



Victorian
Law Reform
Commission

The Convention on the Rights of the Child:
The Rights and Best Interests of Children
Conceived Through Assisted Reproduction

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Preface

This is one of three Occasional Papers published by the Victorian Law Reform Commission as part of the Commission's work on assisted reproduction and adoption. Occasional Papers provide background information which is relevant to questions which the Commission is considering as part of a law reform project.

A central issue which arises in the context of assisted reproduction is how to recognise and protect the best interests of children who are conceived through assisted reproduction. The three Occasional Papers deal with different aspects of this question.

This Paper examines how the concepts of the rights and best interests of children under the Convention on the Rights of the Child apply in the context of assisted reproduction. It considers the implications of the Convention on eligibility for access to assisted reproduction, and to the recognition of parentage of children who are conceived this way.

The Occasional Paper was prepared by John Tobin, Lecturer, Melbourne Law School, who is an expert on the Convention on the Rights of the Child. I thank him for his contribution to this important debate.

The two other Occasional Papers in this series are a paper co-authored by Adjunct Professor John Seymour, Australian National University and Sonia Magri, Lecturer, University of Melbourne, which examines how other Australian states, and the United States, United Kingdom and Canada regulate access to assisted reproduction, and a paper written by Dr Ruth McNair, Senior Lecturer, University of Melbourne, which reviews research findings on the health and other outcomes for children born through assisted reproduction into various types of families.

The Commission publishes Occasional Papers to inform public debate on areas of law reform we are considering. Occasional Papers reflect the views of their authors and do not contain policy recommendations.

The Commission will be publishing an Interim Report on Assisted Reproduction and Adoption early in 2005. We will then consult further on the draft recommendations in the Interim Report.

Abbreviations

AACAP	American Academy of Child and Adolescent Psychiatry
AAP	American Academy of Pediatrics
ART	Assisted Reproductive Technology

Executive Summary

The terms of reference for the Victorian Law Reform Commission (the Commission) inquiry into the laws that govern access to fertility treatment and eligibility to adopt children require the Commission to have *particular regard to the rights and best interests of children*.

This occasional paper attempts to identify and clarify the content of the rights of children which are relevant in the context of access to fertility treatment and eligibility for adoption. It is best read in conjunction with the Commission's Consultation Paper, which explains the existing law in Victoria with respect to assisted reproductive technology (ART) and adoption, and with other occasional papers released by the Commission which provide:

- an overview of the approach taken in other jurisdictions with respect to access to ART and eligibility for adoption for same-sex couples; and
- an assessment of the extensive literature on the outcomes of assisted reproduction for children.

It is important to note that the Commission's Consultation Paper gives rise to over 50 discrete questions nearly all of which could be assessed by reference to a child's rights and best interests. This paper does not attempt to respond to each of these questions. Instead it seeks to address five fundamental issues that arise out of the Commission's Consultation Paper:

1. What are 'children's rights' and what is meant by the phrase, 'a child's best interests'?
2. Is the current refusal under Victorian law to allow same-sex couples to jointly adopt a child consistent with a child's rights and best interests?
3. Is the current test for eligibility to ART, which is largely based on clinical infertility and effectively discriminates against single women and women in same-sex relationships, consistent with a child's rights and best interests?
4. What are the consequences for children of the current failure by the law to recognise as their lawful parents, persons of the same sex who for all practical purposes have jointly assumed responsibility for the care of a child?

5. Finally, does a child who is adopted or born as a result of an assisted reproductive procedure have a right under international law to obtain information identifying his or her biological parents before he or she turns 18?

After examining each of these issues the paper concludes that:

- Same-sex parenting is not contrary to the rights or best interests of the child and there is no legitimate basis on which to deny same-sex couples access to adoption or ART when this matter is viewed from the perspective of the rights of a child;
- the failure under the existing regime to recognise both parents in a same-sex parenting relationship has a discriminatory impact on the children living in such relationships with respect to the enjoyment of several rights; and
- children have a right to obtain information which identifies their biological parents before they turn 18, subject to the rights of other persons and the overriding principle that the receipt of such information is not contrary to their best interests.

Introduction

THE RIGHTS OF CHILDREN

Hilary Rodham, as she then was, once wrote that the phrase ‘children’s rights was a slogan in search of definition’.¹ Indeed, the very notion that children have rights still remains a contentious issue. This debate has been canvassed in detail elsewhere and need not be repeated here.² In contemporary society, however, it is no longer the case that children’s rights remain ‘a slogan in search of a definition’. In 1989 the United Nations General Assembly adopted the Convention on the Rights of the Child (the Convention), a copy of which is attached as an appendix to this paper.³ This treaty, which was the product of 10 years of drafting by States and non-government organisations, quickly became the most widely ratified human rights treaty in the history of international human rights law. There are currently 192 States party to the Convention and only the United States of America and Somalia are yet to accept its obligations.

Australia, which was heavily involved in and made significant contributions during the drafting of the Convention, ratified it in 1990. As a result of ratification, the Federal Government has accepted an obligation under international law to perform its obligations under the Convention in good faith.⁴ Because Australia is a federation of states, Victoria is not ‘bound’ under

1 Hilary Rodham ‘Children under the law’ (1973) 43 *Harvard Educational Review* 1.

2 See for example: Michael Freeman and Philip Veerman (eds), *The Ideologies of Children’s Rights* (1992); Michael Freeman (ed), *Children’s Rights: A Comparative Perspective* (1996); Stephen Parker ‘How can rights talk help children: An Academic Perspective’ in Philip Alston and G Brennan (eds), *The UN Children’s Convention and Australia* (1991) 16; Anne McGillivray ‘Why children do have equal rights: In reply to Laura Purdy’ (1994) 2 *International Journal of Children’s Rights* 243; M Coady, ‘Reflections on Children’s Rights’ in Kathleen Funder (ed), *Citizen Child: Australian Law and Children’s Rights* (1996); Vanessa Pupavac ‘The Infantilisation of the South and the UN Convention on the Rights of the Child’ (1998) *Human Rights Law Bulletin* 3.

3 For a commentary on the Convention see: *UNICEF Implementation Handbook for the Convention on the Rights of the Child* (2002); G Van Bueren, *International Law on the Rights of the Child* (1995); S Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999). For a detailed account of the drafting history of the Convention see: S Detrick (ed), *The United Nations Convention on the Rights of the Child* (1992).

4 Vienna Convention on the Law of Treaties, article 26—‘Every treaty is binding upon the parties to it and must be performed by them in good faith’.

international law to comply with the provisions of the Convention.⁵ Moreover at present, there is no domestic legislation at either a federal or state level that has sought to implement the entire Convention into Australia's domestic law. As a consequence, the Convention has no legal status in Victoria, but by virtue of its near universal acceptance it remains a significant document by which to ascertain the rights of children. Indeed, members of the High Court of Australia have indicated that ratification of the Convention is not to be dismissed as 'a merely platitudinous or ineffectual act, particularly when [it] evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children'.⁶

Although the Convention is not enforceable under international law, it does have a mechanism to monitor a State's compliance with its obligations under the Convention. This consists of a requirement that States parties submit regular reports on their efforts to comply with the Convention to the Committee on the Rights of the Child.⁷ The Committee is an independent body of experts⁸ and although it only has powers to make recommendations to States, it remains the most authoritative body with respect to the content and meaning of States' obligations under the Convention. Its concluding observations on States' reports and other comments therefore provide significant insight into the meaning of the various rights provided under the Convention.

The Convention applies to all children. A 'child' is defined as every human being under the age of 18 years unless under the law applicable to the child majority is attained earlier.⁹ In Victoria the age of majority is 18¹⁰ and thus the Convention applies to all persons under the age of 18. As for the commencement of childhood, when the Convention was being drafted States could not agree on whether to extend the definition of a child to some time before birth due to disagreements over the issue of abortion. Accordingly, it remains for each State to determine whether childhood begins at birth or some time prior to birth. In

5 However, it should be noted that article 27 of the Vienna Convention on the Law of Treaties provides that, '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...'

6 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, 365, Mason CJ and Deane J.

7 Convention on the Rights of the Child, article 44.

8 Convention on the Rights of the Child, article 43.

9 Convention on the Rights of the Child, article 1.

10 *Age of Majority Act 1977*, article 3.

Victoria, as a foetus currently has no status as a legal person,¹¹ childhood begins at birth.

In the context of ART there remains a threshold issue as to whether the Convention has any relevance to a child who is not only yet to be conceived but remains merely in contemplation. In such circumstances it is doubtful that such a child could be said to have any rights. The reality is that if that child is born he or she will have rights under the Convention. It is thus incumbent upon policy makers to accommodate this prospect in designing laws that address the various issues relating to ART.

