the following Parts will reflect upon the adherence of comparative jurisdictions to the C.R.C., due to the absence of a clear framework governing the rights of donor-conceived children within the E.C.H.R., the latter Convention will not feature in this reflection.

V – Comparative Jurisdictions Prohibiting Donor Anonymity

Prior to examining the key case studies which are the focus of this article, this Part will provide an overview of those comparative jurisdictions worldwide which prohibit donor anonymity as a general rule. To date, there are 12 comparative jurisdictions which have deemed anonymous donation to be contrary to domestic law. These jurisdictions hail from both civil and common law traditions and comprise of Austria, Finland, Germany, the Netherlands, New South Wales, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, Victoria, and Western Australia. Norway³⁰ and Finland³¹ are the only jurisdictions to permit access to identifying donor information by the donor-conceived person upon attaining the age of 18, with no exceptions being made for access at an earlier age. All other jurisdictions provide for some access, even if very limited, under the age of 18. Therefore, in New South Wales, a parent may obtain identifying donor information on behalf of a child where the disclosure of that information is reasonably necessary to save the life of the child or to prevent serious damage to the child's physical or psychological health and the information cannot reasonably be obtained by the parent in any other way.³² In New Zealand, a 16 or 17 year-old may apply to the Family Court to be treated as an 18 year-old for the purposes of accessing identifying donor information.³³ In Switzerland, a donor-conceived person under the age of 18 may request the donor's identity, where that person has a

³⁰ The *Act on Biotechnology 2003*, which came into effect on 1 January 2005, governs sperm donation in Norway.

³¹ The *Act on Assisted Fertility Treatments 2006*, brought into effect on 1 September 2007, governs gamete donation in Finland.

³² New South Wales (NSW) *Assisted Reproductive Technology Act 2007*, s. 38(1)(c). The *2007 Act* took effect on 1 January 2010. The standard age for access to identifying donor information in NSW is 18.

³³ *Human Assisted Reproductive Technology (HART) Act 2004*, s. 65. Donor information will be provided where the Court is satisfied that it is in the individual's "best interests" to receive the information requested. The *2004 Act* was brought into effect on 22 August 2005. The standard age for access to donor information is 18.

“legitimate interest”.³⁴ The United Kingdom permits the donor-conceived person to access identifying donor information before attaining the age of 18, but only where this is found to be in the “interests of justice” and where a child had been born with a congenital disability and civil proceedings had been taken against the clinic,³⁵ and in Western Australia, an exception to the general rule of access at age 16 may be made where both the donor and the parents of the donor-conceived child consent to the release of identifying information.³⁶

Regarding age of access to identifying information, the approaches adopted in Norway and Finland most closely resemble the Irish legislation in primarily vindicating the identity rights of the donor-conceived adult rather than the donor-conceived child. Moreover, given the narrow exceptions laid down in New South Wales, Switzerland and the United Kingdom, it certainly can be argued that those jurisdictions do not provide a comprehensive implementation of the C.R.C.

Of particular relevance for the purposes of the current analysis are the following jurisdictions: Austria, providing access at age 14, the Netherlands, providing access at age 16, Victoria and Sweden, providing access at “sufficient maturity”, and Germany, providing access in principle at “any age”. Each jurisdiction will be considered in turn below.

VI – Austria

Access to identifying donor information is regulated in Austria by the *Reproductive Medicine Act 1992* (1992 Act). By virtue of the 1992 Act, sperm donation is permitted in Austria, whereas oocyte and embryo donation are not.³⁷ Section 20(2) of the 1992 Act provides that a person conceived through sperm donation has the right to learn the identity of their biological father upon reaching the age of 14.³⁸ Section 20(2) does not set out any requirement for

³⁴ *Federal Act on Medically Assisted Procreation 1998*, s. 27(2). The 1998 Act was brought into effect on 1 January 2001. The standard age for access to donor information in Switzerland is 18.

³⁵ *Human Fertilisation and Embryology Act 1990*, s. 31. This provision has been unaffected by subsequent legislation amending the original 1990 Act. By virtue of the *Human Fertilisation and Embryology (Disclosure of Donor Information) Regulations (2004)*, donor-conceived people (conceived from 1 April 2005) in all other scenarios will be entitled to access the relevant information upon attaining the age of 18.

³⁶ *Human Reproductive Technology Amendment Act 2004*, s. 33(3). The 2004 Act was brought into effect on 1 December 2004.

³⁷ The Austrian prohibition on egg donation was the subject of a European Court of Human Rights Case in 2011: *S.H. and Others v. Austria* [2011] 52 E.H.R.R. 6. For a commentary on the 1992 Act, see D. Morgan & E. Bernat, “The Reproductive Waltz: The Austrian Medically Assisted Procreation Act” (1992) 5 *Journal of Social Welfare and Family Law* 420.

³⁸ *Austrian Reproductive Medicine Act 1992* (BGBl. Nr. 275/1992), s. 20(2), as amended in 2015 by BGBl. I Nr. 35/2015. The current version of the 1992 Act is available at:

parental consent in permitting donor-conceived people to access donor information at the age of 14. The child's guardian may access this information independently of the child in exceptional, medically justified, cases which are considered to be in the best interests of the child.³⁹

The original government proposal for section 20(2) of the *1992 Act* recommended that identifying donor information should only be released to the donor-conceived person at the age of majority.⁴⁰ A working group was established by the Austrian government which consulted with ministries and civil society organisations in a number of European countries and arrived at a series of recommendations, which were then adopted and/or amended by the Austrian Ministry of Justice.⁴¹ The working group found that the government proposal struck the correct balance between the fundamental principles of human dignity, the best interests of the child, and reproductive rights.⁴² Indeed, the rights of the child were an important factor in the government's reasoning behind the prohibition on anonymity more generally:

[e]ven though there is no legal relationship between the sperm donor and the child, the latter shall have a right to know about his or her genetic heritage. It would be contrary to the personal rights of the child to conceal the identity of his or her genetic father from the child.⁴³

A Judicial Committee report subsequently proposed that the age of 14 be considered the standard age of eligibility for access to genetic information, noting that "[t]he concern underlying the Government Proposal that the donor conceived child may not be able to cope with his or her difficult situation prior to attaining the legal age of majority is not shared by

<<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10003046>> (date accessed: 16 June 2016). Section 15(1) of the *1992 Act* provides that certain information will be accessible directly by the donor-conceived person, whereas other information may only be provided by the medical professional responsible for retaining the data. There is no formal process in Austria for obtaining information (identifying or non-identifying) about donor siblings.

³⁹ *1992 Act*, s. 20(2).

⁴⁰ Austrian Government Proposal No. 216/1991, available <www.parlament.gv.at/PAKT/VHG/XVIII/I/I_00216/imfname_260596.pdf> (date accessed: 4 June 2016) [hereinafter Austrian Government Proposal]. In Austria, the age of majority was 19 years until 1 July 2001, when it was reduced to 18.

⁴¹ Email correspondence with Deva Zwitter, Austrian Legal and Human Rights Professional (8 June 2015).

⁴² The principles, as they operate in the Austrian context, are outlined in detail in the Austrian Government Proposal, *supra* note 41 at 10-11

⁴³ Austrian Government Proposal, *supra* note 40 at 12. This was also debated in depth by the Austrian Parliament: Parliamentary Debate of the 69th Parliamentary Session of the XVIII Legislative Period (Austria, 14 May 1992), 130-155.

the [Judicial] Committee”.⁴⁴ This proposal was accepted by the Austrian parliament in drafting the 1992 legislation, the result of which was section 20(2), outlined above.

There is no national register in Austria for the maintenance of donor information. Instead, fertility clinics and doctors must independently store the relevant information.⁴⁵ Records are kept by the service providers for 30 years and after this period (or earlier if the service provider ceases operations) the records are transferred to the Governor’s Office.⁴⁶ The Governor’s Office stores these files indefinitely. No support or information service exists for those seeking information or looking to make contact with the donor.⁴⁷

Sperm donation is relatively uncommon in Austria and the number of children born through donor conception annually is estimated to be as low as 40–50.⁴⁸ Indeed, there are only seven medical institutions operating in Austria which provide donor conception services.⁴⁹ While the 1992 legislation appears on its face to provide comprehensive rights protection for donor-conceived people under the age of 18, in practice its effectiveness is limited. Familial secrecy around donor conception is still the norm in Austria and thus requests for donor information are very rare in practice.⁵⁰ Referring to an interview held with a representative from one of Austria’s fertility clinic, Allan has pointed out that “[i]n all the time that the clinic had been operating the doctor interviewed remembered only one direct

⁴⁴ *Report of the Judicial Committee* (Austria, No. 490/XVIII GP) 5, available <www.parlament.gv.at/PAKT/VHG/XVIII/I/I_00490/imfname_261307.pdf> (date accessed: 19 May 2016).

⁴⁵ Email correspondence with Agnes Hillebrand, Member, SpenderKinder (German Donor Conception Network) (Vienna, Austria, 10 July 2015). The treating clinic or hospital is required to record the following information about the sperm donor:

- a. first and last name, place of birth, nationality and place of residence;
- b. first and last names of donor’s parents;
- c. date of donation;
- d. results of medical investigations carried out at the time of donation;
- e. whether other families have used the donor’s sperm.

