

A Child's Right to Identity in the Context of Embryo Donation: Lessons from Australia and New Zealand, Part 2

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Abstract

In part 1 of this article the current level of protection of the right to identity both at the national and international levels were considered in the case of embryo donation. It was concluded that at a national level the *National Health Act*, its accompanying regulations and the *Children's Act* fail to protect this right. The constitutional provisions on children's rights are also unhelpful in providing the requisite level of protection. At an international level it was further found that neither the CRC nor the ACRWC explicitly uphold the child's right to identity in the case of embryo donation. In an attempt to address this defect, this article compares the legal protection provided for the right to identity of children born through embryo donation in Australia and New Zealand. A number of lessons can be drawn from this comparative analysis. At a national level the article submits that the birth certificate should indicate the child's true origins and in addition to a register which holds the particulars of the child's donor parents, a separate donor sibling register is also suggested. Legislative amendments are also suggested to Parliament. At an international level, the following recommendations are made: a new United Nations (UN) Convention which centres on Assisted Reproductive Technology, a General Comment drafted by the CRC Committee to cover specific issues and interests of children, ratification of a Convention by the Hague Conference, and an investigation into the concerns raised by international embryo donation to be carried out by the International Social Service Network should be accomplished. Further, the article concludes that an Africa-based instrument would not be as effective as a UN proposed solution, given the cultural and religious concerns in traditional African societies.

Keywords

Assisted reproductive technologies; disclosure; donor-conceived child; embryo donation; gamete donor.

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1 Introduction and background

In part 1 of this article the current level of protection of the right to identity at both the national and the international levels was considered in the case of embryo donation. It was concluded that at a national level the *National Health Act* (NHA),¹ its accompanying regulations² and the *Children's Act*³ fail to protect this right. The constitutional provisions on children's rights are further unhelpful in providing the requisite level of protection. At an international level it was further found that neither the CRC⁴ nor the ACRWC⁵ explicitly upholds the child's right to an identity in the case of embryo donation. This article examines the legal positions in Australia and New Zealand in an attempt to address this defect.

With the rise of the use of spare embryos as part of the Assisted Reproductive Technology (ART) enterprise, the social and legal acceptability of third-party reproduction varies across countries.⁶ Australia and New Zealand have been progressive with regard to their legislation on embryo donation.⁷ The aim of this article is to describe the social context and regulatory framework and to review the current laws and regulations for third-party reproduction in these countries in order to draw parallels and lessons from which South Africa could learn. Recommendations are then made for the way forward both at a national and at an international level.

2 Australia

In Australia, embryo donation is legal in all its states and territories.⁸ There is no federal legislation that covers ART which includes embryo donation,

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¹ *National Health Act* 61 of 2003 (the NHA).

² GN 1165 in GG 40312 of 30 September 2016; GN 251 in GG 44321 of 25 March 2021.

³ *Children's Act* 38 of 2005 (the *Children's Act*).

⁴ *UN Convention on the Rights of the Child* (1989) (the CRC).

⁵ *African Charter on the Rights and Welfare of the Child* (1990) (the ACRWC).

⁶ Hammarberg, Johnson and Petrillo 2011 *Journal of Reproductive and Infant Psychology* 176. Also see Bartholomaeus and Riggs 2019 *New Genetics and Society* 1.

⁷ Fertility Society of Australia date unknown <https://www.fertileysociety.com.au/donor-programme-australia-new-zealand/#embryo-donation>.

⁸ The first babies born through embryo donation were conceived in the 1980s during the "pre-disclosure era", a period in which such offspring were not entitled to identifying information about their donors either through held registers or clinic records. See Millbank *et al* 2017 *J L & Med* 803.

but there are national Guidelines and a Code of Practice.⁹ The Guidelines¹⁰ were produced by the National Health and Medical Research Council (NHMRC) and the Code of Practice was developed by the Reproductive Technology Accreditation Committee (RTAC) of the Fertility Society of Australia – which encourages recipient couples of embryo donation to disclose to their child information about their genetic origins.¹¹

The NHMRC Guidelines protect the interests of children born through embryo donation.¹² The general principle which governs the practice of third-party reproduction is the right of the donor-conceived individual to be informed of her/his biological origins.¹³ The purpose of this principle is to ensure that children born through embryo donation are able to trace their biological parents and siblings.¹⁴

Paragraph 9.2 of the NHMRC Guidelines, which deals with the maintenance of appropriate records, provides for the following:

9.2.1 Clinics must ensure that all relevant information about parties involved in donor conception programs ... are recorded so that this information is available to potential recipients of the donation, any persons born, and/or the gamete or embryo donors.

9.2.2 Information about all parties involved in a donor conception program ... must be kept indefinitely (or at least for the expected lifetime of any persons born); in a way that is secure but is accessible to any relevant party.¹⁵

⁹ Bartholomaeus and Riggs 2019 *New Genetics and Society* 2.

¹⁰ In developing these Guidelines, the Australian Health Ethics Committee was conscious of: "the moral acceptability of ART, the complex biological connections and social relationships that occur in the context of, or as a result of, ART; difficulty in balancing the needs, concerns, and interests of [the donor couple, the recipient couple and the child born] or any child within the family unit who may be affected by that birth". See NHMRC *Ethical Guidelines* 19.

¹¹ These guidelines also recommend counselling and the limitation of the number of families created from donations. See Bartholomaeus and Riggs 2019 *New Genetics and Society* 2. "These Ethical Guidelines provide an overarching framework for the conduct of ART in both clinical practice and research and, when read in conjunction with federal and state or territory legislation, create a robust framework for the conduct of ART in Australia ... All activities referred to in these Ethical Guidelines must be carried out in compliance with existing laws and regulatory frameworks." See NHMRC *Ethical Guidelines* 11.