In the Convention there are 40 substantive articles that provide rights to children covering matters ranging from juvenile justice and child labour to education and health. As this paper will explain, there are several rights which are particularly relevant to children in the context of adoption and assisted reproductive technology, including:

- the right of a child to know and be cared for by his or her parents as far as possible;¹²
- the right to an identity;¹³ and
- a collection of rights that set out the obligations and responsibilities of parents to protect their children from harm,¹⁴ provide them with a safe and secure living environment¹⁵ and ensure their children's best interests remain their basic concern.¹⁶

11 According to the common law position that a foetus lacks independent legal personality until it is born: *K v T* [1983] 1 Qd R 396, confirmed on appeal in *Attorney-General (ex rel Kerr) v T* (1983) 1 Qd R 404, 406–407 and *In the Marriage of F* (1989) 13 Fam LR 189.

12 Convention on the Rights of the Child, article 7(1)—‘The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents’.

13 Convention on the Rights of the Child, article 8(1)—‘State parties undertake to respect the right of the child to preserve his or her identity including name nationality and family relations as recognised by law without unlawful interference’.

14 Convention on the Rights of the Child, article 19.

15 Convention on the Rights of the Child, article 27(2)—‘The parent(s) or others responsible for the child have the primary responsibility to secure within their abilities and financial capacities the conditions necessary for the child’s development’.

16 Convention on the Rights of the Child, article 18(1)—‘...Parents or as the case may be legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.’

THE BEST INTERESTS PRINCIPLE

OVERVIEW

The Victorian Law Reform Commission (the Commission) has Terms of Reference for its inquiry into assisted reproductive technology (ART) and adoption which list both the *rights* of children and their *best interests* as a separate issue for consideration. Under the Convention no such distinction exists and the best interests principle is considered to be a right of children to demand that their best interests are a primary consideration in all matters affecting them.¹⁷ This approach is significant as it counters the criticism often made that the best interests principle, when viewed in isolation, is indeterminate and subjective.¹⁸ In the context of the Convention, however, such criticisms are unwarranted. While the principle remains a fluid and flexible concept, it is not unfettered or entirely subject to the personal whims of a decision-maker. Rather, it is informed and constrained by the rights and principles provided for under the Convention.¹⁹ Put simply, a proposed outcome for a child cannot be said to be in his or her best interests where it conflicts with the provisions of the Convention.

In the context of access to ART and eligibility for adoption, this requires a consideration of what have been identified as the guiding principles under the Convention. In addition to the best interests principle, these guiding principles include:

- the **prohibition against discrimination** with respect to a child's enjoyment of any of the rights under the Convention, on the basis of any status or the status of his or her parents,²⁰ which includes their sexual orientation;²¹

17 Convention on the Rights of the Child, article 3(1)—‘In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.

18 See for example: *Department of Health and Community Services v JWB* (1992) 175 CLR 218, 271, Brennan J, who noted, ‘it must be remembered that, in the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision maker’.

19 See: Philip Alston and B Gilmour Walsh, *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (1996) 32.

20 Convention on the Rights of the Child, article 2(1)—‘State parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind...’; article 2(2)—‘State parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status...of the child's parents, legal guardians or family members’.

- the **right to survival and development** which is an umbrella concept that focuses on the physical, mental, moral, spiritual, psychological and social development of a child;²² and
- the **right to participation** which requires that children have a right to express their views about all matters affecting them and have such views taken into account in accordance with their age and maturity.²³

The other rights listed under the Convention also inform any assessment of the best interests of a child, especially those rights which have been identified above to have particular relevance in the context of access to ART and eligibility for adoption.

THE BEST INTERESTS AS THE PARAMOUNT (NOT PRIMARY) CONSIDERATION IN ADOPTION AND ART

In the context of adoption, the Convention requires that the best interests of the child are not just ‘a primary consideration’ but ‘the paramount consideration’.²⁴ In other words, the best interests of a child are not merely to be balanced as a central consideration against other competing interests,²⁵ including for example a person’s desire to have a child. Rather the best interests of the child are to be the overriding

21 See: S Joseph J Schultz and M Castan, *The International Covenant on Civil and Political Right: Cases Materials and Commentary* (2000) para 23.23.

22 Convention on the Rights of the Child, article 6(2)—‘State parties shall ensure to the maximum extent possible the survival and development of the child’.

23 Convention on the Rights of the Child, article 12(1)—‘State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child’. This will clearly be of greater relevance to older children in the context of adoption. But it remains relevant to ART where there are already children living with persons who are seeking to have another child as a result of an assisted reproductive procedure. In such circumstances consideration must be given to the views of the existing child. These views are not determinative but remain significant in facilitating the involvement of the child in a very significant family decision which will have an impact on his or her life. The right to participation also requires that the assessment of what constitutes a child’s best interests in either adoption or ART must include the views of children who have been adopted or conceived as a result of ART and are living with parents in a same-sex relationship: Philip Alston and B Gilmour Walsh, *The Best Interests of the Child: Towards a Synthesis of Children’s Rights and Cultural Values* (1996) 12. See also *Family Law Act 1975* (Cth) s68F which requires that the Family Court must consider the views of the child when ascertaining his or her best interests.

24 Convention on the Rights of the Child, article 21—‘State parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration...’

25 See n 19, 10–12—discusses weight to be given to best interests principle.

consideration from which the entire process of adoption is to be assessed. Such an approach is consistent with the *Adoption Act 1984* which also requires that the ‘welfare’ and ‘interests’ of the child shall be regarded as the paramount consideration.²⁶

There is no specific article under the Convention that addresses ART. Although proposals were made during drafting to include an article that would deal with medical technology and children, it was never adopted. This should not be taken to mean that the Convention and international law is silent on children born as a result of ART. On the contrary, children born as result of such procedures will be entitled to all the rights listed in the Convention, including the general principle that their best interests must be a primary consideration. But in Victoria the obligation is even more onerous as the guiding principles of the *Infertility Treatment Act 1995* require that the welfare and interests of any person born or to be born as a result of a treatment procedure *are paramount*.²⁷ Although there is no definition of the terms ‘welfare’ and ‘interests’ under the *Infertility Treatment Act*, it seems reasonable to assume that these terms are equivalent to a requirement that the best interests of a child must be paramount. In any event it is arguable that the substantive content of what constitutes a child’s welfare and interests should be informed by the articles under the Convention in the same way that the best interests principle is defined by reference to the Convention.

26 *Adoption Act 1984* (Vic) s 9.

27 *Infertility Treatment Act 1995* (Vic) s 5(1).

Eligibility for Adoption

OVERVIEW

Although parenting ability is the major criterion by which eligibility for adoption is regulated in Victoria, the *Adoption Act 1984* also generally requires that the prospective parents are married or have been living in a heterosexual de facto relationship for two years.²⁸ There is provision for a single person to adopt a child, but only where the Court is satisfied that ‘special circumstances exist in relation to the child which makes it desirable’ to make an adoption order.²⁹ *People in same-sex relationships are therefore prohibited from making a joint application for adoption.* In theory, one person in the relationship could make an application for adoption but the other partner would never be recognised as the child’s legal parent. The issue is whether this regime for assessing eligibility for adoption, which effectively discriminates against same-sex couples (and arguably single persons) can be justified on the basis that it is consistent with the rights and best interests of the child.

IS SAME-SEX PARENTING INCONSISTENT WITH THE RIGHT OF A CHILD TO KNOW AND BE CARED FOR BY HIS OR HER PARENTS?

Opposition to same same-sex couples being able to adopt is often based on an assertion that international law provides children with a right to be born into and cared for by a family comprised of a male and female parent.³⁰ Although the proponents of this position acknowledge there is no express right to this effect, they argue that it is a logical and necessary interpretation of various international

28 *Adoption Act 1984* (Vic) s 11(1)-(4). See: Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed? Consultation Paper* (2003) para 4.12. (Commission’s Consultation Paper)

29 *Adoption Act 1984* (Vic) s 11(3).

30 See for example, the submissions of the Catholic Church in *McBain v Victoria* [2000] FCA 1009 paras 11, 12; Office of the Prime Minister, amendment to the *Sex Discrimination Act 1984* (media release, 1 August 2000)—‘This issue primarily involves the fundamental right of a child within our society to have the reasonable expectation, other things being equal of the care and affection of both a mother and a father’; Attorney-General Philip Ruddock, ‘Government defends Marriage’ (media release, 27 May 2004) which asserts that children have a right to have the opportunity to be raised by a mother and a father.

human rights standards that place responsibility for the care of children with their parents. This position is simply untenable under international law. It was rejected by Justice Sundberg of the Australian Federal Court in *McBain*, where his Honour declared that when the relevant international instruments are considered in their entirety they ‘tell against the existence of an untrammelled right of the kind for which the Catholic Church contends’.³¹ Moreover, there is nothing in the jurisprudence of the Committee on the Rights of the Child, the body of independent experts established to monitor the implementation of the Convention, to support this view.