S. Allan, *A Cross-Jurisdictional Study of Regulatory Requirements and Practice Regarding the Recording of Donor Information and its Release to Donor Conceived People* (Winston Churchill Memorial Trust of Australia, 2011) at 44 [hereinafter Allan].

⁴⁶ E. Blyth & L. Frith, “Donor-Conceived People’s Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity” (2009) 23 *Int’l J. Law, Pol’y. & Fam.* 174 at 178–179 [hereinafter Blyth & Frith].

⁴⁷ Email correspondence with Agnes Hillebrand, Member, SpenderKinder (German Donor Conception Network) (Vienna, Austria, 10 July 2015). See also, E. Blyth & L. Frith, “Access to Genetic and Biographical History in Donor Conception: An Analysis of Recent Trends and Future Possibilities” in Kirsty Horsey, ed., *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge, 2015) 136 at 143.

⁴⁸ Email correspondence with Agnes Hillebrand, Member, SpenderKinder (German Donor Conception Network) (Vienna, Austria, 10 July 2015).

⁴⁹ Allan, *supra* note 45 at 45.

⁵⁰ Eva Maria Bachinger, an author who has interviewed numerous donor-conceived people and medical professionals working in donor conception for her recent book, *Kind auf Bestellung: Ein Plädoyer für Klare Grenzen* (Deuticke, 2015), noted that she had never heard of any donor-conceived people under the age of 18 applying for donor information in Austria. Email from Eva Maria Bachinger to author (20 August 2015).

inquiry by a donor conceived person for information”.⁵¹ Anecdotal evidence suggests that the rate of disclosure by parents, informing their donor-conceived children about the circumstances surrounding their birth, is extremely low.⁵² However, even for the small number of donor-conceived people who know about the method of their conception and seek out information as a consequence, Austrian clinics have a substantial amount of discretion regarding whether or not to release donor information:

there is still quite a high barrier for donor conceived children as you have to contact the clinics directly (and often they are not at all friendly, as in my case on the first attempt). There is no governmental or central database, which is a big problem... But there is just no lobby for that, as it concerns so few people.⁵³

Therefore, while the Austrian government has judged donor-conceived adolescents from the age of 14 to be sufficiently mature to obtain and responsibly use identifying donor information, the predominance of parental secrecy and the lack of a central register for the storage and release of such information has unfortunately rendered the Austrian legislation largely ineffective.

The provisions of the Austrian legislation differ greatly from those set out in jurisdictions such as Norway, Finland, and Ireland. Whereas the latter jurisdictions provide for access to identifying information at the age of 18, Austria recognises the donor-conceived child’s right to such information and is thus provides for a far more thorough implementation of the provisions of the C.R.C. It should be noted, however, that due to the annotation of birth certificates and the establishment of a central register in Ireland, the Irish legislation is, in contrast to the situation in Austria, more likely to give rise to an effective system of application for, and release of, identifying donor records.

⁵¹ Allan, *supra* note 45 at 46.

⁵² Email correspondence with Agnes Hillebrand, Member, SpenderKinder (German Donor Conception Network) (Vienna, Austria, 10 July 2015).

⁵³ *Ibid.*

VII – Germany

Sperm donation is relatively common in Germany,⁵⁴ but neither egg nor embryo donation are permitted. Indeed, by virtue of the *German Embryo Protection Law 1990*⁵⁵ a penalty of up to three years’ imprisonment or a fine is imposed on individuals who carry out egg or embryo transfers using donor eggs.⁵⁶ Until 1970, sperm donation was banned by the German Medical Council, but from 1970 onwards, the Council advised doctors who were carrying out donor conception treatments to not provide any guarantees of anonymity to donors.⁵⁷ This recommendation was frequently flaunted, however, and doctors in turn developed a practice of encouraging recipient parents to maintain secrecy within the family.⁵⁸ Disclosure rates continue to remain low in Germany.⁵⁹ It is estimated that approximately 100,000 people who have been born through sperm donation currently live in Germany, and that between 1,500 to 5,000 children are conceived annually in this way.⁶⁰

Donor anonymity has been prohibited at a constitutional, rather than a legislative, level in Germany. The protection offered by this is thus weaker than comparative regulation in the various jurisdictions explored throughout this Part due to the fact the somewhat abstract constitutional rights are not concretely implemented through legislative regulation and thus there is little practical oversight of the legal ramifications of the relevant constitutional principles in Germany. In 1988, the Germany Federal Constitutional Court held that all people have a constitutional right to obtain information about their genetic heritage, where this information is available.⁶¹ Notwithstanding this, fertility doctors in Germany continued to protect the confidentiality of sperm donors. “[T]he legal situation still

⁵⁴ It has been estimated that somewhere between 100,000 and 130,000 children have been born through sperm donation to date in Germany. Donor Offspring Europe, “Country Reports: Germany” available <<http://donoroffspring.eu/country-reports/germany/>> (date accessed: 1 June 2016).

⁵⁵ Law of 13 December 1990 for the Protection of Embryos (EschG - *Bundesgesetzblatt*, Part I, at 2746–2748) FRG 91.9.

⁵⁶ Section 1, paras 1, numbers 1 and 2 EschG. It has been noted, however, that due to a legal loophole regarding surplus embryos following treatment, donor embryos have been used in fertility treatment in Bavaria since 2014. Email correspondence with “Anne”, Director, Spenderkinder (German Donor Conception Network) (7 June 2015). For anonymity purposes, the Director of Spenderkinder wished to withhold her surname.

⁵⁷ Donor Offspring Europe, “Country Reports: Germany” available <<http://donoroffspring.eu/country-reports/germany/>> (date accessed: 1 June 2016). Direct source: *Deutsches Ärzteblatt* 1970, 1982.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* Email correspondence with Anne, Director, Spenderkinder (German Donor Conception Network) (7 June 2015).

⁶⁰ Child Rights International Network, “Supreme Court of Germany Decision XI ZR 201/13” (28 January 2015).

⁶¹ *Bundesverfassungsgericht*, 1 BvR Jan. 18, 1988, docket no. 1 BvR 1589/87, elaborated one year later in *Bundesverfassungsgericht*, Urteil vom 31. Januar 1989 – 1 BvL 17/87 –, BVerfGE 79, 256. The hierarchy of courts in Germany from lowest to highest is as follows: Amtsgericht, Landgericht (LG – Regional Court), Oberlandesgericht (OLG – Higher Regional Court), Bundesgerichtshof (BGH – Federal Court of Justice).

left many uncertainties” as the constitutional decisions had not been translated into domestic legislation and this made it easy for clinics to claim that donor-conceived individuals did not have any rights to the requested information.⁶²

On 6 February 2013, a German donor-conceived individual won a legal case against her parents’ fertility doctor at the Higher Regional Court of Hamm, North Rhine-Westphalia.⁶³ The case concerned an I.V.F. procedure which had taken place in 1991, in which the recipient parents had contractually agreed to respect the anonymity of the sperm donors involved. The Court held that a child has the right to obtain information on the identity of the anonymous sperm donor through whom they have been conceived. The Court therefore held the treating physician responsible to make every effort to obtain this information and pass it onto the plaintiff. The Higher Regional Court based its decision on the duty to perform a contract in good faith which is set out in section 242 of the German Civil Code,⁶⁴ which the Court found to be applicable because the child was a third party beneficiary of the contract between the physician and the parents and the physician therefore owed duties of care to the child. The Court also held that the child’s constitutional rights of personhood, and the right included therein to know their biological parents, outweighed the donor’s privacy rights, referring to the 1988 decision of the Federal Constitutional Court, noted above.⁶⁵ This decision was the first to refer to the individual’s constitutional right to information regarding genetic heritage (under Articles 1(1) and 2(1) of the German Constitution which outline the “common personal rights” of every individual) and it therefore reinvigorated the debate regarding the importance of introducing a statutory regime to deal with the abolition of donor anonymity in practice.

On 28 January 2015, the German Federal Court of Justice⁶⁶ held that all donor-conceived people have a right to know the identity of their donor, also basing its reasoning

⁶² Donor Offspring Europe, “Country Reports: Germany” available <<http://donoroffspring.eu/country-reports/germany/>> (date accessed: 1 June 2016).

⁶³ OLG Hamm, Urteil vom 06.02.2013, Az. I-14 U 7/12 = NJW-Spezial 2013, 165.

⁶⁴ Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung, 2 January 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), as amended by Article 3 of the law of 24 May 2016 (BGBl. I S. 1190).

⁶⁵ The decision of the Higher Regional Court Hamm sparked much interest in the legal literature, with some commentators finding fault with it and others agreeing with it in principle. See, for example: S. Fink & K.J. Grün, “Der Auskunftsanspruch über Die Abstammung Des durch Heterologe Insemination Gezeugten Kindes gegen Den Arzt” [2013] *Neue Juristische Wochenschrift* 1913; T. Kingreen, “Auskunftsanspruch Des im Wege Der Heterologen Insemination Gezeugten Kindes” [2013] *Zeitschrift für Das Gesamte Familienrecht* 641.