¹² Guiding Principle 2 of the NHMRC *Ethical Guidelines*.

¹³ NHMRC *Ethical Guidelines* paras 4.2.9, 4.4.1, 6.1. See also ss 5(c), 56 and 71 of the *Assisted Reproductive Treatment Act* 76 of 2008.

¹⁴ "These Ethical Guidelines acknowledge the importance of the biological connection and support the right of an individual to know their genetic origins. The voluntary exchange of information between the donor, recipient and the persons born, facilitated by donor registries, is central to upholding this right." See NHMRC *Ethical Guidelines* 11.

¹⁵ NHMRC *Ethical Guidelines* 85.

The RTAC Code of Practice provides that with regard to embryos, clinics must comply with the NHMRC Guidelines on the use of ART and any applicable state¹⁶ or territory legislation.¹⁷

Notably, counselling for both the donor and recipient couples is mandatory¹⁸ and must cover the following topics: the lack of a genetic tie to both recipient parents of a child born after the embryo donation procedure; the importance of disclosure – including the appropriate time and manner of disclosure – to the child born as a result of the donor embryo; and possible future interaction between the child and the donor couple.¹⁹

The NHMRC Ethical Guidelines and the RTAC Code of Practice provide that ART clinics are obliged to maintain detailed records, which includes identifying and non-identifying information of the donor and recipient couples so that persons born through embryo donation are able to trace their genetic origins.²⁰

Although the national Guidelines and Code of Practice offer protection for the right of persons born from donated embryos to know the details of their genetic origins,²¹ it must be noted that the capacity for offspring born through embryo donation to apply for information about their biological parents varies from state to state.²²

For example, in the state of Victoria, in terms of the Victorian *Assisted Reproductive Treatment Act* of 2008, an addendum is attached to the birth certificates²³ of children born as a result of donor treatment to notify them that additional information about their birth is available.²⁴ This acts as an incentive for the recipient parents to inform their child about their donors'

¹⁶ "While all states and territories follow the national guidelines, specific legislation mentioning embryo donation is present in four jurisdictions: Victoria, New South Wales, South Australia and Western Australia." See Bartholomaeus and Riggs 2019 *New Genetics and Society* 2.

¹⁷ RTAC *Code of Practice for Assisted Reproductive Technology Units* para 2.8(a)-(b).

¹⁸ NHMRC *Ethical Guidelines* paras 4.3-4.4. Also see RTAC *Code of Practice for Assisted Reproductive Technology Units* paras 2.2.1(g) and 2.8(d).

¹⁹ In specific states ART clinics are obliged to record details about donors, recipients and offspring in the central state register. See Hammarberg, Johnson and Petrillo 2011 *Journal of Reproductive and Infant Psychology* 178.

²⁰ See Hammarberg, Johnson and Petrillo 2011 *Journal of Reproductive and Infant Psychology* 178.

²¹ NHMRC *Ethical Guidelines* paras 4.2.9, 4.4.1, 6.1.

²² Hammarberg, Johnson and Petrillo 2011 *Journal of Reproductive and Infant Psychology* 178.

²³ Section 17B(2) of the *Assisted Reproductive Treatment Act* 76 of 2008 states that "the Registrar must attach an addendum to the certificate stating that further information is available about the entry".

²⁴ This protects the child's right to personal, biological and family identity, but also national identity should the donors be of a different nationality from that of the recipients. See Allan 2016 *Family Matters* 52.

origins, but would also increase the likelihood of the child finding out about her/his biological origins, even if her/his parents do not reveal this to her/him.²⁵ In Western Australia, only donor-conceived persons who are of the age 16 and above and who were conceived after December 2004 may apply for identifying information about their donors in accordance with the amendments to the *Human Reproductive Technology Act, 1991*.²⁶

In New South Wales the particulars of donor-conceived children as well as the details about their donor and recipient parents are recorded in a voluntary and central register.²⁷ The voluntary register allows donors and persons who were conceived prior to 1 January 2010 to voluntarily submit relevant information.²⁸ Post 1 January 2010, ART providers are obliged to submit to the New South Wales Ministry of Health within two months of the donor-conceived child's birth mandatory information for inclusion in the central register.²⁹ The central register provides an opportunity for donor-conceived persons, their donor and recipient parents to lodge an application to be provided with information about one another.³⁰ Where a match occurs, the donor-conceived child can exchange information with and elect to meet her/his donor-conceived siblings, donor parents or relatives.³¹ Similarly, in South Australia the *Reproductive Technology Clinical Practices Act, 1988* was amended in 2009 to include the establishment of a central register.³²

Therefore, while subtle legislative differences exist between states in Australia, embryo donation is generally considered a socially acceptable and legally permissible means to form a family.³³ However, the right of donor-conceived offspring to access information about their genetic origins, their donor parents and siblings remains unequal across Australia in the

²⁵ Allan 2016 *Family Matters* 52.

²⁶ Allan 2019 https://www.health.wa.gov.au/~/_media/Files/Corporate/Reports-and-publications/HRT/Review-of-HRT-and-Surrogacy-Act-Part-2.pdf xxii.

²⁷ These individuals must also advise who may be given access to this information. See ss 32C, 33, 33A and 33B of the *Assisted Reproductive Technology Act, 2007*. See also NSW Health 2022 <https://www.health.nsw.gov.au/art/Pages/the-central-register.aspx>.

²⁸ Section 33A, 33B and 33C of the *Assisted Reproductive Technology Act, 2007*.