Article 7(1) of the Convention does provide children with a right to know and be cared for as far as possible by their parents. Article 18(1) further provides that parents have primary responsibility for the upbringing and development of a child, and article 27(2) states that parent(s) have the primary responsibility to secure the conditions of living necessary for a child’s development. But there is nothing in the drafting history of the Convention to suggest that the term ‘parents’ was necessarily to be defined or indeed confined to a man and woman, or to a child’s biological parents. The Committee’s comments in its outline of issues to be raised during its discussion day on the ‘Role of the Family in the Promotion of the Rights of the Child’ tend to imply that a more flexible interpretation of the definition of parents is warranted:

The basic institution in society for the survival, protection and development of the child is the family. When considering the family environment the Convention reflects different family structures arising from the various cultural patterns and emerging familial relationships. In this regard the Convention refers to the extended family and the community and applies to situations of nuclear family, separated parents, single parent family, common law family and adoptive family.³²

This passage could in no way be taken to restrict the definition of ‘parents’ to heterosexual couples. It is true there is no reference to persons of the same sex, but there is also no express exclusion of such relationships. Sexuality appears to be an irrelevant consideration, which would appear to be consistent with the Committee’s view that the notion of family, and by implication parents, is a

31 *McBain v Victoria* [2000] FCA 1009 para 12.

32 Role of the Family: the Promotion of the Rights of the Child, 7th Session 10 October 1994 CRC/C/24 (1994) para 2.1; also in Committee on the Rights of the Child, Reports of General Discussion Days CRC/C/DOD/1 (19 September 2001) 27.

flexible one that must respond to and accommodate the reality of changing and diverse social relationships.

This view is confirmed in the Committee's subsequent summary of its discussion day where it explained:

On the basis of the different interventions it would seem hard to argue for a single notion of the family. Through the influence of economic and social factors and of the prevailing political, cultural or religious traditions, the family has always been shaped in a diversity of ways and naturally faces different challenges or living conditions. Would it therefore be acceptable to consider that only some kinds of family deserve assistance and support from the State and society i.e.: nuclear, extended, biological, adoptive or single parent families? Could it be considered that only in certain circumstances would the family or family life have decisive social value? On the basis of what criteria: legal, political, religious, other? Would it be possible to favour a perspective where only under certain conditions would children be given the opportunity to enjoy rights, which in fact are inherent to the dignity of their human nature?

All these questions seem to place the essential value of the principle of non discrimination in the forefront of the general discussion.³³ [author's emphasis]

Such comments make it difficult, if not impossible, to argue for a notion of 'parents' under international law that would necessarily be restricted to two persons—a mother and father. On the contrary, given the diversity of family arrangements that exist within contemporary society they invite an interpretation whereby neither biology nor a heterosexual union should be the sole determinants of parenthood.³⁴ Indeed, they challenge the traditional dual parent paradigm³⁵ and suggest that existing social practices indicate as a matter of fact that a child may have many different parents, including:

- a gestational/birth parent, being the woman who gave birth to the child;
- genetic/biological parents, being the woman whose ovum was used for the creation of the child and the man whose sperm was used to fertilise the ovum, whether by natural methods of conception or via an assisted reproductive procedure; and

33 Summary of General Discussion CRC/C/34 paras 190–191; also in Committee on the Rights of the Child, Reports of General Discussion Days CRC/C/DOD/1 (19 September 2001) 29.

34 G Fuscaldo, 'What makes a parent? It's not black or white' (2003) 29 *Journal of Medical Ethics* 66).

35 Ibid.

- nurturing/social parents, being the person or persons recognised under the law of a State as being responsible for the actual care of the child.

These categories are not necessarily mutually exclusive, and more importantly the last category is not defined or restricted by reference to the sexuality of those persons who care for the child. Rather, it allows for national law³⁶ to reflect the identity of those persons who have formally accepted responsibility for the care of a child and are prepared to act as the social parents of a child.

There is no doubt that this position presents a challenge to the established and dominant expectations held by many within society about legitimate family structures. But its adoption need not be taken as sounding a death knell for ‘the family’ as a social institution. As Justice Skweyiya of the Constitutional Court of South Africa explained when rejecting the historical insistence on heterosexual parenting with respect to adoption in South Africa:

The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change.³⁷

Thus the family can still remain the fundamental unit of society and the optimal place in which all children should be raised and provided with care. But the

36 The contentious nature of the definition of ‘parents’ is reflected by the fact that article 7 is the subject of a number of declarations and reservations including one from the United Kingdom which provides:

The United Kingdom interprets the references in the Convention to ‘parents’ to mean those persons who as a matter of national law are treated as parents. This includes cases where the law regards a child as having only one parent, for example, where a child has been adopted by one person only and in certain cases where a child is conceived other than as a result of sexual intercourse by the woman who gives birth to it and she is treated as the only parent: CRC/C/2/Rev2, 33.

Australia, however, has made no such reservation with respect to the definition of ‘parents’ and is unable to assert that the meaning of this term is defined solely by reference to domestic law. In other words, although international law allows for and indeed requires States to use their national law to recognise the parents of a child, it does not allow domestic law to restrict the scope of the term ‘parents’ in a manner that would undermine the definition of this term under international law.

37 *Du Toit & Anor v The Minister for Welfare and Population Development & Ors* (2003) 4 CHRLD 21 para 19. See also the earlier jurisprudence of the Court with respect to the definition of family in: *National Coalition for Gay and Lesbian Family v Minister for Home Affairs* [2000] 2 SA 1 (CC) paras 47–48.

effective functioning of this unit is not to be assessed by reference to its structure or the sexuality of its members, rather the capacity of its members to ensure the 'healthy development of a child through the provision of a stable, consistent, warm and responsive relationship between a child and his or her care giver'.³⁸

IS SAME-SEX PARENTING AND BY IMPLICATION SAME-SEX ADOPTION CONTRARY TO THE BEST INTERESTS OF THE CHILD?

Opponents of eligibility for same-sex couples to adopt (and access ART) also invoke the best interests principle and argue that same-sex parenting relationships are contrary to a child's best interests.³⁹ This view is based on the assumption that a heterosexual relationship is the optimal environment for a child to develop. According to this line of thought, same-sex relationships and single parents are not only unable to offer the same standard of environment, but in the case of same-sex relationships may actually cause harm to children because of their sexuality. Thus, same-sex parent and single parent families are presumed to be contrary to the best interests of the child. On this view, the State should not actively facilitate their existence by allowing same-sex couples or single persons to be eligible for adoption (or indeed to have access to ART).

This view is normally based upon four assumptions:

- that two parents are necessarily better than one and by implication that a single parent will be unable to ensure the development of a child as well as two parents;
- that every child needs a male role model (read: father) and female role model (read: mother) actively involved in his or her life;
- that lesbians and gay men will harm a child's development, particularly with respect to his or her gender identity and sexual orientation; and

38 *Re K* (1995) 15 RFL (4th) 129, 143 (Nevins J).

39 See for example: Second Reading Speech, Commonwealth House of Representatives, 17 August 2000 (Daryl Williams, Attorney-General). The then Attorney argued that a proposed amendment to the *Sex Discrimination Act 1984* (Cth) to allow states to discriminate against single women and women in same-sex relationships in the provision of ART was justified on the basis that it was in the best interests of a child to be brought up by family consisting of two parents, a mother and a father.

- that children of same-sex parenting relationships are more likely to experience social stigma and discrimination.⁴⁰

However, the assessment of a child's best interests under international law is not based on mere assumptions or preconceptions about the legitimacy or otherwise of various family structures. Rather, a child's best interests must be informed by empirical evidence that assesses the actual as opposed to speculative impact of family structures and a parent's sexuality on the development of a child. The occasional paper in this series prepared by Dr Ruth McNair provides an extensive review of the existing literature covering these issues, but it still remains important to critique, albeit briefly, the four assumptions used to support the claim that same-sex parenting relationships (and single parents) undermine a child's best interests and his or her right to personal development.

ARE TWO PARENTS NECESSARILY BETTER THAN ONE?

In the first instance intuition and experience tells us that a two person heterosexual parenting relationship provides no guarantees for the care and development of a child.⁴¹ Although there is research to suggest that children from single parent families suffer in their development relative to their counterparts in two parent families,⁴² commentators have identified numerous weaknesses in this research.⁴³ For example, as Walker points out, such studies are often based on the experience of children in divorced families where a variety of factors are at play, and thus have limited relevance in assessing the underlying ability of single people to care for children.⁴⁴ She points to a growing body of evidence to suggest that poverty and a lack of social support are the key reasons contributing to children's

40 For a detailed critique of these assumptions see: K Walker '1950s Family Values vs Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria' 11 *Public Law Review* 292 (2000) 301; T Dower 'Redefining Family: Should Lesbians have access to assisted reproduction?' 25 *Melbourne University Law Review* 466 (2001) 471–474; American Academy of Pediatrics 'Technical Report: Coparent or Second Parent Adoption by Same Sex Parents' 109 *Pediatrics* 341 (2002).