⁶⁶ The Federal Court of Justice is Germany’s highest civil court. This decision was a decision of the latter court and was therefore final.

upon Articles 1(1) and 2(1) of the German Constitution.⁶⁷ The two claimants in the case were donor-conceived sisters, born in 1997 and 2002, whose parents took the case on their behalf. The Hannover regional court had previously held that both claimants had a right to know the donor’s identity, but only from the age of 16, applying the law as it relates to adoptees in Germany.⁶⁸ This requirement was rejected by the Federal Court of Justice, which concluded that there was no necessity for a minimum age requirement in releasing identifying donor information.⁶⁹ The judges noted that it had to be assumed that a child could have a desire to know their parents at any age and saw no foundation in existing laws to support the age requirement of 16.

In practice, anonymous sperm donation is no longer possible in Germany. However, a practical obstacle to the protection of the right to identity is that many clinics in Germany have until recently operated a practice of destroying their medical records 10 years after treatment, invoking what was the minimum storage period for medical records under domestic law.⁷⁰ Therefore, for some, the right to donor information has been rendered meaningless because information about the sperm donor is not available, or even where available, clinics may claim that it is not. As a result of the European Union “Tissue and Cells Directives”,⁷¹ implemented in Germany in 2007, records about sperm donations must be stored for at least 30 years. Notwithstanding this, fertility clinics continue to retain a significant amount of power regarding the release of donor information.⁷² There is no State register for the recording of donor information in Germany.⁷³ While the 2015 judgment has had some positive implications,⁷⁴ the right to identity will not be fully vindicated until legislation is introduced. Blyth and Frith assert:

⁶⁷ BGH, Urteil vom 28.01.2015, Az. XII ZR 201/13 = NJW 2015, 1098.

⁶⁸ Germany’s Personal Status Law (Personenstandgesetz) provides that adopted people may access information about their birth mother at the age of 16. It should also be noted that the Federal Court of Justice has ruled that Personal Status Law’s age limit of 16 only applies to those adopted individuals wishing to obtain the relevant information *without* the support of their adoptive parents.

⁶⁹ This decision was final.

⁷⁰ Email correspondence with Stina, Director, Spenderkinder (German Donor Conception Network) (Berlin, Germany, 24 August 2015).

⁷¹ Directive 2004/23/EC, Directive 2006/17/EC and Directive 2006/86/EC.

⁷² If a clinic refuses to release information, the only option available to the donor-conceived person is to take legal action against the clinic, which is financially prohibitive for many. Email correspondence with Anne, Director, Spenderkinder (German Donor Conception Network) (7 June 2015).

⁷³ Donor Offspring Europe, “Country Reports: German” available <<http://donoroffspring.eu/country-reports/germany/>> (date accessed: 1 June 2016).

⁷⁴ For example, the local court of Essen recently granted a donor-conceived person legal aid to sue her doctor for damages as he claims that he has destroyed data about her donor. Legal aid is only granted where a court believes that it is likely that the claimant will win and an award of damages for data destruction may encourage some fertility doctors to restore the “lost” data. LG Essen, Beschluss vom 9.07.2015, Az. 1 O 58/15. Email correspondence with Stina, Director, Spenderkinder (German Donor Conception Network) (Berlin, Germany, 24 August 2015).

Germany still lacks the infrastructure considered necessary for the effective implementation of rights to information, such as a central register of donations and births resulting from gamete donation, protection of donors from legal liability for offspring, provision of counselling and intermediary services to facilitate and support information provision – and if sought – contact.⁷⁵

While Germany considers donor anonymity to be in violation of the donor-conceived individual's constitutional rights and is therefore a member of the group of jurisdictions globally prohibiting the practice of anonymity, this jurisdiction lies on periphery by virtue of the fact that it lacks legislation to adequately implement the prohibition.⁷⁶ Moreover, since disclosure rates in Germany continue to be low, there are very few donor-conceived people in Germany under the age of 18 who would be in a position to seek the relevant information, despite the fact that the courts have declared donor-conceived people of any age to be entitled to possess this information.⁷⁷

The German legal position differs greatly from that of Ireland. Whereas the Irish legislation provides for access to identifying information at the age of 18, Germany recognises the donor-conceived *child's* right to such information, a principle which is wholly in line with the provisions of the C.R.C. It should be noted, however, that due to the annotation of birth certificates and the establishment of a central register in Ireland, the Irish legislation is, in contrast to the situation in Germany, more likely to give rise to an effective system of application for, and release of, identifying donor records.

⁷⁵ Blyth & Frith, *supra* note 46 at 145.

⁷⁶ Encouraged by the decision of the Higher Regional Court of Hamm of 2013, the coalition agreement between the three governing parties (C.D.U., C.S.U. and S.P.D.) provides that legislation will be drafted concerning the right of donor conceived persons to know about their ancestry. (Deutschlands Zukunft gestalten, S. 99, available <https://www3.spd.de/linkableblob/112790/data/20131127_koalitionsvertrag.pdf>) Legislation, however, is not likely to be imminent as there has been no draft law issued yet and the legislative period ends in autumn 2017. In an official answer to a parliamentary question (kleine Anfrage) of the Green Party, the government stated that it has not formed an opinion yet how to implement such rights in practice (BT-Drs. 18/4914 of 18 May 2015, question 22). Furthermore, the Federal Ministry of Justice and for Consumer Protection awaits the report of a working committee on the right of genetic heritage (Arbeitskreis Abstammungsrecht) (BT-Drs. 18/4914 of 18 May 2015, question 31), which is due to be published either at the end of 2016 or at the beginning of 2017.

⁷⁷ Email correspondence with Anne, Director, Spenderkinder (German Donor Conception Network) (7 June 2015).

VIII – The Netherlands

Approximately 1,100 couples request donor insemination annually in the Netherlands.⁷⁸ While the debate around the prohibition of anonymity was begun in the Netherlands by a number of religious politicians who sought to diminish the practice of donor conception, it soon became a discussion based on the needs and rights of the child to genetic information.⁷⁹ A dual-access system was in operation in the Netherlands between 1990 and 2004, which meant that prospective parents could choose open-identity or anonymous donors, but in both cases, a certain amount of autobiographical information would be available to the donor-conceived child.⁸⁰

The *Artificial Insemination (Donor Data) Act 2002 (2002 Act)*, brought into effect on 1 June 2004, provides that egg, sperm and embryo donation is permissible but that fertility clinics are not permitted to use anonymous gametes or embryos.⁸¹ A two year transition period was granted under the new law due to concerns over the possible falling number of donors, during which the use of anonymous donors was still permitted.⁸² According to paragraph 2 of Article 3(2) of the *2002 Act*, eligibility to request disclosure of the donor’s identity is conferred when the donor-conceived person attains the age of 16.⁸³ According to paragraph 2 of Article 3(1) of the *2002 Act*, non-identifying information may be obtained by the donor-conceived child from the age of 12, or by their parents at any age. Article 3(2) also notes that a donor may refuse to have their information released, but that in such a scenario,

⁷⁸ P.M.W. Janssens, A.H.M. Simons, R.J. van Kooij, E. Blokzijl and G.A.J. Dunselman, “A New Dutch Law Regulating Provision of Identifying Information of Donors to Offspring: Background, Content and Impact” (2006) 21(4) *Human Reproduction* 852 at 854 [hereinafter Janssens *et al.*].

⁷⁹ *Ibid.* at 852.

⁸⁰ J.K. de Bruyn, *Advice on Medical Technical Aspects of Artificial Insemination with Donor Semen; The Dutch Consensus* (Medical Scientific Council of the Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing, Utrecht English Version, 1997).

⁸¹ For a discussion of Dutch parents’ opinions on anonymity prior to the introduction of the Act, see A. Brewaeys, S. Golombok, N. Naaktgeboren, J.K. de Bruyn and E. V. van Hall, “Donor Insemination: Dutch Parents’ Opinions about Confidentiality and Donor Anonymity and the Emotional Adjustment of their Children” (1997) 12(7) *Human Reproduction* 1591.

⁸² W. Weber, “Dutch Sperm Donors Will Remain Anonymous for Another Two Years” [2000] 355 *Lancet* 1249.