²⁹ Section 33(1) of the *Assisted Reproductive Technology Act, 2007*.

³⁰ The *Assisted Reproductive Technology Act, 2007* provides for a central register which allows applications for information from persons born through gamete donation. Also see Hammarberg, Johnson and Petrillo 2011 *Journal of Reproductive and Infant Psychology* 179.

³¹ A match occurs through the use of the same donor code. See Johnson 2014 *Indian Journal of Medical Research* 10.

³² Now the *Assisted Reproductive Treatment Act, 1988*. See Hammarberg, Johnson and Petrillo 2011 *Journal of Reproductive and Infant Psychology* 179.

³³ Hammarberg, Johnson and Petrillo 2011 *Journal of Reproductive and Infant Psychology* 176.

absence of a central register in each state or at a national level.³⁴ In short, Australia's national framework provides for the protection of the child's right to personal, biological, family and siblingship identity through states' detailed record system, central register and the attachment of an addendum to the child's birth certificate.

3 New Zealand

In New Zealand,³⁵ embryo donation is strictly regulated under the *Human Assisted Reproductive Technology Act, 2004* (HART Act)³⁶ and Guidelines set by the government-appointed Advisory Committee on ART (ACART).³⁷

New Zealand's embryo donation policy and practice is an open donation process, allowing offspring to access genetic information.³⁸ As in Australia, counselling is mandatory for both the donor and recipient couples.³⁹ At these individual counselling sessions the following topics are explored: "motivations for, feelings about and expectations of donation; grief and loss around genetic connection; and the needs and rights of children born through embryo donation".⁴⁰

Furthermore, New Zealand has a unique additional requirement: donors and recipients must meet *prior* to the donation for joint counselling sessions.⁴¹ And unlike conventional donation practices where a recipient couple would select their donors, the choice rests with the donor couple.⁴² In the joint

³⁴ Hammarberg, Johnson and Petrillo 2011 *Journal of Reproductive and Infant Psychology* 179. Donor-conceived children may also struggle to obtain information about their donors due to laws not being retrospective in their particular state or because the records may have been destroyed. See Power 2017 https://www.news24.com/parent/Fertility/Trying_to_conceive/why-donor-conceived-children-need-to-know-their-origins-20170328.

³⁵ Embryo donation has been available in New Zealand only since late 2005. See Goedeke date unknown <https://www.fertilitynz.org.nz/information/donation-and-other-options/embryo-donation/>.

³⁶ Wilsdon 2019 *J L & Med* 691.

³⁷ Goedeke and Daniels 2018 *Journal of Reproductive and Infant Psychology* 1.

³⁸ Goedeke and Daniels 2017 *Qualitative Health Research* 1402.

³⁹ Goedeke and Daniels 2018 *Journal of Reproductive and Infant Psychology* 2.

⁴⁰ Counsellors will note the donor couples' desires concerning the recipient couples' characteristics and assist the prospective recipients to compile profiles from which donors will choose whom they would like to meet face-to-face in joint counselling. Individual counselling helps to make sure that prospective donor and recipient couples have analysed the relevant issues in depth before they are shown each other's profiles. See Goedeke and Daniels 2018 *Journal of Reproductive and Infant Psychology* 2.

⁴¹ New Zealand is at present the only country in the world with this policy. See Goedeke and Daniels 2018 *Journal of Reproductive and Infant Psychology* 1. "Joint counselling sessions address issues on which the Ethics Committee for Assisted Reproductive Technologies (ECART) requires agreement." Also see Goedeke and Payne 2010 *Human Reproduction* 2822.

⁴² Goedeke *et al* 2015 *Human Reproduction* 2343. Research suggests that many couples opt not to donate due to the fear of placing their embryos in the "wrong

counselling sessions, prospective donor and recipient couples become acquainted with one another and discuss the prospects of exchanging information and retaining contact.⁴³ It is important to clarify these matters because despite the fact that embryo donation guidelines draw on the HART Act, which stipulates that offspring should be informed of and have access to information concerning their genetic origins, the decision to disclose rests with the recipient parents⁴⁴ since the child's birth certificate reflects the particulars of the recipients only.⁴⁵ While addendums to birth certificates in the instance where children are conceived through gamete donation have been suggested,⁴⁶ the situation in New Zealand remains unchanged and contested.⁴⁷

The HART Act provides for the recording, storing and sharing of information between donors of donated embryos and donor offspring.⁴⁸ Upon reaching the age of 18 the donor-conceived adult can access information about their donors' identities in addition to identifying information about their siblings, provided the latter have also reached the age of 18.⁴⁹

This alignment towards "openness" is supported by several studies on embryo donation done in the country.⁵⁰ The findings of these studies suggest that the child's genetic connection is significant for both the donor and recipient couples and accordingly suggest the need for ongoing social

family". Concerns about the child's well-being and a sense of ongoing emotional ties are also influential factors. For these reasons, allowing prospective donors to select a recipient couple whereby they may specify desired characteristics, for example, "the recipients' age, marital status, ethnicity, socioeconomic class or sexual orientation", will arguably lead to greater ease. These open-identity conditions allow for the prospect of the donors, the recipients and the child born to have varying degrees of ongoing contact. See Goedeke and Daniels 2018 *Journal of Reproductive and Infant Psychology* 3.

⁴³ Goedeke and Daniels 2018 *Journal of Reproductive and Infant Psychology* 2.

⁴⁴ Goedeke and Daniels 2018 *Journal of Reproductive and Infant Psychology* 2.

⁴⁵ Gibbs and Scheman 2013 *New Zealand Journal of Social Sciences Online* 16.

⁴⁶ New Zealand Parliament *Government Response* 5.