41 See generally: World Health Organisation, *WHO World Report on Violence and Health* (2002) 57–86, which details abuse and neglect of children by parents and other care givers.

42 See: K Walker '1950s Family Values vs Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria' 11 *Public Law Review* 292 (2000) 301—discusses relevant studies.

43 See for example: K Walker 'Should there be limits on who may access assisted reproductive services?' 6 *Flinders Journal of Law Reform* 67 (2002) 77.

44 Ibid.

developmental problems in single parent families.⁴⁵ In light of such observations there would appear to be no empirical basis on which to assert that:

- a two parent family is necessarily better for the development and care of a child than a single parent family; or
- a single parent family is necessarily incapable of providing a safe and stable environment in which to ensure the development of a child.

DO SAME-SEX PARENTING RELATIONSHIPS DEPRIVE CHILDREN OF GENDER ROLE MODELS?

Opponents of same-sex parenting relationships and single parents by choice warn of the danger to a child's development because of the absence of appropriate gender role models. This concern is usually raised in the context of the need for a young boy to have a male role model actively participating in his life and is supported by research indicating adverse developmental effects on children in families where the father is absent. Putting aside the contentious issue of whether gender modelling is necessary for children's development,⁴⁶ the first point to note is that the research used to support the need for a male role model is based on the experience of children where divorce has been the cause of separation of the child from the father.⁴⁷ Its relevance is thus questionable with respect to situations of same-sex adoption.

Secondly, a same-sex relationship does not necessarily mean that a child will be denied access to the active participation of his or her father (or indeed mother). Research indicates that many lesbian parents actively facilitate the involvement of a child's biological father in his or her life.⁴⁸ This approach is entirely consistent with the right under international law of a child to know and be cared for by his or her parents (broadly defined) as far as possible. Thirdly, as Walker points out, the source of appropriate male role modelling need not be confined to a child's father and can be provided by members of a child's extended family, friends,

45 Ibid.

46 See generally *ibid* 78.

47 See: T Dower 'Redefining Family: Should Lesbians have access to assisted reproduction?' 25 *Melbourne University Law Review* 466 (2001) 474.

48 See: R McNair, D Dempsey, S Wise and A Perlesz 'Lesbian Parenting: Issues Strengths and Challenges' 63 *Family Matters* 40 (2002) 45.

teachers and the like.⁴⁹ Fourthly, and perhaps most significantly, research indicates that:

...the gender identity of preadolescent children raised by lesbian mothers has been found consistently to be in line with their biologic sex...No differences have been found in the toy, game, activity, dress, or friendship preferences of boys or girls who had lesbian mothers, compared with those who had heterosexual mothers.⁵⁰

After an examination of the relevant literature Golombok concluded:

With respect to gender development there was no evidence of confusion about gender identity among these children and no difference in sex role behaviour between children in lesbian and heterosexual families for either boys or girls.⁵¹

On the basis of such findings, there appears to be no legitimate grounds on which to assert that same-sex parenting relationships are necessarily incompatible with a child receiving access to appropriate gender role models, whether they are male or female.

DO SAME-SEX PARENTING RELATIONSHIPS HARM CHILDREN'S DEVELOPMENT?

Despite arguments to the contrary and alleged weaknesses in research methodologies, there is a growing body of evidence to suggest that same-sex parenting causes no harm to children.⁵² The weight of the evidence is such that in 1999 the American Academy of Child and Adolescent Psychiatry issued a policy statement on Gay, Lesbian and Bisexual Parents which states:

There is no evidence to suggest or support that parents with a gay, lesbian or bisexual orientation are per se different from or deficient in parenting skills, child centered concerns and parent-child attachments, when compared to parents with a heterosexual

49 See n 43, 78-79.

50 American Academy of Pediatrics 'Technical Report: Coparent or Second Parent Adoption by Same Sex Parents' 109 *Pediatrics* 341 (2002) 342—notes that 'compared with young adults who had heterosexual mothers, men and women who had lesbian mothers were slightly more likely to consider the possibility of having a same-sex partner and more of them had been involved in at least a brief relationship with someone of the same sex, but in each group similar proportions of adult men and women identified themselves as homosexual': 342.

51 S Golombok 'Adoption by lesbian couples: Is it in the best interests of the child?' 324 *British Medical Journal* 1407 (2002) 1408.

52 See generally the Victorian Law Reform Commission's Occasional Paper—R McNair, *Outcomes for Children born of A.R.T. in a Diverse Range of Families* (2004) 39–55.

orientation. It has long been established that a homosexual orientation is not related to psychopathology and there is no basis on which to assume that a parental homosexual orientation will increase likelihood of or induce a homosexual orientation in the child.

Outcome studies of children raised by parents with a homosexual or bisexual orientation, when compared to heterosexual parents, show no greater degree or instability in the parental relationship or developmental dysfunction in children.

The AACAP opposes any discrimination based on sexual orientation against individuals in regard to their rights as custodial or adoptive parents.⁵³

In 2002, the American Academy of Pediatrics (AAP) issued a policy statement and technical report on Coparent or Second Parent Adoption by Same-sex Parents in which it also concluded:

A growing body of scientific literature demonstrates that children who grow up with 1 or 2 gay and/or lesbian parents fare as well as in emotional, cognitive, social and sexual functioning as do children whose parents are heterosexual. Children's optimal development seems to be influenced more by the nature of the relationships and interactions within the family unit than by the particular structural form it takes.⁵⁴

This position invoked a hostile response from some sections of the community and allegations of the Academy cowering to political correctness.⁵⁵ But as Golombok has noted:

On the basis of the evidence it seems that the American Academy of Pediatrics acted not out of political correctness but with the intention of protecting children who are likely to benefit from the legal recognition of their second parent.⁵⁶

This observation is critical and is supported by decisions of national courts in jurisdictions such as Canada⁵⁷ and South Africa⁵⁸ which have dismissed claims that

53 American Academy of Child and Adolescent Psychiatry Gay, Lesbian and Bisexual Parents Policy Statement, approved by Council June 1999 available at <www.aacap.org/publications/index.htm>.

54 See n 50, 341.

55 See n 51, 1407.

56 Ibid 1408.

57 See: *Re K* (1995) 15 RFL (4th) 129—assessed evidence and dismissed claims that the mental health of gay and lesbian parents, the stability of their relationships, the impact of same-sex parenting on a child's sexual orientation and psychological development and the potential social stigma experienced by children living in such relationships was in any way contrary to the best interests of a child. For a discussion of the case see: D Sandor, 'Same sex couples can adopt in Ontario: The Canadian Case of *Re K* and its Significance to Australian Family Law' (1997) 11 *Australian Journal of Family Law* 16.

same-sex adoption is contrary to a child's best interests. Its acceptance, however, requires adults to surrender their tendency to interpret the best interests principle by reference to their own preferences and expectations about family structure, in favour of a child centred approach informed by empirical evidence and the views of children.

ARE CHILDREN OF SAME-SEX PARENTING RELATIONSHIPS MORE LIKELY TO EXPERIENCE DISCRIMINATION?

Despite the absence of credible evidence to suggest any direct harm as a result of same-sex parenting, the claim is still made that such family arrangements remain contrary to the best interests of children because of the potential social stigma they experience as a result of living with same-sex parents. Such claims are also unsubstantiated. Studies about the experience of children living with single lesbian mothers when compared to children living with heterosexual single mothers have revealed the former are no more likely to be teased or ostracised by their peers.⁵⁹ As Dower points out, 'courts in custody cases have largely discredited the public stigma argument' and found it to be overstated and without foundation.⁶⁰ But even if this were not the case, any acceptance of the 'public stigma argument' would effectively allow discrimination to perpetuate itself and would run the risk of legitimising homophobia'.⁶¹

CONCLUSION: SAME-SEX PARENTING IS NOT CONTRARY TO THE BEST INTERESTS OF A CHILD

In light of the above discussion, it would appear that opponents of adoption by same-sex couples who base their objection on the best interests of a child are misappropriating this principle. They appear to be more concerned with serving their own ideological objectives than the best interests of children. There is simply no credible evidence that such relationships cause harm to the intellectual, emotional, psychological or sexual development of children by virtue of the sexuality of their parents. On the contrary, there is an overwhelming and growing

58 *Du Toit & Anor v The Minister for Welfare and Population Development and Ors* (2003) 4 CHRLD 21.