⁸³ An updated version of the *2002 Act* is available <http://wetten.overheid.nl/BWBR0013642/geldigheidsdatum_04-09-2015> (date accessed: 16 June 2016). Publications relating to the passage of the Bill are available on the website of the Dutch Upper House: <www.eerstekamer.nl/wetsvoorstel/23207_wet_donorgegevens> (date accessed: 1 April 2016), and additional information is available at: <www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2012/09/03/evaluatie-embryowet-en-wet-donorgegevens-kunstmatige-bevruchting.html> (date accessed: 1 April 2016).

the best interests of the child will take priority.⁸⁴ Doctors may request medical information on behalf of the donor-conceived person at any time.⁸⁵ The first donor-conceived people eligible under the *2002 Act* will come of age in 2020, but the Foundation for Donor Data, the Central Register for the storage and release of donor information in the Netherlands, has been releasing such information to donor-conceived people aged 16 and over for many years where donors have consented to disclosure.⁸⁶ The Foundation provides information to all relevant parties to the donation, but has no formal public education role.⁸⁷ It is the treating fertility doctor's responsibility for reporting all relevant information about the donor to the Foundation for storage and potential future release.⁸⁸ The Foundation stores identifying donor information, including first and last names, address and date of birth, and an extensive list of non-identifying information, including details about the donor's family, medical information, physical appearance, occupation, and interests. Moreover, the Foundation stores information regarding the foreign gametes used by Dutch clinics and doctors, and thereby provides for governmental oversight of the prohibition on donor anonymity.⁸⁹ Data about the donor is stored by the Foundation for 80 years.⁹⁰

Clinics are obliged to provide all information about current as well as past donors to the Foundation. In theory, clinics were also required to contact all donors who donated prior to the coming into force of the *2002 Act*, to ask whether they were willing to have their identifying information released, and to report the response to the Foundation. While some have adhered to this requirement, most clinics have claimed that donor records have either been lost or destroyed and that they therefore have not been able to contact past donors.⁹¹

In the Netherlands, a D.N.A. databank (F.I.O.M.) offers voluntary donor and donor-conceived person linking services.⁹² F.I.O.M. also provides counselling, support, information

⁸⁴ The Foundation for Donor Data will be responsible for undertaking this balancing exercise, but criteria for such a balancing exercise have not yet been developed. Interview with Daniëlla Wiercx van Rhijn, Deputy Secretary, Foundation for Donor Data (The Hague, the Netherlands, 12 August 2015).

⁸⁵ Allan, *supra* note 45 at 23.

⁸⁶ Interview with Daniëlla Wiercx van Rhijn, Deputy Secretary, Foundation for Donor Data (The Hague, the Netherlands, 12 August 2015). The Foundation operates under the Ministry of Health, Welfare and Sport.

⁸⁷ *Ibid.*

⁸⁸ Allan, *supra* note 45 at 22.

⁸⁹ Interview with Ties van der Meer, Chairman, Stichting Donorkind (Donor Conceived Network in the Netherlands) (The Hague, the Netherlands, 30 June 2015).

⁹⁰ Janssens *et al.*, *supra* note 78 at 853.

⁹¹ Interview with Ties van der Meer, Chairman, Stichting Donorkind (Donor Conceived Network in the Netherlands) (The Hague, the Netherlands, 30 June 2015).

⁹² F.I.O.M. has recently been merged with another agency, International Social Services (I.S.S.). I.S.S. was previously responsible for providing support services for inter-country adoptees. See also, Donor Offspring

and intermediary services and in this sense, the organisation works closely with the Foundation. For instance, once it has been established by the Foundation that identifying donor information may be released to the donor-conceived person, F.I.O.M. is engaged to provide therapeutic and practical support. In this context, one of F.I.O.M.’s social workers will initially talk to the donor about the possibility of exchanging information. The social worker will then discuss all issues arising with the donor-conceived individual and will subsequently organise and facilitate the exchange of information and any potential meeting between the two parties. The parties may then continue to communicate independently, but will always have the option of requesting the support of the social worker at a future date if necessary.⁹³ Counselling is not mandatory but is generally used by the donor-conceived person in practice.⁹⁴ According to Allan, “it is clear that FIOM has both expertise and has implemented a very effective system”.⁹⁵

The *2002 Act* does not contain any provisions relating to the donor-conceived person’s access to information about their donor siblings. The Foundation has, however, adopted a policy of linking donor-conceived people who share the same donor, where an interest has been expressed in potential sibling matches.⁹⁶

There is no evidence to suggest that the release of identifying donor information to Dutch donor-conceived people under the age of 18 has been detrimental to their psychological well-being. On the contrary, the system appears to work well in practice. According to Van der Meer:

I have received reports that the withholding of information has had a negative effect on donor-conceived children and adults. It is felt as damaging to their integrity. I have never received reports about people who felt, in hindsight, that they were not mature enough to receive the information. But I have heard many positive stories about obtaining information and establishing contact with the donor.⁹⁷

Europe, “Country Reports: The Netherlands” available <<http://donoroffspring.eu/country-reports/the-netherlands/>> (date accessed: 1 May 2016).

⁹³ Allan, *supra* note 47 at 31.

⁹⁴ Interview with Ties van der Meer, Chairman, Stichting Donorkind (Donor Conceived Network in the Netherlands) (The Hague, the Netherlands, 30 June 2015).

⁹⁵ Allan, *supra* note 45 at 31.

⁹⁶ *Ibid.* at 27.

⁹⁷ Interview with Ties van der Meer, Chairman, Stichting Donorkind (Donor Conceived Network in the Netherlands) (The Hague, the Netherlands, 30 June 2015).

While the *2002 Act* has yet to be tested, it is clear that the government's choice of the age of 16 for the release of identifying donor information has been based on many years of positive experience in this area. The Netherlands is also a noteworthy case study in that the provision of support by social workers adds to the effectiveness of the system of information release. The age limits set down in the Dutch legislation, not unlike the provisions set down in Austria, are more in line with the requirements of the C.R.C. than those found in the Irish legislation. While the provisions of both pieces of legislation have yet to be tested, it appears that the Dutch system will provide for a more effective vindication of the donor-conceived child's right to identity in practice due to the multifaceted and comprehensive nature of its regulation, as well as the successful cooperation between the Foundation and F.I.O.M. At present, there is no equivalent organisation to F.I.O.M. in the Irish system, and thus the social work support provided by that organisation is a distinct advantage in comparison to the system envisaged for Ireland.

IX – Sweden

Sweden was the first jurisdiction worldwide to outlaw donor anonymity. The *Act on Insemination 1984 (1984 Act)*, brought into effect on 18 March 1985, was the first piece of legislation to regulate donor conception in Sweden, and has been “heralded as revolutionary and unique” on this basis.⁹⁸ The *1984 Act*, as amended by the *I.V.F. Act 1988*, permits all individuals conceived through the use of a donor, in a State hospital⁹⁹ recognised by the National Board of Health and Welfare (National Board),¹⁰⁰ to access identifying information about their egg or sperm donors under certain circumstances.¹⁰¹ To this end, the importation of gametes is prohibited without prior authorisation by the National Board.¹⁰² The legislation applies only to sperm and eggs, and does not apply to donated embryos.¹⁰³ The *Genetic Integrity Act 2006 (2006 Act)* repealed and re-enacted both the 1984 and 1988 Acts almost verbatim as individual Chapters of the *2006 Act*.¹⁰⁴ Chapter 6 of the *2006 Act* specifically deals

⁹⁸ Nordic Council of Ministers, *Assisted Reproduction in the Nordic Countries: A Comparative Study of Policies and Regulation* (2006) at 17 [hereinafter Nordic Council].

⁹⁹ There are fewer than 10 State hospitals in Sweden.

¹⁰⁰ The Swedish National Board of Health and Welfare, or the Socialstyrelsen, is a Swedish government agency under the Ministry of Health and Social Affairs. The website of the National Board is available at: <www.socialstyrelsen.se/english> (date accessed: 18 June 2016).

¹⁰¹ J. Stoll, “Swedish Donor Offspring and Their Legal Right to Information” (Ph.D. Thesis: Uppsala University, 2008) at 42 [hereinafter Stoll].

¹⁰² *Genetic Integrity Act 2006*, ch. 6, s.7.

¹⁰³ Interview with Gunilla Cederström, Investigator, Swedish National Board of Health and Welfare (Stockholm, Sweden, 2 June 2015).

¹⁰⁴ Stoll, *supra* note 101 at 42.

with the question of donor conception, section 5 of which provides: “[a] person conceived [through donor conception] has, *if he or she has reached sufficient maturity*, the right to access the information about the donor which is recorded in the hospital’s special medical record.”¹⁰⁵

This provision applies to those who were conceived after 1 March 1985. An “Insemination Committee” was established by the Swedish Ministry of Justice and charged with the responsibility of drafting a preparatory report in advance of the passage of the *1984 Act*.¹⁰⁶ The report of the Insemination Committee was published in 1983¹⁰⁷ and the issue of the “sufficient maturity” approach was debated in some depth by the Insemination Committee prior to the provision’s enactment.¹⁰⁸ The Committee noted that donor-conceived people under the age of 18, particularly during adolescence, can have strong desires to obtain identifying donor information, but stated that in general “teenage children were not sufficiently emotionally mature to use this information in a responsible way”.¹⁰⁹ The Committee did, however, suggest that in “exceptional cases” there may be justification for releasing the relevant information to a child, particularly in instances where they were approaching the age of 18 and thus recommended that in those situations the child should be entitled to identifying information provided that the donor had first consented to its release.¹¹⁰ The Swedish parliament disagreed, concluding that all donor-conceived people with “sufficient maturity” should have a right to identifying donor information. “Sufficient maturity” would be presumed for all adults, and in the case of donor-conceived people under the age of 18, the Social Welfare Board would carry out individual assessments.¹¹¹

The “sufficient maturity” test was adopted primarily because releasing information to donor-conceived people under the age of 18 was seen to be in the best interests of the child.¹¹² Indeed, “the best interests of the prospective child is arguably the cornerstone of the insemination and I.V.F. Chapters of the Genetic Integrity Act” and the drafters of the

¹⁰⁵ Emphasis added.