⁴⁷ The Advisory Committee on Assisted Reproductive Technology (ACART) has released a consultation document for comment on "potential strategies to strengthen offspring access to information about their origins". See ACART *Proposed Donation Guidelines* 21. The debate concerning birth certificates is ongoing. See Goedeke and Daniels 2018 *Journal of Reproductive and Infant Psychology* 8; Goedeke and Daniels 2017 *Bioethics Beyond Altruism* 127-128.

⁴⁸ Daniels 2008 https://www.researchgate.net/publication/228349203_Guidelines_for_embryo_donation_for_reproductive_purposes_in_New_Zealand_A_childfamily_approach 6.

⁴⁹ Additionally, donor offspring who are 18 and above may consent to the disclosure of identifying information to their donors. See Daniels 2008 https://www.researchgate.net/publication/228349203_Guidelines_for_embryo_donation_for_reproductive_purposes_in_New_Zealand_A_childfamily_approach 6.

⁵⁰ Goedeke *Embryo Donation in New Zealand* 165; Goedeke *et al* 2015 *Human Reproduction* 2344-2346.

ties.⁵¹ The donor and recipient couples also framed embryo donation as "building new and extended kinship forms".⁵² Moreover, embryo donation under open-identity conditions supports research which links the child's knowledge of her/his genetic heritage with a healthy identity development.⁵³

Therefore, with the awareness of the child's right to have knowledge about his her/his genetic origins⁵⁴ and the donor couple's ability not only to specify characteristics they desire but to meet and actively select the recipients, the practice of embryo donation in New Zealand is a transparent and open-identity process.⁵⁵ To sum up, New Zealand's legislative framework protects the child's right to personal, biological, family and siblingship identity.

4 Analysis

4.1 Similarities in approaches

Like Australia and New Zealand, South Africa also offers embryo donation as a means of combatting infertility. Further, all three jurisdictions make provision for the maintenance of appropriate records of information of all parties involved in the embryo donation process, albeit using different systems.⁵⁶

Both Australia and New Zealand's national legislation and guidelines encourage the right of children to know their biological origins which encapsulates the right to know their genetic parents and siblings. Another similarity between these two jurisdictions relates to the provision of mandatory counselling. This has been shown to be an excellent tool for both the donor and recipient couples to thoroughly consider the impact of their decisions on the prospective child to be born. Discussing the method and timing of disclosure will ensure that the child's identity interests and wellbeing are protected.

4.2 Differences in approaches

The main difference between South Africa, Australia and New Zealand is the duty to disclose. In South Africa the primary focus is the preservation of the anonymity of the donors as the divulgence of the identities of the genetic

⁵¹ Goedeke and Daniels 2018 *Journal of Reproductive and Infant Psychology* 3.

⁵² Goedeke and Daniels 2018 *Journal of Reproductive and Infant Psychology* 3.

⁵³ See Goedeke and Daniels 2017 *Bioethics Beyond Altruism* 121; Blyth 2012 *Reproductive Biomedicine Online* 719-726; Daniels, Grace and Gillett 2011 *Human Reproduction* 2783-2790.

⁵⁴ Goedeke and Payne 2010 *Human Reproduction* 2827.

⁵⁵ Goedeke and Daniels 2018 *Journal of Reproductive and Infant Psychology* 2.

⁵⁶ Part 6 and 7 of the *Assisted Reproductive Treatment Act* 76 of 2008; s 63 of *Human Assisted Reproductive Technology Act*, 2004; GN 1165 in GG 40312 of 30 September 2016, para 5.

parents to the embryo-conceived child is prohibited.⁵⁷ Effectively, the child's right to her/his personal, biological, family and siblingship identity is denied. In Australia the general principle which governs the country's position on third-party reproduction technologies is the right of children to know their biological origins later in their lives. New Zealand strongly encourages disclosure; however, the decision to disclose, rests with the recipient parents.

Another difference is the method of storing information and the purpose for which these records are maintained. Unlike South Africa's method of recording the donors' particulars in a central bank for an undefined period or purpose, Australia's NHMRC Guidelines specifically articulates that the donors' particulars should be stored indefinitely for the expected life duration of the donor-conceived person and made accessible not only to the donor-conceived child her/himself, but also to her/his recipient parents or any other relevant party.⁵⁸ The creation of the voluntary and central register is an excellent initiative by the state of New South Wales, but it would make more sense and be of greater convenience to have a single national register. One can imagine the inevitable difficulties that may arise where the donor-conceived child relocates to another state later in life.⁵⁹ New Zealand's comprehensive information-keeping regime also aims to ensure that children born from donated embryos can learn about their genetic origins.⁶⁰

In South Africa, although section 28(1)(a) of the *Constitution of the Republic of South Africa*, 1996 protects the child's right to a national identity and entitles a child to a birth certificate, the birth certificate would reflect the names of the recipients only and make no mention of the identities of the donors or that further information is available regarding the child's biological origins.

In Australia, the protection of children born through embryo donation is not uniform, as the legislation differs from state to state. While children in the State of Victoria will benefit from the addendum to their birth certificates alerting them to the existence of additional information surrounding their biological origins, children in other states face greater challenges in attaining this knowledge. Furthermore, the age at which children in their

⁵⁷ Section 19 of the NHA; s 41(2) of *Children's Act*, GN 1165 in GG 40312 of 30 September 2016.

⁵⁸ Other relevant parties include other biological family members. See NHMRC *Ethical Guidelines* 24.