59 F Tasker and S Golombok, *Growing Up in a Lesbian Family* (1997) 149–150. See also n 51, 1408.

60 See n 47, 473.

61 *Ibid.* See also n 50, 343—notes that even if children living with same-sex parents were subject to greater teasing, based on the experience of children from divorced families, they would 'seem to cope rather well with the challenge of understanding and describing their families to peers and teachers'.

body of evidence to suggest that people living in same-sex relationships are no more and no less capable of fulfilling their duties and responsibilities towards children in their care than parents living in heterosexual relationships. In short, as the AAP has declared, 'parents' sexual orientation is not a variable that, in itself, predicts their ability to provide a home environment that supports children's development.'⁶² Rather, it is 'the happiness of the *relationship between adults* in the household, and the openness of warmth and communication *between the adult/s and the children*' that have a major impact on children.⁶³

Significantly, it is these sentiments that informed the Constitutional Court of South Africa when it was asked to assess the constitutionality of an adoption regime which, like that currently in place in Victoria, prevented persons in a same-sex relationship from jointly adopting a child. In its judgment the Court declared:

In their current form the impugned provisions exclude from their ambit potential joint adoptive parents who are unmarried, but who are partners in permanent same sex life partnerships and who would otherwise meet the [requisite parenting] criteria...*Their exclusion surely defeats the very essence of social purpose of adoption which is to provide the stability, commitment, affection and support important to a child's development, which can be offered by suitably qualified persons.*⁶⁴ [author's emphasis]

The Court therefore concluded:

Excluding partners in same sex life partnerships from adopting children jointly where they would otherwise be suitable to do so is in conflict with the principle enshrined in section 28(2) of the Constitution [that a child's best interests are of paramount importance in every matter concerning the child].⁶⁵

62 See n 50, 343.

63 J Millbank, *Meet the Parents: A Review of the Research on Lesbian and Gay Families* (2002) 4.

64 *Du Toit & Anor v The Minister for Welfare and Population Development and Ors* (2003) 4 CHRLD 21 para 21.

65 Ibid para 22.

Access to Assisted Reproductive Technology

OVERVIEW

The *Infertility Treatment Act 1995* determines access to ART in Victoria by identifying those people who may undergo treatment and the conditions under which they may do so.⁶⁶ The Act states that for a woman to have a treatment procedure she must be married or in a heterosexual relationship. However, this requirement of a legally recognised heterosexual union was rendered inoperative by the High Court in *McBain*⁶⁷ where it was held that a service provider could not deny a single woman access to ART as this would amount to discrimination on the basis of her marital status. This means that in theory any woman can apply for an ART procedure irrespective of her marital status or sexuality.

But a right to apply for access to ART does not translate into a right to receive an assisted reproductive procedure. On the contrary, a woman must first establish that she is either:

- ‘unlikely to become pregnant’ other than by a treatment procedure; or
- if she were to become pregnant, that she would be likely to give birth to a child with a genetic abnormality or risk communicating a disease to a child.

The meaning and application of these tests is relatively straightforward for women who are in heterosexual relationships. But an assessment of the phrase ‘unlikely to become pregnant’ is arguably more problematic for single women or women in same-sex relationships. The Infertility Treatment Authority, which is the body responsible for administering the *Infertility Treatment Act 1995*, has adopted the view that such women must establish that they are ‘clinically infertile’. As noted in the Commission’s Consultation Paper, this is a test which is ‘difficult to apply with respect to women who do not engage in sexual relations with men or who do so infrequently’.⁶⁸ *As a consequence, it is more difficult for single women or women in*

66 See the Commission’s Consultation Paper paras 3.1–3.24.

67 *Re McBain; Ex Parte Australian Catholic Bishops Conference* [2002] HCA 16 (18 April 2002).

68 Commission’s Consultation Paper para 3.14. See also n 42, 297–299—critical of the requirement that single women or women in same-sex relationships must establish clinical infertility because it

same-sex relationships to gain access to ART procedures compared to women who are married or in other heterosexual relationships.

A further consequence of the application of the existing eligibility test is the potential for women to resort to assisted insemination without medical assistance. As noted in the Commission's Consultation Paper, this process involves the insemination of semen into a woman's vagina, cervix or uterus, usually with a syringe, and is distinct from intra-uterine insemination which involves the placement of sperm into the womb using a catheter.⁶⁹ The danger associated with assisted insemination without medical assistance is that there may be no screening of the donor's sperm. Of course any woman, irrespective of her sexuality or marital status, can always elect to have assisted insemination without medical assistance. But under the current regime, lesbian women and single women are effectively denied the right to receive medical assistance and its concomitant health benefits. Moreover, the health of the children conceived and born as a result of assisted insemination without medical assistance is potentially compromised in the absence of any mechanism to screen the donor's sperm. Accordingly it is not only the disparity in access to ART experienced by lesbian and single women that raises a question of whether the existing eligibility should be changed, but also the potential for the current test to jeopardise the right of a child to the highest attainable standard of health.⁷⁰

A CHILD RIGHTS APPROACH TO ACCESS TO ART

A primary objective of this paper is to assess the test for eligibility for ART from the perspective of a child's rights and best interests. Adopting this approach, the most notable observation is that the existing eligibility test is devoid of any consideration of children's rights or their best interests. In its current format, the test appears to be inconsistent with the guiding principles of the *Infertility Treatment Act 1995* which, as noted above, require that the welfare and interests of any person born or to be born as a result of a treatment procedure are paramount. Despite this overriding requirement, eligibility is determined solely by reference to issues concerning a woman's fertility. This creates an adult-centric test that involves no assessment of the rights and interests of the child who may be

effectively 'reimposes the discrimination on the basis of marital status' which the Federal Court and High Court had ruled to be invalid.

69 Commission's Consultation Paper para 1.4.

70 Convention on the Rights of the Child, article 24(1)—states Parties recognise the right of the child to the enjoyment of the highest attainable standard of health.

born as a result of such a procedure, let alone making such concerns the paramount consideration. Moreover, the current interpretation of the test effectively makes it discriminatory and adult-centric by introducing factors, namely the sexuality of a woman and/or her marital status, that have no necessary bearing on the ability of a woman to care for a child. As noted above, it also raises the prospect of jeopardising the health of children born to women who have been denied access to medical assistance, because of the inability to screen the donor's sperm.

If the test for eligibility for ART were truly to be consistent with the rights of children under the Convention (and reflect the principle under the *Infertility Treatment Act* that the welfare and interests of a child must be paramount), fertility must be an irrelevant consideration as it has no bearing on the ability of a person to care for a child. As such, there is a need to remove the current nexus between fertility and access to ART and replace it with a test that involves greater emphasis on the rights and best interests of children.

REMOVING THE NEXUS BETWEEN ACCESS TO ART AND FERTILITY

As noted in the Commission's Consultation Paper, the approach adopted in the United Kingdom provides an example of an eligibility test that has no nexus with the fertility of a woman.⁷¹ The *Human Fertilisation and Embryology Act 1990* (UK) provides:

A woman shall not be provided with treatment services unless account has been taken of the welfare of the child who may be born as a result of the treatment (including the need of that child for a father) and of any other child who may be affected by the birth.⁷²

Here the test for eligibility is linked to the welfare of the prospective child, an approach that would be consistent with the requirement under the *Infertility Treatment Act* that the welfare and interests of the child be the paramount concern. But this approach remains problematic for two reasons. First a welfare based approach is significantly different from a rights based approach.⁷³ A welfare based approach treats children as the objects of benevolence and passive recipients

71 Commission's Consultation Paper paras 4.21–4.24.

72 *Human Fertilisation and Embryology Act 1990* (UK) s 13(5).

73 See generally: Marta Santos Pais, 'A Human Rights Conceptual Framework for UNICEF' *UNICEF Essays No 9*.

of assistance. The assessment of the welfare of a child, when viewed in isolation, is invariably subjective and vague. In contrast, a rights based approach is founded upon the recognition of children as rights holders and is characterised by their universal entitlements defined under the Convention. It is designed to empower and strengthen the autonomy of children rather than leave the fulfilment of their needs to the discretion of adults.