¹⁰⁶ Nordic Council, *supra* note 98 at 15.

¹⁰⁷ Insemination Committee, Swedish Ministry of Justice, *Barn Genom Insemination (Children Conceived by Artificial Insemination)* (SOU 1983: 42) [hereinafter Insemination Committee].

¹⁰⁸ *Ibid.* at 122-123. See also, Stoll, *supra* note 101 at 46.

¹⁰⁹ Stoll, *ibid.* at 46.

¹¹⁰ Insemination Committee, *supra* note 107, at 123, 164.

¹¹¹ Stoll, *supra* note 101 at 46.

¹¹² The Insemination Committee relied on the reports of adopted children in drawing the conclusion that it would be in the best interests of the child to be informed about her genetic heritage. Insemination Committee, *supra* note 107 at 110-121.

legislation were careful to ensure that the child's best interests were prioritised over the interests of recipient parents and donors in *2006 Act*.¹¹³

The National Board's *Regulations and Guidelines on Assisted Conception*, which elaborate on, and provide guidance on the implementation of, the provisions of the Swedish legislation, were introduced in 2002 and took effect in 2003.¹¹⁴ The Regulations are legally binding, whereas the Guidelines allow for a variety of approaches to the implementation of the legislation.¹¹⁵ Chapter 10 of the *Regulations and Guidelines on Assisted Conception*, entitled "The child's right to his or her genetic origin", do not add anything to the provisions of the *2006 Act* regarding the actual process of releasing donor information.¹¹⁶ Record-keeping was an important requirement of the 1984 legislation and by virtue of the *2006 Act*, "special medical records" must be preserved for at least 70 years.¹¹⁷ Prior to the enactment of the *1984 Act*, donor records were frequently destroyed or subject to strict confidentiality by treating doctors in Sweden.¹¹⁸ In line with this general preference for secrecy, parents were encouraged not to disclose the method of conception to the child.¹¹⁹ Importantly, however, section 2 of Chapter 11 of the *Regulations and Guidelines on Assisted Conception* now provide as follows: "[t]he notes in the medical record about the donor shall be made with consideration to the child's legally prescribed right to find out about his or her origins and right to have information about the donor which is in the medical record." Chapter 11 of the *Regulations and Guidelines on Assisted Conception* recommends that identifying information as well as notes on the donor's appearance and/or a photograph, weight and height, profession, interests and family circumstances should be included in the special medical record.¹²⁰ The *Regulations and Guidelines on Assisted Conception* envisage that identifying as well as non-identifying should therefore be accessible to the donor-conceived child at "sufficient maturity".

¹¹³ Stoll, *supra* note 101 at 47.

¹¹⁴ National Board, *Regulations and Guidelines on Assisted Conception* (SOSFS 2002: 13) [hereinafter *Regulations and Guidelines*]. The *Regulations and Guidelines on Assisted Conception* were issued by the National Board of Health and Welfare in 2002 and came into force on 1 January 2003. The document is unique in that it is a mixed source of law combining both binding Regulations and non-binding Guidelines in the same instrument. The instrument contains 13 Chapters: each Chapter commences with the relevant Regulations and where the National Board of Health and Welfare has found it appropriate to issue Guidelines in relation to a given Regulation, the Guidelines are presented immediately underneath the Regulations in question.

¹¹⁵ Stoll, *supra* note 101 at 43.

¹¹⁶ *Ibid.* 44.

¹¹⁷ *Genetic Integrity Act*, ch 6, s.4.

¹¹⁸ Stoll, *supra* note 101 at 48.

¹¹⁹ C. Gottlieb, O. Lalos & F. Lindblad, "Disclosure of Donor Insemination to the Child: the Impact of Swedish Legislation on Couples' Attitudes" (2000) 15(9) *Human Reproduction* 2052 at 2052 [hereinafter Gottlieb *et al.*].

¹²⁰ Stoll, *supra* note 101 at 50.

The donor-conceived person may either approach the treating hospital or medical institution directly for donor information, or may instead turn to the municipal Social Welfare Board for assistance.¹²¹ Section 5 of Chapter 6 of the *2006 Act* provides that if a donor-conceived person “has reason to suspect” that she was so conceived, the Social Welfare Board “is obliged to, on request, help them find out if there is any information recorded in a special medical record”. Stoll argues that the current system of locating donor information on a case-by-case basis from the relevant medical institution is an “inefficient and inconvenient way to administer the access to identifying information” and therefore that the establishment of a Central Register storing and releasing donor information should be seriously considered.¹²² The lack of a centralised system means that very little is known about any applications made by donor-conceived people. A Swedish State report noted in 2007 that there had been no known applications by donor-conceived people for identifying information at that time.¹²³ The National Board of Health and Welfare was not in a position to comment on how many donor-conceived people have sought access to identifying information in Sweden to date.¹²⁴ Neither was it in a position to comment on how many donor-conceived children in total have been granted access based on the “sufficient maturity” criterion.¹²⁵ Donor information is held by the State hospitals, representatives of which are in general reluctant to discuss the matter.¹²⁶ Allan suggests that “[i]t is assumed, given the long history of the law” that hospitals release identifying information to Swedish donor-conceived people, but that “this needs to be followed up and confirmed”.¹²⁷

The individual State hospital is responsible for carrying out the “sufficient maturity” assessment, and little is therefore known at a central level about how the test is conducted in practice.¹²⁸ Neither the National Board of Health and Welfare nor the municipal Social Welfare Board plays any role in assessing the donor-conceived child.¹²⁹ However, I was informed that since the concept of “sufficient maturity” is difficult to communicate to medical

¹²¹ Municipal social welfare boards in Sweden have the responsibility of assisting donor-conceived people within distinct municipal districts, as opposed to the National Board of Health and Welfare, which operates on a nationwide basis and is not responsible for assisting donor-conceived people in this matter directly.

¹²² Stoll, *supra* note 101 at 50.

¹²³ Official Investigations, Swedish State Government, *Report of the Investigation into Parenthood with Assisted Reproduction* (SOU 2007: 3) 102.

¹²⁴ Interview with Gunilla Cederström, Investigator, Swedish National Board of Health and Welfare (Stockholm, Sweden, 2 June 2015).

¹²⁵ *Ibid.*

¹²⁶ Allan, *supra* note 45 at 43.

¹²⁷ *Ibid.*

¹²⁸ Interview with Gunilla Cederström, Investigator, Swedish National Board of Health and Welfare (Stockholm, Sweden, 2 June 2015).

¹²⁹ *Ibid.*

professionals and social welfare staff generally, the National Board has received a government mandate to develop guidelines and support documents for these types of assessment, and this is likely to be completed in the near future.¹³⁰ The *Regulations and Guidelines on Assisted Conception* and support documents would also be used, on an optional basis, by State hospitals in carrying out their assessments of donor-conceived children. The National Board emphasised that in the context of medical and family matters in Sweden, government policy in general is to take into account the child's opinions and attitudes in accordance with her age and maturity, and to tailor any information provided to the child on the same basis.¹³¹ The National Board also pointed out that where a child has been deemed to be insufficiently mature by the treating hospital and therefore ineligible to access to the donor's information, they will be entitled to re-apply for a follow-up assessment at a later date.¹³²

While it was originally anticipated that "sufficient maturity" would generally be found to exist when the child was in their upper teens,¹³³ it was suggested to me that treating hospitals would not have any objection to providing information to donor-conceived children in their early or mid-teens.¹³⁴ However, the founder of Sweden's main donor conception network, Scandinavian Seed Siblings, stated that she had not come across more than approximately ten Swedish donor-conceived people in total who have applied for donor information since the 1984 legislation came into effect. It was not known how many of these individuals had been granted the requested information, or whether any of them had obtained information below the age of 18.¹³⁵ Of those members of Scandinavian Seed Siblings who had obtained donor information under the age of 18, all of whom had been conceived abroad and thus received donor information from the relevant foreign jurisdictions,¹³⁶ all reported having had positive experiences of the process of receiving information about, and communicating with, their donors: "[a]s far as I'm concerned, there have been no reports of donor-conceived people under 18 who were traumatised by the experience due to their young age... all reports have been positive."¹³⁷

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ Gottlieb *et al*, *supra* note 119 at 2052.

¹³⁴ Interview with Maria Hasselblad, Founder, Scandinavian Seed Siblings, (Stockholm, Sweden, 20 July 2015). Ms. Hasselblad noted that she has spoken to numerous gynaecologists and clinic administrators in Sweden about the issue.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.* Ms. Hasselblad noted that the majority of people in Sweden wishing to conceive using donor sperm will travel abroad to obtain foreign gametes. Those seeking donor sperm will generally go to Denmark, whereas those seeking donor eggs will generally go to Spain or Poland.