⁵⁹ The lack of a national register creates difficulty in accessing information and creates a class system amongst donor-conceived persons based on the state in which they were conceived. See Shepherd 2023 <https://www.theguardian.com/science/2023/feb/08/urgent-calls-for-australia-wide-register-of-sperm-donations-amid-concerns-about-prolific-donors>.

⁶⁰ Section 3(f) of the *Human Assisted Reproductive Technology Act*, 2004.

adolescence will be able to access this additional information will also depend on the age restriction of their particular state.

Unlike Australia, New Zealand provides for the uniform age of 18 for donor-conceived persons to access information across the country. Hence, an addendum to the child's birth certificate like that implemented in Australia has been rejected in New Zealand as the decision to disclose lies with the recipient parents. Furthermore, the prior meeting between the donor and recipient parents is a unique aspect.⁶¹

New Zealand's approach thus seems akin to a middle ground between the child's rights and that of the recipient parents, with South Africa on one end elevating the interests of the donors and recipients⁶² and Australia on the opposite end elevating the rights and interests of children born through embryo donation. What is thus the best way to safeguard the child's right to identity at an international and national level? This will be considered next.

5 Recommendations

5.1 *Safeguarding the child's right to identity at an international level*

International embryo donation is already a reality, and this raises concerns about the present protection of children's rights.⁶³ An international vacuum exists in relation to international embryo arrangements, which leaves the rights of children born through such methods at risk.⁶⁴ There are three possibilities of finding a global solution. First, a new UN Convention could be created to cover the area of ART.⁶⁵ An international convention is an agreement between different countries which is legally binding upon ratification.⁶⁶ A monitoring body should be established to evaluate the progress of contracting state parties in implementing the convention through periodic reports submitted by states.⁶⁷ A convention would be feasible in the sense that citizens of countries that ban embryo donation could seek such arrangements elsewhere.⁶⁸ Hence, there is the necessity for a convention to address how to prevent the contravention of the law without harming

⁶¹ While counselling should be mandatory for both the donors and recipients, meeting prior to the donation should be made optional. In-person meetings may not always be possible and thus it is suggested that virtual meetings should also be an option.

⁶² *AB v Minister of Social Development* 2017 3 SA 570 (CC) paras 155-161.

⁶³ Embryo Donation International date unknown <https://www.embryodonation.com/donate-your-embryos.php>.

⁶⁴ Clark "Ethical Implications of Embryo Adoption" 213.

⁶⁵ With regard to other forms of ART, there have been calls for the adoption of an international convention, for example, in the case of surrogacy. See Mohaparea 2015 *Loyola University International Law Review* 25-26.

⁶⁶ UN Enable date unknown <https://www.un.org/esa/socdev/enable/convinfofaq.htm>.

⁶⁷ UN Enable date unknown <https://www.un.org/esa/socdev/enable/convinfofaq.htm>.

⁶⁸ Mohaparea 2015 *Loyola University International Law Review* 55.

children born of such illegal arrangements.⁶⁹ Thus, the international legal instrument should be signed by country of residence or the citizenship of the donating parents.⁷⁰

While international legal instruments would serve as critical tools to convey the necessary concrete change in attitudes around the rights and interests of children born through embryo donation, the endorsement and ratification of international instruments is insufficient to bring about substantial change.⁷¹

Second, the CRC Committee could draft a General Comment⁷² to cover specific issues and interests related to children born through embryo donation.⁷³ A General Comment would provide comprehensive guidance on state obligations, outline measures that should be undertaken to meet treaty provisions and contribute towards the development of domestic regulatory responses to embryo donation in the absence of an international agreement.⁷⁴ However, the first step is for the CRC Committee to articulate a uniform definition of the right to identity, to determine the fundamental principles that ought to inform its application and enforceability under international law.⁷⁵ Only then can state parties' obligations to respect, protect and fulfil the child's right to identity in the context of embryo donation be effectively implemented and translated into concrete commitments and meaningful actions.⁷⁶

A General Comment may also be vital to the work of the Permanent Bureau of the Hague Conference on Private International Law (Hague Conference) on the development of a potential private international law agreement, as well as to the efforts of the International Social Service (ISS) network on formulating a list of principles with the objective of protecting the rights of children in the context of international embryo donation.⁷⁷ However, a

⁶⁹ Mohaparea 2015 *Loyola University International Law Review* 55.

⁷⁰ Page *Artificial Womb Technology* 45.

⁷¹ Neumayer 2005 *Journal of Conflict Resolution* 925. The poor political will of ratifying states remains a challenge with many human rights instruments. See Hill 2010 *Journals of Politics* 1162.

⁷² Similar calls have also been made in favour of drafting a new General Comment on surrogacy and the adoption of a Hague Convention on donor-conceived children. See ISS date unknown <https://www.iss-ssi.org/index.php/en/>.

⁷³ The CRC is the most widely ratified international human rights instrument which applies to all children under 18 in all contexts. See UNHR Office of the High Commissioner 2021 <https://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2020.aspx>.

⁷⁴ Baird 2019 *Business and Law* 116.

⁷⁵ This definition should be premised on "an understanding of identity as a spectrum of significant personal characteristics and social ties". McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pDF> 1–2.

⁷⁶ McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pDF> 1–2.

⁷⁷ McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pDF> 1-2.