The second problem with the approach adopted in the United Kingdom is that the welfare of a child is expressly linked with the need of a child for a father. This principle is currently being reviewed by the Human Fertilisation and Embryology Authority.⁷⁴ However, the current approach raises the risk of creating a presumption against access to ART for single women or women in a same-sex relationship. This concern is arguably addressed by the body responsible for the implementation of the *Human Fertilisation and Embryology Act 1990* (UK) in its Code of Practice, which provides that the Act ‘does not exclude any category of woman from being considered for treatment’.⁷⁵ The Code also states that centres providing ART should avoid ‘adopting any policy or criteria that may appear arbitrary or discriminatory’⁷⁶ and should note ‘the importance of a stable and supportive environment for any child produced as a result of the treatment’.⁷⁷ Specific factors to be considered in undertaking this assessment include:

- commitment to having and raising children;
- medical histories;
- health and age as factors in the future ability to provide for a child’s needs;
- any risk of possible harm to the child; and
- the effect on the existing family.⁷⁸

Notably, sexuality and the relationship status of women are not listed as factors considered relevant to the ability of a woman to provide a stable and supportive environment for a child.

74 See <www.hfea.gov.uk/AboutHFEA/HFEAPolicy/ReviewoftheWelfareoftheChildPrinciple>.

75 Human Fertilisation and Embryology Authority Code of Practice (2001) clause 3.10; Commission’s Consultation Paper para 4.24.

76 Human Fertilisation and Embryology Authority Code of Practice (2001) clause 3.3.

77 Ibid clause 3.14.

78 Ibid.

ELIGIBILITY DETERMINED BY PARENTING CRITERIA

The preceding discussion has highlighted the weaknesses of eligibility tests for ART that are determined by reference to either a woman's fertility or the welfare of a child. Another alternative canvassed in the Commission's Consultation Paper is to provide little or no regulation of access to ART.⁷⁹ Such an approach removes any barriers to access to ART and is arguably more equitable. But it is an extremely adult-centric approach, which gives absolutely no consideration to the rights and best interests of the child who may be born as a result of an assisted reproductive procedure. It is also entirely at odds with the requirement under the *Infertility Treatment Act* that the welfare and interests of a child to be born as a result of any procedure must be the paramount consideration.

It would appear that when the question of eligibility is assessed by reference to the rights and best interests of a child, the primary test for eligibility must be the capacity of a woman to fulfil her parental duties and responsibilities with respect to the prospective child. But parenting criteria are problematic for a number of reasons and there is a significant discussion of these difficulties in the Commission's Consultation Paper.⁸⁰ This discussion need not be repeated here, suffice to address three issues:

- Are parenting criteria discriminatory?
- Is it possible to agree on parenting criteria?
- Ensuring a nexus between the criteria and parenting ability.

ARE PARENTING CRITERIA DISCRIMINATORY?

It has been suggested that it may be considered discriminatory to impose criteria for having a child via an ART procedure when the decision to have a child naturally is not subject to a test of eligibility. However, it is important to distinguish between the role of a State in each of these scenarios and its concomitant responsibilities. The State plays no active role in facilitating natural births. In Victoria, even if the government wanted to regulate who had children, it has no legitimate or effective means by which to do so. As such, its role must be confined to assisting a child's parents to secure the rights and best interests of a child *once* he or she is born. In the context of ART, however, the State plays a

79 Commission's Consultation Paper paras 4.28–4.29.

80 Commission's Consultation Paper para 4.7.

significant role in facilitating and enabling a woman to give birth to a child. It is thus able, and arguably obliged to take all appropriate measures to ensure that the woman who delivers that baby will have the capacity to fulfil her duties to and responsibilities for that child.

This idea of evaluating prospective parents is neither novel nor unique and already exists for adoptive parents. As is the case with ART, the process of adoption involves the State facilitating the process of a person or persons becoming a parent. Eligibility for adoption has always been determined by reference to parenting criteria. This is not to say adoption and ART are the same or that the parenting criteria for adoption should be applied to ART. But the feature common to both adoption and ART is the active involvement of the State. It therefore seems anomalous that current Victorian law does not address the issue of access to ART by reference to parenting criteria when this (combined with marital status) is the sole consideration for eligibility for adoption. If the rights of the child, including his or her best interests, were truly to be considered the paramount consideration in both ART and adoption procedures, it would seem inevitable that access and eligibility must be determined primarily by parenting criteria.

IS IT POSSIBLE TO AGREE ON PARENTING CRITERIA?

This gives rise to another issue raised in the Commission's Consultation Paper regarding the suitability of parenting criteria—namely an alleged lack of consensus on appropriate parenting criteria and measures to predict parenting ability. Such concerns are arguably exaggerated and misplaced. The Convention itself identifies the core responsibilities of parents to include:

- provision of a safe, loving and secure family environment (preamble);
- provision of appropriate guidance and direction to a child in the exercise of his or her rights (article 5);
- protection against harm (article 19);
- an obligation to ensure a child's best interest shall be the parent(s)' basic concern (article 18(2));
- an obligation to ensure the upbringing and development of a child (article 18(2)); and
- an obligation to secure within their abilities and financial capacities the conditions of living necessary for the child's development (article 27(2))

including the provision of adequate food, housing and clothing (article 27(3)).

The accumulated experience of our medical practitioners and courts in dealing with issues pertaining to the care and protection of children means that as a society we are already acutely aware of the factors that may impede a person's ability to fulfil these obligations. Such factors include, for example, poverty,⁸¹ certain psychiatric conditions, certain physical disabilities, drug and alcohol addiction or a history of violence and sexual abuse.⁸² The existing process of granting adoption must involve assessments according to prescribed parenting criteria,⁸³ the Family Court must consider the capacity of parents to fulfil their parental responsibilities in any orders involving children,⁸⁴ as must the Children's Court in any orders relating to the care and welfare of children.⁸⁵ It is therefore

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- 81 Under international law there are obligations imposed on States to provide financial and other forms of support to existing families to ensure parents are able to fulfil their responsibilities with respect to their children. But there is no general obligation to provide financial or other support to a person who requests the State provide assistance in the facilitation of their desire to become a parent, either by way of an ART procedure or adoption. As a consequence, the financial capacity of a person, or indeed persons, to care for a child is arguably a legitimate factor in determining the overall capacity of that person or persons to fulfil their responsibilities to a child conceived as a result of an ART procedure.
- 82 This is not to say that each of these factors would necessarily be indicative of a person's capacity to provide appropriate parenting to a child and care would be required to ensure such characteristics were given appropriate weighting in the assessment process. There would need to be an avenue of review available to those women who were refused access. See n 43, 87–89 which provides a discussion of the difficulties associated with using a list of grounds as a basis for the exclusion of a woman's access to ART.
- 83 Adoption Regulations 1998, regulation 35—relevant factors include age, emotional, physical and mental health, financial circumstances, stability of character and stability of the relationship between the applicants such that the applicants have the capacity to provide a secure and beneficial emotional and physical relationship during a child's upbringing.
- 84 *Family Law Act 1975* (Cth) s 61B—'parental responsibility' means all the duties, powers, responsibilities and authority which by law parents have in relation to children. The assessment of the best interests of a child by the Family Court requires consideration of a number of factors, four of which are relevant to parenting responsibilities: the capacity of a parent to provide for the needs of a child, including emotional and intellectual needs; the attitude to the child and to the responsibilities of parenthood demonstrated by each parent; the need to protect a child from harm both physical and psychological; and family violence involving the child or a member of the child's family: s 68F(2).
- 85 *Children and Young Persons Act 1989* (Vic) s 63—lists the grounds of when a child is in need of protection which include: if the child is likely to suffer significant harm as a result of physical injury or sexual assault, or emotional or psychological harm that is likely to significantly damage a child's emotional or intellectual development, and the child's parents have not protected and are unlikely to protect the child from such harm or the parents have not arranged or allowed for the provision of basic care or effective medical, surgical and other remedial care.

unwarranted to suggest there does not exist the possibility of reaching agreement as to appropriate parenting criteria for access to ART, or a means to predict whether a person or persons are reasonably likely to satisfy such criteria.

ENSURING A NEXUS BETWEEN THE CRITERIA AND PARENTING ABILITY

This paper does not attempt to articulate the specific parenting criteria that should be used to assess eligibility for ART if such a model were to be adopted. It does, however, recommend that the procedure for the assessment of parenting ability should be set out in legislation rather than left to the discretion of individual medical practitioners. Such a procedure would require the creation of a clear, transparent and accountable process monitored by an independent body, and include an opportunity for a woman to review a decision if she were denied access. In the absence of such safeguards it would be difficult to provide an effective system of ensuring (a) medical practitioners were in fact assessing an applicant's parenting ability and (b) were not applying the agreed parenting criteria in a discriminatory manner.

This paper also suggests that whatever parenting criteria are adopted, they need not be excessively prescriptive as their objective is not to guarantee a woman will be a 'perfect' parent (if indeed such a standard could ever be measured or achieved). Rather, they must be designed to allow for an assessment of whether a woman on her own or in conjunction with a partner or other persons is reasonably likely to provide as a minimum a safe, stable and healthy environment for a child.