¹³⁷ *Ibid.*

Following the passage of the 1984 legislation, the number of people coming forward to donate gametes declined.¹³⁸ Prior to the 1984 legislation, approximately 200 children were born annually to donor conception, but during the four years subsequent to its introduction, only 200 were born in total.¹³⁹ Despite some conflicting reports, there appears to be a problem with donor shortages in Sweden.¹⁴⁰ Daniels and Lalos have attributed the decline to the desire of Swedish medical professionals to see the legislation fail, pointing out that due to their moral qualms with the concept of disclosure, medical professionals have adopted a policy of refusing to recruit donors and of referring patients to neighbouring countries for treatment.¹⁴¹

There is no requirement in either the *2006 Act* or the *Regulations and Guidelines on Assisted Conception* that donor-conceived people receive counselling prior to the release of donor information, nor is there any State provision for psychosocial support during the process of communicating with the donor.¹⁴² The 1984 and 2006 Acts are also silent on the question of donor siblings and no State authority has been established in Sweden to assist donor-conceived people to obtain information about, or establish contact with, any genetic relatives other than the donor. It is also noteworthy that no provision exists permitting the donor to access identifying information about the donor-conceived individual, or to the parents and donors to access identifying information about one another.¹⁴³

In assessing the suitability of couples for fertility treatment, the *Regulations and Guidelines on Assisted Conception* provide that they be assessed jointly by a doctor and a social worker or psychologist in order to determine their suitability as parents, and in arriving at

¹³⁸ See generally, K. Daniels & O. Lalos, “The Swedish Insemination Act and the Availability of Donors” (1995) 10(7) *Human Reproduction* 1871 [hereinafter Daniels & Lalos]; K. Daniels, “The Swedish Insemination Act and Its Impact” (1994) 34(4) *Australia and New Zealand Journal of Obstetrics and Gynaecology* 437.

¹³⁹ Nordic Council, *supra* note 101 at 21, referring to Kerstin Hagenfeldt, “Donor Insemination – a Treatment Method in Crisis” (1990) 87(21) *Läkartidningen* 1849.

¹⁴⁰ Nordic Council, *supra* note 101 at 17. Interview with Maria Hasselblad, Founder, Scandinavian Seed Siblings, (Stockholm, Sweden, 20 July 2015). Interestingly, a 2014 study found that a majority of the 210 participants (65% of egg donors and 70% of sperm donors) who had chosen to donate within the open-identity framework were positive about being contacted by a donor-conceived child upon maturity. S. Isaksson, G. Sydsjö, A. Skoog Svanberg and C. Lampic, “Preferences and Needs Regarding Future Contact with Donation Offspring among Identity-Release Gamete Donors: Results from the Swedish Study on Gamete Donation” (2014) 102(4) *Fertility and Sterility* 1160.

¹⁴¹ Daniels & Lalos, *supra* note 138 at 1872.

¹⁴² Blyth & Frith, *supra* note 46 at 141.

¹⁴³ Stoll, *supra* note 101 at 42; Insemination Committee, *supra* note 107. This was supported by the Swedish Parliament and is reflected in the 1984 legislation through a notable absence of any provision permitting such access to parents of donor-conceived people.

that decision, the doctor should be satisfied that the couple “will tell the child about the child’s origins”.¹⁴⁴ The *Regulations and Guidelines on Assisted Conception* also provide that donors be counselled in advance of donation, and that they should, in this context, be informed “about the psychological and social consequences that a donation can give rise to”.¹⁴⁵ However, the *Regulations and Guidelines on Assisted Conception* are not legally binding and thus doctors vary in their adherence to them.¹⁴⁶ Nonetheless, disclosure rates regarding the donor conception are relatively high.¹⁴⁷ However, since many donor-conceived people in Sweden are born through foreign gametes, and thus would not be seeking donor information in Sweden, the Swedish legislation is not as effective as it could otherwise be.

The Swedish legal position differs greatly from that of Ireland. Whereas the Irish legislation provides for access to identifying information at the age of 18, Sweden recognises the donor-conceived *child’s* right to such information and is thus acting wholly in line with the provisions of the C.R.C. As will be seen below, Victoria’s legislation mirrors that of Sweden in its adoption of the principle of “sufficient maturity”. It should be noted, however, that due to the establishment of a central register in Ireland, and the unlikelihood of Irish doctors encouraging patients to engage in fertility travel, the Irish legislation is, in contrast to the situation in Sweden, more likely to give rise to an effective system of application for, and release of, identifying donor records.

X – Victoria, Australia

Federal legislation governing the use of assisted reproductive technology has not been introduced in Australia and the regulation of donor conception is therefore provided for in Victoria through State legislation. The (federal) National Health and Medical Research Council (N.H.M.R.C.) ethical guidelines for clinical practice and research involving A.R.T.¹⁴⁸ are, however, relevant to an extent. This is due to the fact that all fertility clinics in Victoria must be registered with the Victorian Assisted Reproductive Treatment Authority

¹⁴⁴ Chapter 4 of the *Regulations and Guidelines on Assisted Conception*, *supra* note 114. Stoll, *supra* note 101 at 54.

¹⁴⁵ Chapter 5 of the *Regulations and Guidelines on Assisted Conception*, *ibid*.

¹⁴⁶ A. Skoog Svanberg, “Attitudes towards Gamete Donation among Swedish Gynaecologists and Obstetricians” (2008) 23 *Human Reproduction* 904 at 907. See also, A. Lalos, “Legislated Right for Donor-Insemination Children to Know Their Genetic Origin: A Study of Parental Thinking” (2007) 22 *Human Reproduction* 1759.

¹⁴⁷ S. Isaksson, A. Skoog Svanberg, G. Sydsjö, A. Thurin-Kjelberg, P.O. Karlström, N.G. Solensten and C. Lampic, “Two Decades after Legislation on Identifiable Donors in Sweden: Are Recipient Couples Ready to Be Open about Using Gamete Donation?” (2011) 26(4) *Human Reproduction* 853.

¹⁴⁸ National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (Australian Government, 2007).

(V.A.R.T.A.)¹⁴⁹ in order to practice donor conception services, and registration will not be granted unless the clinic is accredited by the Fertility Society of Australia (R.T.A.C.), which in turn requires adherence to the N.H.M.R.C. guidelines.¹⁵⁰ Therefore, the provisions of the guidelines relating to donor conception are binding upon treatment clinics in Victoria. Of particular importance in this context is guideline 6.1, providing that:

[p]ersons conceived using ART procedures are entitled to know their genetic parents. Clinics must not use donated gametes in reproductive procedures unless the donor has consented to the release of identifying information about himself or herself to the persons conceived using his or her gametes.¹⁵¹

The Law Reform Committee of Victoria, in a 2012 report, declared the following:

[k]nowledge about parentage and heredity often forms a substantial part of a person’s sense of identity, and donor-conceived people who want this information, but are unable to obtain it, experience significant stress and frustration. Where people learn as youths or adults that they are donor-conceived, and are consequently forced to evaluate who they are through newly perceived relationships, the stress and frustration of not being able to find out more about their donor can be exacerbated.¹⁵²

The Victorian Law Reform Commission has pointed out that “Victoria’s regime for the collection of and access to donor information is considered to be at the forefront of public policy in this area”.¹⁵³ Victoria first passed legislation regulating donor conception in 1984.¹⁵⁴ Prior to this, “a culture of secrecy surrounded donor-conception, despite contemporaneous debates about the rights of adopted people to have access to information about their birth parents”.¹⁵⁵ The *Infertility (Medical Procedures) Act 1984 (1984 Act (Vic))* allowed all parties involved in the donor conception to find out information about one another.¹⁵⁶ By virtue of

¹⁴⁹ By virtue of the *Assisted Reproductive Treatment Act 2008*.

¹⁵⁰ Law Reform Committee of Victoria, *Inquiry into Access by Donor-Conceived People to Information about Donors* (Parliamentary Paper No. 120, March 2012) 22 [hereinafter Law Reform Committee of Victoria].

¹⁵¹ National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (Australian Government, 2007) 25.

¹⁵² Law Reform Committee of Victoria, *supra* note 150 at 37.

¹⁵³ Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (March 2007) 148 [Victorian Law Reform Commission, *Final Report*]. For a commentary on the early development of the regulation of donor conception in Victoria, see K. Walker, “1950s Family Values vs. Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria” (2000) 11 *Public Law Review* 11.

¹⁵⁴ This legislation was brought into effect in 1988.

¹⁵⁵ Law Reform Committee of Victoria, *supra* note 150 at 26.