General Comment is disadvantageous in that it would not be legally binding.⁷⁸

Third, a Convention by the Hague Conference (HCCH) may be ratified.⁷⁹ In an era of globalisation, cross-border embryo donation raises complex questions of private international law due to the variances in States' national laws.⁸⁰ An Experts Group on cross-border recognition and enforcement of embryo donation agreements could be formed in order to develop a distinct protocol on international embryo donation arrangements.⁸¹ Such an instrument should address the issue of extra information contained on the child's birth certificate and make provision for an international register since it would be easier for children born overseas to access.⁸² Accessibility should be set at the age of majority, which for most countries is 18 years of age.⁸³

Fourth, the ISS⁸⁴ should investigate and undertake research to address the myriad of questions and concerns raised by international embryo donation.⁸⁵ Possible steps which the ISS could take include studying the present international position, current domestic laws, economic impact, and the bonding between the child and the recipient parents.⁸⁶ Furthermore, the question of the nationality of the child should be addressed.⁸⁷ Moreover, the ISS may advocate a new General Comment on embryo donation by the CRC Committee and a Hague Convention on international embryo donation, organise international conferences and gather State

⁷⁸ The views of governments and judges outweigh this. See Geber, Kyriakakis and O'Byrne 2013 *MJIL* 7.

⁷⁹ Mohaparea 2015 *Loyola University International Law Review* 26, 36, 43.

⁸⁰ HCCH date unknown <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

⁸¹ "The Experts Group is currently focusing on developing a general private international law instrument on legal parentage; and a separate protocol on legal parentage established as a result of international surrogacy arrangements." See HCCH date unknown <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

⁸² Page *Artificial Womb Technology* 47-48.

⁸³ Bacalso and Mihajlović *Age Matters!* 9.

⁸⁴ The ISS is an international NGO founded in 1924. With its presence in more than 120 countries, the ISS is a global actor in promoting child protection and welfare through its training projects, awareness campaigns and advocacy work. See ISS date unknown <https://www.iss-ssi.org/index.php/en/>.

⁸⁵ The voices of children born through surrogacy have also been elevated through the work of the ISS, that has since 2013 called for the urgent regulation of international surrogacy arrangements and in 2016 launched an initiative to draw up the Verona Principles to guide international policy and legislation. These efforts were supported by and contributed to by the CRC Committee as well as the HCCH. See ISS date unknown <https://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy>.

⁸⁶ Childwatch International Research Network 2013 <https://www.childwatch.uio.no/news/2013/international-surrogacy%3A-a-new-field-of-investigat.html>.

⁸⁷ Childwatch International Research Network 2013 <https://www.childwatch.uio.no/news/2013/international-surrogacy%3A-a-new-field-of-investigat.html>.

representatives to come to an agreement on the necessity of regulating embryo donation at international level.⁸⁸

An African instrument may not gain the support of African nations due to the fact that ART raises some cultural concerns.⁸⁹ Studies have shown that the way people in traditional African societies treat infertility is closely linked to their socio-cultural and economic life circumstances and available health care options.⁹⁰ Therefore, an Africa-based instrument would not be suitable, given that the acceptance of ART still faces some resistance in African traditional communities.⁹¹ As the local sociocultural context and notions must be taken into account when developing and implementing such a solution,⁹² a proposed UN solution may be more effective.

5.2 Safeguarding the child's right to identity at the national level

First, the child's right to a legal identity must be safeguarded as it is from this that the right to personal, biological, genetic, family, sibling and national identities stems.⁹³ Safeguarding the child's legal identity begins with the registration of the child's birth and the issuing of a birth certificate.⁹⁴ The birth certificate should serve as a true record of the child's origins and not be a deceptive genealogical record.⁹⁵ The birth certificate should identify the recipient social parents in order to serve as legal evidence of parentage.⁹⁶ An annotation on the child's birth certificate should indicate the child's mode of conception in the event that a third party reproduction method was used⁹⁷

⁸⁸ Childwatch International Research Network 2013 <https://www.childwatch.uio.no/news/2013/international-surrogacy%3A-a-new-field-of-investigat.html>.

⁸⁹ ART may even be primarily rejected based on traditional values. See Setenane *Assessing the Ethico-Cultural Implications* 3. Studies completed in West Africa expressed concern about the genetic aspect involved in gamete donation and the ethics surrounding the duty to one's clan. See Écra *et al* 2017 *Open Journal of Obstetrics and Gynaecology* 600-601.

⁹⁰ Gerrits and Shaw 2010 *F, V & V in ObGyn* 194.

⁹¹ Setenane *Assessing the Ethico-Cultural Implications* 3.

⁹² Gerrits and Shaw 2010 *F, V & V in ObGyn* 194.

⁹³ Page *Artificial Womb Technology* 40-41.

⁹⁴ Venkov 2018 <https://www.thetornidentity.org/2018/12/13/children-right-legal-identity>.

⁹⁵ "The nature of our society is such that we are prevented from knowing who we are...". See Smith 2020 *Cath U L Rev* 371. Today's birth certificates have become method for social parents to withhold the fact from their children that they were conceived through a donated embryo. Mundy 2013 <https://newrepublic.com/article/112375/birth-certificates-age-adoption-and-egg-donation>.

⁹⁶ Mundy 2013 <https://newrepublic.com/article/112375/birth-certificates-age-adoption-and-egg-donation>.

⁹⁷ The New South Wales approach may be followed. This mandates all ART providers to submit mandatory information of every child born from ART treatment. Failure to do so would subject the ART provider to a penalty. See s 33 of the *Assisted Reproductive Technology Act, 2007*.

and that further information is available about the child's birth.⁹⁸ This annotation guarantees the child's being able to determine that she/he was born through embryo donation, especially where the social parents have not informed the child.⁹⁹ This extra information should also indicate in which specific (national or provincial) register the child can seek and apply for further information concerning her/his donor parents and/or potential genetic siblings.¹⁰⁰ A separate registry, a Donor Sibling Registry, could be created and updated regularly, in order to enable potential full genetic siblings to connect.¹⁰¹ However, the law should make it a requirement that that the child may be given access to such information only upon reaching the age of majority, i.e. 18 years¹⁰² or when the child is "sufficiently mature".¹⁰³ This "extra information" should also provide the particulars of the clinic that assisted with the embryo donation procedure in order to certify that the child has parents biologically different from her/his legal ones and the ART method used.¹⁰⁴

⁹⁸ Adams *et al* 2019 https://www.news24.com/parent/fertility/trying_to_conceive/experts-answer-your-questions-on-donor-conception-and-ivf-20190625.