The criteria adopted should also have a legitimate and established nexus with securing the rights and best interests of a child. It would be inappropriate to list the sexuality of a person as a criterion either for access to ART or for eligibility to adopt. As noted above, there is no credible evidence to suggest the sexuality of a person impacts negatively on his or her parenting ability. It is arguable that the relationship, as opposed to marital status of a person, could be considered a relevant factor given it is generally acknowledged that a single person is more likely to face (although will not necessarily do so) greater difficulty in fulfilling his or her responsibilities to a child. As noted by the AAP, 'parents and children have better outcomes when the daunting tasks of parenting are shared'.⁸⁶ At the same time, it is important to stress that the relationship status of a person should not be

86 See n 50, 343.

the determinative factor in assessing eligibility for ART.⁸⁷ There will clearly be circumstances in which a single person will be able to demonstrate that he or she has the capacity to fulfil a parent's duties to and responsibilities for a child. The reality is that the Family Court and Children's Court make determinations to this effect every day.

87 Such an approach would amount to discrimination against a woman on the basis of her marital status and would be a violation of Australia's obligations under international law. See for example: International Covenant on Civil and Political Rights articles 2 and 26; Convention on the Elimination of All Forms of Discrimination Against Women article 1. It is important to note that the definition of discrimination under international law is not to be equated with differential treatment per se. Differential treatment is permitted where the criteria for such differentiation are reasonable and objective and the aim is to achieve a purpose which is legitimate under international law: Human Rights Committee General Comment 18 Non-Discrimination (Thirty-seventh session 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev 6 at 146, para 13. Thus a State has the power to consider the relationship status of a person in the context of determining eligibility for adoption, but only to the extent that this factor is relevant to the ability of that person to fulfil his or her responsibilities with respect to the care of a child.

The Discriminatory Consequences for Children Caused By the Failure of Current Laws to Recognise Their Same-Sex Parents

OVERVIEW

To date, much of the criticism of the failure to allow same-sex couples to adopt children and the difficulties experienced by lesbian and single women when seeking access to ART has focussed on the discrimination suffered by adults. This section of the paper seeks to identify the discriminatory consequences of the existing laws for children. As the law currently stands in Victoria, and at Commonwealth level, there is no way to legally recognise as a parent:

- the same-sex partner of a woman who gives birth to a child as a result of an ART procedure;
- the same-sex partner of a woman who gives birth to a child who was naturally conceived;
- the same-sex partner of a man or woman who adopts a child; or
- the same-sex partner of a man who has a child via a surrogacy arrangement.

This has a number of practical consequences under domestic law, all of which discriminate against a child living with parents who are in a same-sex relationship. For example, only a child's legally recognised parent(s) will appear on the child's birth certificate.⁸⁸ The non-legally recognised parent cannot provide consent to medical treatment for a child or permission to attend a school excursion. A legally recognised parent cannot make a claim for child support from a non-parent under the Commonwealth *Child Support (Assessment) Act 1989*.⁸⁹ This occurs even when the non-legally recognised parent agreed to assume common parenting responsibilities when the decision to adopt the child or conceive him or her via an assisted reproductive procedure was first made. Finally, the statutory intestacy laws

88 For a discussion of the law relating to birth registration see the Commission's Consultation Paper paras 5.78–5.83.

89 See the Commission's Consultation Paper para 5.35.

in Victoria mean that a child cannot automatically benefit from the estate of a non-legally recognised 'parent' upon that person's death, in the event that he or she dies intestate.⁹⁰

These discriminatory consequences are not unlawful under domestic law because there is nothing to prevent discrimination against a child on the basis of the sexuality of his or her parents. This is not the case, however, under international law. The prohibition against discrimination is a fundamental principle of international law⁹¹ and a guiding principle under the Convention on the Rights of the Child. This means States must ensure and respect the rights under the Convention of each child without discrimination of any kind irrespective of the child's status. This would include his or her status as a child living with parents of the same sex.⁹² The Convention further provides that States must take all appropriate measures to ensure a child is protected from all forms of discrimination on the basis of the status of his or her parents, which would extend to their sexual orientation.⁹³

For the purposes of international law, discrimination is defined as:

Any distinction, exclusion, restriction or preference based on any status which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms.⁹⁴

It is not necessary that the discrimination be intended, it need only be shown that the effect of the treatment is to undermine the enjoyment of a right. The application of this test to the failure under Victorian (and federal) law to recognise same-sex partners as the lawful parents of a child reveals discrimination relating to a child's enjoyment of several rights under the Convention including:

90 *Administration and Probate Act 1958* (Vic) s 52(1)(f), (i). See also Commission's Consultation Paper para 5.43. To die intestate means to die without leaving a valid will or leaving a will which does not dispose of everything.

91 See Human Rights Committee General Comment 18 Non-Discrimination (Thirty-seventh session 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev 6 at 146, para 1.

92 Convention on the Rights of the Child, article 2(1).

93 Convention on the Rights of the Child, article 2(2).

94 This formulation is based on article 1 of the Convention for the Elimination of All Forms of Racial Discrimination as adopted and amended by the Human Rights Committee General Comment 18 Non-Discrimination (Thirty-seventh session 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev 6 at 146, para 6.

- the right to birth registration;
- the right to an identity; and
- a collection of rights with respect to the obligation of parents to care for their children.

THE RIGHT TO BIRTH REGISTRATION⁹⁵

Article 7 of the Convention requires that a child shall be registered immediately after birth. The Convention does not stipulate what information must be provided upon birth registration and the *travaux préparatoires* (its drafting history) provide no real insight into this issue. The jurisprudence of the Committee is more helpful in this regard and stresses that States must ‘provide information on the elements of the child’s identity included in the birth registration’.⁹⁶ It has also indicated that ‘the absence of such basic documentation detailing the child’s age and *family affiliations* may hamper the implementation of a child’s other rights...’⁹⁷ [author’s emphasis]. The Committee is yet to discuss the meaning of terms such as ‘the elements of a child’s identity’ or ‘family affiliations’, but it would arguably extend to the inclusion of information about those persons who have assumed the role of and consented to act as the parent of a child.

Under the current law in Victoria, the same-sex partner of a woman who conceives a child as a result of an ART procedure or via natural methods of conception can never be recognised on the birth certificate of that child as his or her parent. The same consequence applies to the same-sex partner of a woman or man who adopts a child in their capacity as a single person. In other words, despite the fact that the partner may assume all the common responsibilities of the day to day care of the child, the existing law makes no provision for the recognition of this form of parenting relationship on a child’s birth certificate or any other documents maintained by the Registry of Births, Deaths and Marriages. It thus arguably fails to satisfy the Committee’s requirement that a child’s birth registration must detail the child’s family affiliations and provide information with respect to the various elements of a child’s identity.

95 See Commission’s Consultation Paper paras 5.78–5.83 which detail the current law in Victoria with respect to registration of births.

96 Committee on the Rights of the Child, Guidelines for Periodic Reports, CRC/C/58 para 51.

97 Committee on the Rights of the Child, Concluding Observations for Honduras, CRC/C/15/Add24 para 12.

The effective enjoyment of a child's right to birth registration requires that the law recognise and reflect the actual nature of a child's family environment and include information about the identity of those persons who have accepted parental responsibility for the child.⁹⁸ The failure to satisfy these requirements under the current regime effectively means that children living in families where the parents are in a same-sex relationship are denied the rights that are accorded to children living in families where the parents are in a heterosexual relationship.

The significance of this discrimination should not be underestimated. As the AAP in its policy statement on Coparent or Second Parent Adoption by Same Sex Parents declared:

Children deserve to know that their relationships with both of their parents are stable and legally recognised. This applies to all children, whether their parents are of the same or opposite sex. The American Academy of Pediatrics recognises that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment and development as can children whose parents are heterosexual. When 2 adults participate in parenting a child, they and the child deserve the serenity that comes with legal recognition...

...Denying legal parent status through adoption to coparents or second parents prevents these children from enjoying the psychological and legal security that comes from having 2 willing, capable and loving parents.⁹⁹

But children are not only deprived of the legal security that comes with recognition of both parents, they are also denied the specific benefits and rights that flow to a child from the legal recognition of same-sex partners as parents, including:

- guarantees with respect to the second parent's parenting responsibilities if the first parent were to die or become incapacitated;

98 Article 7(2) of the Convention requires States to ensure the registration of a child's birth in accordance with their national law. This should not be taken to mean that States are able to justify the exclusion of same-sex parents from a child's birth certificate on the basis that such persons are not recognised as parents under national law. Such an interpretation would potentially leave article 7 devoid of any meaning as its scope would be entirely at the discretion of a State. Article 7(2) also requires that the implementation of a child's right to birth registration must also be consistent with the relevant international instruments, including the Convention. As such, birth registration of a child must be consistent with both national and international law.