¹⁵⁶ L. Johnson, K. Bourne & K. Hammarberg, “Donor Conception in Victoria, Australia: The ‘Time to Tell’ Campaign, Donor-Linking and Implications for Clinical Practice” (2012) 19 *Journal of Law and Medicine* 803 at 803 [hereinafter Johnson]. For an overview of the relevant Victorian law pertaining to access to genetic information, see Law Institute Victoria, *Access by Donor-Conceived People to Information about Donors* (Issues Paper, August 2012) 4–9.

the *1984 Act* (Vic), Victoria became the first jurisdiction to implement a Central Register for the storage and release of relevant information.¹⁵⁷ Donor data must be retained by the Central Register indefinitely.¹⁵⁸ However, the limitation of the 1984 legislation was the requirement that the donor's consent be obtained before identifying information could be released.¹⁵⁹

The *1984 Act* (Vic) was replaced by the *Infertility Treatment Act 1995* (*1995 Act*), brought into effect on 1 January 1998. Section 17 of the *1995 Act* required the donor to consent to the release of identifying information *prior* to the donation. By virtue of section 79(1) of the *1995 Act*, the relevant information would only be released upon the attainment of adulthood by the donor-conceived person. In 2007 the Victorian Law Reform Commission stated that “even though the right to access information is often expressed to be the child's right, the right does not come into effect until the child reaches adulthood”.¹⁶⁰ The Commission was of the view that children who wish to obtain information about donors, whether identifying or non-identifying, should be permitted to access it without the need for the consent or assistance of their parents.¹⁶¹ The Commission pointed out that many children become particularly curious about donors in their early teenage years and ultimately recommended that:

a child be able to apply for information about a donor at any age, but that the release of the information should remain subject to an assessment by a counsellor that the child has sufficient maturity to understand the nature of the information and the possible consequences of making contact with the donor.¹⁶²

This recommendation was reflected in the *Assisted Reproductive Treatment Act 2008* (*2008 Act*), which was enacted in 2010. Notably, section 59 of the *2008 Act* provides that the Registrar must disclose identifying information to the donor-conceived person where the applicant is (i) an adult (18 years), or (ii) a child, where the child's parent or guardian consents the application, or where “a counsellor has provided counselling to the person and advised the Registrar, in writing, that the person is sufficiently mature to understand the

¹⁵⁷ Johnson, *ibid.* at 804. For commentary welcoming the introduction of the Central Register in Victoria, see R. Thorpe, S. Croy, K Peterson and M.K. Pitts, “In the Best Interests of the Child? Regulating Assisted Reproductive Technologies and the Well-Being of Offspring in Three Australian States” [2012] *International Journal of Law, Policy and the Family* 259.

¹⁵⁸ Blyth & Frith, *supra* note 46 at 140.

¹⁵⁹ For a treatment of the importance of anonymity and disclosure for sperm donors in Australia, see D. Riggs & B. Scholz, “The Value and Meaning Attached to Genetic Relatedness among Australian Sperm Donors” (2011) 30(1) *New Genetics and Society* 41.

¹⁶⁰ Victorian Law Reform Commission, *Final Report*, *supra* note 153 at 157.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

consequences of the disclosure”.¹⁶³ Therefore, the standard age for access is the age of legal maturity, that is 18 years,¹⁶⁴ but an important exception applies permitting those who have been deemed to be “sufficiently mature” to access identifying donor information. All donors have consented to information release since 1998, the year in which the *1995 Act* was brought into effect. Therefore, many donor-conceived adolescents conceived in Victoria are currently eligible to be assessed on the grounds of “sufficient maturity”.

Non-identifying information about the donor may be obtained by the donor-conceived person of any age by virtue of section 57 of the *2008 Act*. Non-identifying information will not be released to the donor-conceived person unless counselling has been offered to them,¹⁶⁵ and identifying information will not be released unless counselling has been received “about the potential consequences of disclosure of information from the Central Register”.¹⁶⁶

Until recently, identifying donor information was not available to individuals conceived in Victoria before 1998, the year in which the *1995 Act* was brought into effect. Those born from gametes or embryos donated between 1 July 1988 and 1 December 1997 (the period between the enactment of the *1984 Act* (Vic) and the *1995 Act*) have been able to apply for information about their donor, but, as noted above, identifying information could only be provided with the consent of the donor. This was remedied by the *1995 Act* and extended to those under the age of 18 in the circumstances described above by virtue of the *2008 Act*.¹⁶⁷ The *Assisted Reproductive Treatment Further Amendment Act 2014* (*2014 Act*), which was commenced on 29 June 2015, amends the *2008 Act* to allow all donor-conceived people to apply for non-identifying information (where this exists) and to allow those born before the enactment of the *1995 Act* to seek identifying information with the donor’s consent.¹⁶⁸

¹⁶³ It should be noted that Australia’s N.H.M.R.C. has also endorsed the “sufficient maturity” test. National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (Australian Government, 2007).

¹⁶⁴ There have been calls for a lowering of the standard age requirement to that of 16 in Victoria. Law Institute Victoria, *Access by Donor-Conceived People to Information about Donors* (Issues Paper, August 2012) 13.

¹⁶⁵ *2008 Act*, s. 61(1)(a).

¹⁶⁶ *Ibid.*, s. 61(1)(b). For a general critique of the *2008 Act*, see R. Thorpe, K. Peterson, M.K. Pitts and H.W. Baker, “New Assisted Reproductive Technology Laws in Victoria: A Genuine Overhaul or Just Cut and Paste?” (2011) 18(4) *Journal of Law and Medicine* 835.

¹⁶⁷ It should be noted that gametes donated prior to 1 January 1998 continued to be used until 31 May 2006 in Victoria, resulting in a situation where some children born after the enactment of the *1995 Act* do not have automatic access to identifying donor information when they attain the relevant age. From 1 June 2006, gametes donated prior to 1998 may no longer be used for the creation of new families, but may be nonetheless be sought for the formation of siblings in existing families.

¹⁶⁸ The *2014 Act* was based in part on a recommendation made by the Parliament of Victoria’s Law Reform Committee that donor-conceived people should have retrospective access to donor information. Law Reform Committee of Victoria, *supra* note 153 at 26. See also K. Hammarberg, L. Johnson, K. Bourne, J. Fisher and M.

Moreover, section 22 of the *Assisted Reproductive Treatment Amendment Act 2016* provides that retrospective access to donor information will be made available to donor-conceived people irrespective of whether or not the donor has provided consent to its release. In such instances, all reasonable efforts will be made to notify the donor of its intended release, and counselling will be made available to the donor prior to its release. Contact preferences will allow donors and donor-conceived people to decide how they communicate with those to whom they are linked, and there will be a “no contact” preference option. Moreover, responsibility for managing the central and voluntary registers will be moved to V.A.R.T.A. (from B.D.M.) under the new legislation.

A Voluntary Register also exists in Victoria, serving a number of purposes, including the storage and release of information relating to donor siblings.¹⁶⁹ The Voluntary Register is also administered by B.D.M. and is the only official means by which donor-conceived people may access information about their donor siblings in Victoria. The Voluntary Register permits donor-conceived people to voluntarily record information about themselves and about their desire to share information with others on the register and where two or more people are matched, they are then contacted by B.D.M.¹⁷⁰ Non-identifying information will only be released after counselling has been offered to the donor-conceived person,¹⁷¹ and identifying information will only be released once counselling has been received.¹⁷² Individuals may then make communication with each other independently of B.D.M. Donor-conceived adults may seek and be granted non-identifying and identifying information with consent about their donor siblings through the Voluntary Register.¹⁷³

Kirkman, “Proposed Legislative Change Mandating Retrospective Release of Identifying Information: Consultation with Donors and Government Response” (2014) 29(2) *Human Reproduction* 286. A consultation is ongoing in Victoria in order to further equalise the rights of donor-conceived people born during different time periods. See, for example, State Government of Victoria Department of Health and Human Services, *A Right to Know Your Identity: Giving Donor-Conceived People the Right to Access Information Identifying Their Donor* (June 2015).

¹⁶⁹ The Voluntary Register is dealt with in detail in Part 7 of the *2008 Act*. It is noteworthy that the Victorian Law Reform Commission suggested in 2007 that it was not appropriate to recommend that people be able to make direct applications for information about donor conceived siblings and that the voluntary register was therefore more appropriate for this purpose; Victorian Law Reform Commission, *Final Report*, *supra* note 153 at 155.

¹⁷⁰ Victorian Assisted Reproductive Treatment Authority, ‘Central and Voluntary Registers’ available <www.varta.org.au/central-and-voluntary-registers> (date accessed: 17 May 2016).

¹⁷¹ *2008 Act*, s. 73(1)(a).

¹⁷² *Ibid.*, s. 73(1)(b).

¹⁷³ This information may be also be granted to parents seeking information on their child’s behalf. Interview with Kate Bourne, Donor Register Services Manager, V.A.R.T.A. (Melbourne, Victoria, 21 September 2015).

While the Central and Voluntary Registers are officially administered by B.D.M. in Victoria, the latter works closely with V.A.R.T.A. in ensuring that the donor-conceived person is provided with information, assistance and support at each stage of the process of seeking information about, and making contact with, genetic relations.¹⁷⁴ The Law Reform Committee of Victoria has asserted that all of these measures taken together “sufficiently ensure that the rights and desires of the donor-conceived person are paramount”.¹⁷⁵

The Victorian approach to “sufficient maturity” has, to a large extent, been welcomed by the donor conception community in Australia. However, it should be noted that no donor-conceived people have applied for information under the “sufficient maturity” assessment (section 59(1)(ii)(B) of the *2008 Act*).¹⁷⁶ Among other potential factors, this may be because donor-conceived children “may either not be aware of their conception status or unaware that they have the right to apply”.¹⁷⁷ Kate Bourne, Infertility Counsellor with V.A.R.T.A., has noted that parents generally apply on behalf of their children, if the child is curious about the donor. Children are invited to attend the counselling session if their parents feel that this is appropriate.¹⁷⁸ Indeed, many parents are applying for information on behalf of their children when they are very young: “[m]any of these parents say that they didn’t intend to apply for information while their child was young but were prompted by the need to answer their child/ren’s questions”.¹⁷⁹ An assessment of “sufficient maturity” will be based upon the counsellor’s professional judgement.¹⁸⁰ Regarding any potential safety concerns for the donor-conceived youth, Bourne states:

[i]deally I would hope that the child’s parents are involved and support the child’s search for information. I would also hope that the donor’s partner (if he has one) is also actively involved. I see it as the linking between two families rather than just between the DC child and the donor. Donors are not required to have a police check or a child protection check... I know of one single mother who requested her donor to have a police check before she would allow her children to meet him. She also discussed

¹⁷⁴ For a discussion of how donor relations in Victoria have been connected in practice, see T. Freeman, K. Bourne, V. Jadvá and V. Smith, “Making Connections: Contact between Sperm Donor Relations” in Tabitha Freeman, Susan Graham & Martin Richards, eds., *Relatedness in Assisted Reproduction: Families, Origins and Identities* (Cambridge University Press, 2014) 270 at 276–284.