⁹⁹ Adams *et al* 2019 https://www.news24.com/parent/fertility/trying_to_conceive/experts-answer-your-questions-on-donor-conception-and-ivf-20190625.

¹⁰⁰ Hammarberg, Johnson and Petrillo 2011 *Journal of Reproductive and Infant Psychology* 179.

¹⁰¹ Jolly 2017 <https://www.theguardian.com/lifeandstyle/2017/jan/21/donor-siblings-duties-of-blood-matter>.

¹⁰² At age 18 individuals can make their own decisions and will have greater emotional maturity. It is an opportunity for these individuals to seek further information which their parents cannot provide. See Graham 2022 *Reproductive BioMedicine and Society Online* 196. Internationally there has been a trend towards the recognition of a donor-conceived person's right to know her/his origins. Austria is the only country that allows children as young as 14 to have access to this information, whilst the age of 16 is more common in countries across Europe such as Germany and the Netherlands. See Clark 2012 *Ga J Int'l & Comp L* 621. However, the legal position in South Africa is that donor anonymity is a legal requirement, as indicated in s 41(2) of the *Children's Act*, which prohibits the child from accessing any information that may reveal the donor's identity. The proposal for the right to access identifying information at age 18 would be a step in the right direction with the end goal being the age of 16. See Thaldar and Shozi 2022 *SAMJ* 409.

¹⁰³ "Sufficiently mature" is not defined in law, but Sweden's National Board of Health and Welfare has clarified that this age is "interpreted to mean at attainment of majority" i.e. at the age of 18 years. See Gottlieb, Lalos and Lindblad 2000 *Human Reproduction* 2052. Also see *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 23.1. While the recipient parents may argue that they are in the best position to determine the child's level of maturity, in the state of Victoria the Victorian Assisted Reproductive Treatment Authority (VARTA) will release the donors' identifying details to the child before they turn 18 years only if a VARTA counsellor considers the child sufficiently mature. See VARTA date unknown <https://www.varta.org.au/after-donor-conception/i-am-parent-donor-conceived-person>; Broughton 2018 <https://www.timeslive.co.za/sunday-times/news/2018-08-11-let-children-know-their-genetic-origins-say---child-law-experts>.

¹⁰⁴ Page *Artificial Womb Technology* 42.

A birth registration form specifically designed to address the practice of embryo donation should accompany the child's birth registration.¹⁰⁵ The registered ART provider must complete it, and it should be accompanied by a copy of the child's birth certificate within 30 days of birth.¹⁰⁶ This information would be essential in future, where the recipient couple or relatives want to submit extra information to the central data bank.¹⁰⁷ Additionally, once the embryo donation offspring have reached the age of 18 or are "sufficiently mature", they should be required to present a copy of their identity document and birth certificate in order to verify their identity before the identifying information is released.¹⁰⁸ Thus, recording the child's legal parents on the birth certificate and indicating that further information is available, in addition to lodging an "Embryo Donor-Conceived Offspring Birth Registration Form" would serve to protect not only the child's dynamic family identity¹⁰⁹ but also her/his biological and genetic origins.

The child's right to a nationality is protected, based on the principles of *jus sanguinis* or *jus soli*.¹¹⁰ Either way of acquiring a nationality is based on information that is recorded on the child's birth certificate;¹¹¹ however, this may be complicated at an international level when the child is born in a country different from that of the recipient parents' nationality.¹¹² Where such a child is born abroad to South African recipient parents, a possible solution would be for the parents to register the child at a South African Embassy so as to obtain an official record indicating the child's South African citizenship.¹¹³

¹⁰⁵ Section 33 of the *Assisted Reproductive Technology Act, 2007*. This "Embryo Donor-Conceived Offspring Birth Registration Form" would require the following information: the number of children born as a result of the embryo donation; the children's full names; birth dates; gender; weight at birth. See example: Embryo Donation International 2014 <https://www.embryodonation.com/downloads/Embryo%20Donor-Conceived%20Offspring%20Birth%20Registration%20Form.pdf>.

¹⁰⁶ The *Births and Deaths Registration Act 51 of 1992* provides that all births must be registered within 30 days. See DHA date unknown <http://www.dha.gov.za/index.php/civic-services/birth-certificates>.

¹⁰⁷ DHA date unknown <http://www.dha.gov.za/index.php/civic-services/birth-certificates>.

¹⁰⁸ Embryo Donation International date unknown <https://www.embryodonation.com/embryo-recipient-idp.php>.

¹⁰⁹ Teman and Berend 2020 *Journal of Family Issues* 2.

¹¹⁰ Pryce 2016 *Ind J Global Legal Studies* 932.

¹¹¹ Page *Artificial Womb Technology* 43.

¹¹² With the increased number of children born through embryo donation, it is foreseeable that a remarkably large group of children will face the same challenges as children born abroad and conceived through surrogacy, egg donation and sperm donation – who have been denied the nationality of their legal/social parents. See Nichol 2016 *Michigan State Law Review* 907.

¹¹³ Tucker date unknown <https://pved.org/thelegalitiesofivf.php>.

The NHA, Regulations relating to the Artificial Fertilisation of Persons¹¹⁴ and the *Children's Act* should be amended accordingly. Firstly, the definition of "embryo donation" should be inserted in both Acts in order to distinguish it from gamete donation.¹¹⁵ Secondly, section 19 of the NHA and section 41 of the *Children's Act*¹¹⁶ should be amended to provide for children born as a result of embryo donation to apply for and to have access to information stored in the electronic central data bank¹¹⁷ concerning the identities of the donating couple, once they have reached the age of majority or are deemed "sufficiently mature".¹¹⁸ Thirdly, guidelines should be promulgated to require clinics to maintain detailed records of all parties involved in donor conception programmes; and counselling with a professional who has the appropriate training and experience to counsel in reproduction should be mandatory for both the donor and recipient couples. Joint counselling should be suggested but should not be obligatory. The donor couple must understand that the potential offspring born as a result of the embryo donation may be curious about the donors themselves and may desire to meet the donors and/or their genetic siblings.¹¹⁹ The donor couple should consent to the disclosure of their identities in writing, so that their future offspring may access this information once they have come of age or are "sufficiently mature". The central data bank should also make provision for related parties to lodge further information that may be of assistance to the offspring, such as their potential genetic siblings. Alternatively, a new Act with its focus on ART and the rights of children born from such practices should be drafted by Parliament.¹²⁰ A child born through embryo donation has a legal right to know their identity. While this right is difficult to enforce, it is not impossible to do so at a national level.

¹¹⁴ GN 1165 in GG 40312 of 30 September 2016; GN 251 in GG 44321 of 25 March 2021.

¹¹⁵ The definition adopted by the World Health Organisation could be applied. See Zegers-Hochschild *et al* 2009 *Fertility and Sterility* 1520.

¹¹⁶ *Children's Act*, s 41(1): "A child born as a result of artificial fertilisation or surrogacy or the guardian of such child is entitled to have access to – (a) any medical information concerning that child's genetic parents; and (b) any other information concerning that child's genetic parents but not before the child reaches the age of 18 years." S 41(2): "Information disclosed in terms of subsection (1) may not reveal the identity of the person whose gamete was or gametes were used for such artificial fertilisation or the identity of the surrogate mother."

¹¹⁷ GN 1165 in GG 40312 of 30 September 2016, para 5.

¹¹⁸ Should an individual under the age of 18 years approach the clinic with the request to access information regarding her/his genetic origins, the clinic should arrange for counselling with a professional who has the appropriate experience in such decision-making processes and evaluate whether the individual is emotionally mature and has the capacity to fully comprehend the nature of the request. See NHMRC *Ethical Guidelines* para 5.9.2.

¹¹⁹ Embryo Donation International date unknown <https://www.embryodonation.com/embryo-recipient-idp.php>.

¹²⁰ Lessons should be drawn from the legal positions in Australia and New Zealand.

6 Concluding remarks

In conclusion, rapid developments in ART have caused countries to re-evaluate the way in which identity formation in children is viewed and have led to calls to modify existing legislation to accommodate these unique challenges. Embryo donation is still a novel practice in South Africa and without comprehensive national legislation or international guidelines the unregulated nature of this practice as opposed to other forms of ART places children in a position of uncertainty.¹²¹

Clarity is thus needed on the meaning of identity rights with regard to various forms of ART, and legislative reform should reflect the clarified position. Not only should children have the right to know the truth about their origins, but prospective recipient couples considering embryo donation need to be made aware of the concomitant social, psychological and legal complexities. The time has undoubtedly come for the South African legislature and the international community to formalise the realisation of the right to identity of all donor-conceived children. This paper confirms that this is not an insurmountable challenge. There are a number of steps that can be taken at both a national and an international level to enforce the identity rights of children born through gamete and embryo donation. It is up to South Africa and the international community to decide how urgently it wishes to take these steps.

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¹²¹ The lack of specific legislation governing embryo donation in South Africa creates uncertainty surrounding the screening of donors; the matching process; the parties' legal rights and responsibilities; and the handling, storage and transfer of embryos and the overall risks thereof. Embryo donation is similar to the adoption of an infant as both processes produce a family structure where neither parent is genetically related to the child. However, the former allows the recipient mother to carry and deliver the child, thus giving the recipient parents parental rights prior to the birth as opposed to having to rely on the biological mother to relinquish her rights after birth. Furthermore, no adoption order is required, and the child born from embryo donation is effectively considered the biological child of the recipient couple. See Mpedi 2023 <https://www.dailymaverick.co.za/opinionista/2023-04-23-south-africa-needs-legislation-to-regulate-and-formalise-embryo-adoption/>.

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List of Abbreviations

ACART	Advisory Committee on Assisted Reproductive Technology
ARCWC	African Charter on the Rights and Welfare of the Child
ART	Assisted Reproductive Technology
Cath U L Rev	Catholic University Law Review
CRC	Convention on the Rights of the Child
DHA	Department of Home Affairs
F, V & V in ObGyn	Facts, Views and Vision in ObGyn
HART Act	Human Assisted Reproductive Technology Act, 2004
HCCH	Hague Conference on Private International Law
Ind J Global Legal Studies	Indiana Journal of Global Legal Studies
ISS	International Social Service
J L & Med	Journal of Law and Medicine

MJIL	Melbourne Journal of International Law
NGO	non-governmental organisation
NHA	National Health Act 61 of 2003
NHMRC	National Health and Medical Research Council
RTAC	Reproductive Technology Accreditation Committee
SAMJ	South African Medical Journal
UN	United Nations
UNHR	United Nations Human Rights
VARTA	Victorian Assisted Reproductive Treatment Authority