¹⁷⁵ Law Reform Committee of Victoria, *supra* note 150 at 51. The Parliament of Victoria agreed with this reasoning in a response paper the following year. Victorian Government Response to Law Reform Committee of Victoria, *Inquiry into Access by Donor-Conceived People to Information about Donors* (August 2013).

¹⁷⁶ Interview with Kate Bourne, Donor Register Services Manager, V.A.R.T.A. (Melbourne, Victoria, 21 September 2015). Ms Bourne was being interviewed in her personal capacity as opposed to formally speaking on behalf of V.A.R.T.A.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

his values prior to meeting and what role he wanted to have. I think it is vitally important that both the child (and the parents ideally) and the donor (and his partner if he has one) have counselling prior to contact to explore their roles/boundaries, the implications of contact and what they would like to occur in the short and long term.¹⁸¹

Moreover, regarding the effects of provision of donor information to young children in Victoria, Bourne states as follows: “[i]t is too early to assess the outcomes. Parents I have had contact with report that the effect has been very positive... [I] probably lean towards the benefits of early contact with the donors as I have seen so many positive connections.”¹⁸²

The *2008 Act* also creates a system whereby a donor-conceived child’s birth certificate is marked and annotated with identifying information about the donor. Where a donor-conceived person above the age of 18 applies for a copy of their birth certificate, they will be informed that an annotated version of the certificate exists, and will then be permitted to view the annotation should they wish to do so. Bourne notes that the system of annotated birth certificates “is a real legal incentive for parents to inform their children of their conception”¹⁸³ but that there have been “no recent studies on disclosure in Victoria so it is difficult to assess exactly what impact it has had”.¹⁸⁴ The system of annotated births is accompanied by public education and outreach on the importance of parental disclosure:

[a]ll parents are contacted by BDM after their child has been registered and given a *Time to Tell* brochure which describes the benefits of disclosure and gives details about VARTA. VARTA provides free information and advice sessions to parents and also runs a day long Time to Tell seminar each for parents and a Family Storybook workshop to help parents make their own book with their family story about using a donor to build their family.¹⁸⁵

Bourne suggests that public attitudes in Victoria are changing as a result of the various measures adopted: “I worked as a counsellor in ART clinics from 1991-2009. I found that the discussion changed in the counselling sessions from ‘Why tell?’ to ‘How to tell?’ which reflected the significant change in attitudes and the move towards openness.”¹⁸⁶

¹⁸¹ *Ibid.* It should be noted that information may be withheld from a donor-conceived person where a concern exists regarding a “potentially adverse effect on the welfare and interests or the health and safety of a relevant party”. Blyth & Frith, *supra* note 46 at 143.

¹⁸² Interview with Kate Bourne, Donor Register Services Manager, V.A.R.T.A. (Melbourne, Victoria, 21 September 2015).

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.* For more information on the “Time to Tell” campaign, see Johnson, *supra* note 156 at 811.

¹⁸⁶ Interview with Kate Bourne, Donor Register Services Manager, V.A.R.T.A. (Melbourne, Victoria, 21 September 2015).

While the “sufficient maturity” approach has not yet been tested in Victoria, there is some evidence to suggest that the combination of a central register employing a number of varied options for disclosure, mandatory counselling, annotation of birth certificates and education and outreach regarding the importance of disclosure, has had positive outcomes for donor-conceived children and adults wishing to learn about their genetic heritage.

Like the case of Sweden, the age requirements in Victoria for the release of donor information are very much in line with the C.R.C. In contrast to Victoria, Ireland falls short on the vindication of the donor-conceived *child’s* right to identity. Notwithstanding, the Irish legislation mirrors the Victorian legal position in clearly defined ways, such as the annotation of birth certificates and the establishment of a central register for the storage, management and release of donor information. The Victorian system also mimics that in place in the Netherlands in its comprehensiveness and effectiveness. Differences between the Victorian position and the Irish legislation include the lack of envisaged education and outreach policies on donor conception in Ireland, the lack of retrospective access to donor information (without consent), and the fact that the relevant information is currently available to those young donor-conceived people who are now eligible to apply in Victoria, in contrast to Ireland, where the first donor-conceived people will become eligible to apply 18 years after the commencement of the donor conception provisions in the *2015 Act*.

XI – Discussion

The foregoing analysis of those key jurisdictions offering rights of access to genetic origins information to donor-conceived children under the age of 18 illustrates the fact that the right manifests itself in various ways and that there is by no means a single universally accepted best practice approach in this area. The options available to jurisdictions wishing to introduce a prohibition on anonymity and access to genetic information for donor-conceived children include: introducing a generally applicable age requirement, such as that of 14 or 16; introducing an approach to information release based on the “sufficient maturity” or “best interests” of the child; annotating the child’s birth certificate with donor information and providing access to the annotated birth certificate before the child attains the age of 18,¹⁸⁷ or

¹⁸⁷ While there are no States at present which include donor information on the original birth certificate, it should be noted that some donor-conceived people have advocated for such an approach to be taken. See, for example, T. Rowley, “My Life Was a Lie... Now Gaps on My Birth Certificate Tell the Truth about My Father”

any combination of the above. Other measures which have proven to be effective in comparative jurisdictions include: the drafting of specific legislation on release of donor records, the establishment of a central registry for the storage and release of such information, the provision of mandatory counselling, and the roll-out of education and outreach programmes to encourage increased parental disclosure and to reduce the stigma surrounding the practice of donor conception. All jurisdictional case studies examined above have emphasised the importance of identifying donor information for young people below the age of 18, but those jurisdictions which have experienced the greatest efficacy in the protection of the donor-conceived child's right to identity in practice have not simply laid down a bald judicial statement or legislative provision regarding the age at which access will be permitted, but have ensured the guarantee of access in practice through the establishment of central registers, the annotation of birth certificates to incentivise parental disclosure, and the creation of support and information systems for those parties subject to the donor conception arrangement.

Those comparative jurisdictions which have been least efficacious in securing the rights of the donor-conceived child have been circumvented by parental secrecy, the lack of a central register, the lack of legislation regulating donor conception, and the absence of recruitment of domestic donors. The Irish government has pre-emptively avoided such hurdles through the drafting of legislation, the creation of a National Donor Conceived Person Register, the annotation of birth certificates incentivising parental disclosure, and the laying down of structures which will encourage the domestic recruitment of donors.

While there may, naturally, be options available which have not yet been implemented abroad, the Irish government might well gain an insight into how information release for donor-conceived children could operate in this jurisdiction by examining the approaches of those jurisdictions outlined above. Therefore, should the Irish government wish to extend the right to identity to donor-conceived children in this jurisdiction, it might consider the introduction of a generally applicable age requirement for access under the age of 18, the

The Telegraph (London, 20 July 2014) discussing the case of Emma Cresswell, who took a successful legal action seeking to have her social father's name removed from her original birth certificate. An Australian donor-conceived man is in the process of taking a similar legal action in that jurisdiction. See also, S. Dingle, "Man Conceived with Donated Sperm Seeks Birth Certificate Change to Reflect 'Truth'" *ABC News* (Sydney, 4 September 2014). It should be noted that children of any age may access their birth certificate in Ireland, so if the government was interested in introducing measures to reflect the identity of the donor on the original birth certificate, it might also consider a minimum age requirement for access to birth certificates. Email from Jackie Hickey (General Register Office, Ireland) to author (1 September 2015).

introduction of an exception to the general age requirement where the child is considered to be “sufficiently mature”, the introduction of mandatory counselling prior to access,¹⁸⁸ and the roll-out of education and outreach programmes for the benefit of all parties to the donor conception arrangement, and in particular, for the benefit of the donor-conceived child. Such an approach would truly vindicate the donor-conceived *child’s* right to identity and would thereby be in line with Ireland’s obligations under the C.R.C.

¹⁸⁸ While individuals seeking to record information on the central register in Ireland on a *voluntary* basis will be required to undergo counselling prior to recording information (*2015 Act*, s. 38(2)), the same requirement does not apply where information is mandatorily recorded by the State, that is, in the case of release of donor information for those party to a standard donor conception arrangement governed by the *2015 Act*.