99 See n 50, 339.

- protection of the child's legal right to have and maintain relationships with both parents which is especially relevant in the event of separation;
- the requirement for child support from both parents in the event of the parents' separation; and
- a legal basis for either parent to provide consent to medical care and to make education, health care and other important decisions on behalf of the child.

While many of these adverse consequences could be prevented by, for example, same-sex couples obtaining a parenting order from the Family Court or making a will, this does not address the fundamental discrimination caused by the existing regime. To properly reflect the true nature of a child's family relations, the effective registration of a child's birth would arguably need to make provision for the potential to recognise same-sex couples as the lawful parents of a child.

Such a practice could give rise to a number of issues. For example, the Commission's Consultation Paper raises the possibility that a same-sex couple may not wish both partners to appear on a birth certificate as parents 'because this will force the child to produce a document which discloses his or her parents' sexuality whenever and wherever he or she presents it'.¹⁰⁰ Such a concern could be easily resolved by adopting a procedure that regulates the circumstances as to when the full details of a child's family relationship are disclosed. The Committee on the Rights of the Child has explained that in the context of birth registration, measures must be adopted to 'prevent any kind of stigmatisation or discrimination against a child'.¹⁰¹

The other consequence of adopting a system of birth registration, which includes information about a child's familial relations and those factors relevant to his or her identity, is whether this extends to a requirement to allow for the recognition of:

- all forms of parenting relationships, namely, birth/gestational, biological/genetic and social/nurturing; and
- the potential to identify the gender of each parent.

This represents a significant shift from the current insistence on naming only a mother and a father. But this current approach is not consistent with the

100 Commission's Consultation Paper para 5.81.

101 Committee on the Rights of the Child, Guidelines for Periodic Reports, CRC/C/58 para 51.

formation of contemporary family structures. Nor is it consistent with the rights of children under international law to demand that the registration of their birth represents a true indication of their familial relations and not simply an outdated desire to conform to a heterosexual couple concept of parentage.

The adoption of a birth registration system which makes provision for the recognition of various forms of parenting relationships raises issues about the status and obligations of these various categories of parents. The most notable are the potential liability of non-social parents for child support and the rights of a child with respect to inheritance. A focus on the rights of the child in this context may be seen as interfering with the rights of adults, particularly those adults who only agree to donate gametes if there are no further obligations to any child born through the use of those gametes. Although a discussion of such concerns is beyond the scope of this paper, it is worth noting that they can be easily addressed by legislation which clearly defines the scope of rights and obligations of such persons.¹⁰² The Convention does not require donors of gametes to assume all of the responsibilities that a social parent may have.

THE RIGHT TO PRESERVE IDENTITY

Article 8 of the Convention provides children with a right to preserve their identity. The inclusion of this right was intended to act as ‘a safeguard to preserve personal, legal and family identity of children throughout the world’.¹⁰³ It requires States not only to refrain from unlawful interference with a child’s identity, but also to take active measures to ensure the effective enjoyment of a child’s right to preserve his or her identity. The Committee has stressed the importance of birth registration as one measure of securing a child’s right to an identity¹⁰⁴ and explained that States must not only create but also maintain records critical to establishing a child’s identity.¹⁰⁵ The current failure of Victorian law to recognise

102 To a certain extent the *Status of Children Act 1974* (Part II) already operates to define and create legal parent–child relationships in the context of assisted reproduction.

103 See: S Detrick (ed), *The United Nations Convention on the Rights of the Child* (1992) 620—delegation of Argentina.

104 See for example: Committee on the Rights of the Child, Concluding Observations for Sierra Leone, CRC/C/15/Add116 para 42. See also Committee on the Rights of the Child, Concluding Observations for Paraguay, CRC/C/15/Add27 para 10; Paraguay CRC/C/15/Add75 para 18; Comoros CRC/C/15/Add141 para 27; Djibouti CRC/C/15/Add131 para 31; Peru CRC/C/15/Add8 para 8.

105 In its report on Peru, the Committee expressed its concern that ‘due to the internal violence several registration centres have been destroyed, adversely affecting the situation of thousands of children

the same-sex parents of a child on his or her birth certificate, or in any other way, would therefore appear to be inconsistent with a child's right to preserve his or her identity under article 8 of the Convention.

It is important to note that the definition of a child's right to identity under article 8 expressly includes his or her 'family relations'. In light of the Committee's expansive definition of the term 'family', it is difficult to conceive of a credible argument that would exclude the same-sex parents of a child from the phrase, 'family relations'. The drafting history of the Convention does indicate that the proponent of article 8, Argentina, was preoccupied with a child's biological familial relations and a desire to address a situation in which many children were abducted and 'adopted' to members of the armed forces without any record of the child's biological parents. But there is nothing in the final text of article 8 which demands that the meaning of 'family relations' be restricted to biological ties. Such an approach accords with neither the Committee's broad notion of family nor the reality that children 'draw their own identity from the people who take daily care of them and are their psychological parents'.¹⁰⁶

Article 8 does, however, refer to 'family relations as recognized by law' which raises the prospect of a State arguing it has no obligation to recognise the same-sex parents of a child because such relationships are not recognised under domestic law. Such an interpretation is disingenuous. As one commentator has explained:

If national law is meant then article 8 does nothing more that obligate a state to respect its own applicable laws. This construction would diminish the right significantly for it would free a state to deprive a child of 'genuine' identity so long as the state provides a replacement identity and does so under the colour of national law. The concept of 'genuine identity' would virtually be eliminated from the right.¹⁰⁷

Accordingly, the phrase 'as recognized by law' should be read to refer to familial relations as recognised under domestic *or* international law and while States have a degree of discretion regarding the implementation of the right to identity, they cannot adopt an approach that is inconsistent with international human rights standards.

who are often left without any identity document...': Committee on the Rights of the Child, Concluding Observations for Peru, CRC/C/15/Add8 para 8.

106 B Woodhouse, 'Are you my mother? Conceptualising Children's Identity Rights in Transracial Adoptions' (1995) 2 *Duke Journal of Gender Law and Policy* 107, 127.

107 G Stewart, 'Interpreting the Child's Right to Identity in the UN Convention on the Rights of the Child' (1992) 26 *Family Law Quarterly* 221, 224.

In summary, States have a positive obligation to actively obtain and legally recognise information about the identity of a child's parents—gestational, genetic and social—and to record it in a way that ensures the preservation of a child's familial relations. The current failure of Victorian law to undertake such measures with respect to the parenting roles performed by both partners in same-sex relationships falls short of the measures necessary to ensure the protection of a child's familial relations and identity.

RIGHTS WITH RESPECT TO THE OBLIGATION OF PARENTS TO CARE FOR THEIR CHILDREN

As noted above the Convention sets out a number of rights with respect to the obligations of parents to care for their children. Parents have primary responsibility for the upbringing and development of a child and the child's best interests must be their basic concern.¹⁰⁸ They must secure an adequate standard of living for their children and provide maintenance in the event of a family breakdown.¹⁰⁹ The failure under the current regime in Victoria to recognise both same-sex partners as lawful parents means that children living with same-sex parents are not necessarily entitled to enjoy their rights in relation to parental obligations.

The Convention does allow for the obligations imposed on parents to be extended to other persons responsible for a child¹¹⁰ but Victorian (and federal) law fail to impose any obligations on same-sex partners who are not legally recognised as the parent of a child. In theory, such persons could and may consent to such responsibilities in practice (even to the extent of consenting to such responsibilities formally under a parenting order issued by the Family Court). The reality is that unlike lawfully recognised parents, they are under no legal obligation to do so.

108 Convention on the Rights of the Child, article 18(1).

109 Convention on the Rights of the Child, articles 27(2), (4).

110 For example, article 27(2) of the Convention provides that 'the parent(s) or others responsible for the care of the child have the primary responsibility to secure, within their abilities and financial capacities the conditions necessary for the child's development'.

A Child's Right to Know the Identity of His or Her Parents

OVERVIEW

Among the many issues raised in the Commission's Consultation Paper is the right of a child to know the identity of his or her biological parents if he or she is adopted or born as a result of an assisted reproductive procedure using donated gametes.¹¹¹ This section of the paper seeks to address this issue¹¹² from the perspective of a child's rights and argues that despite a divergence of views among commentators¹¹³ it would appear that, on balance, international law supports a presumption in favour of allowing a child to receive information identifying his or her biological parents. This right is not absolute and must be balanced against a biological parent's right to privacy. It also remains subject to the overriding caveat that the release of identifying information must not be contrary to the child's best interests.

By way of background, Victorian law currently provides that children who are adopted or born as a result of an assisted reproductive procedure have a right to receive information about the identity of their biological parents. But in the case of both the *Adoption Act 1984* and *Infertility Treatment Act 1995* children cannot independently apply for such information until they reach 18.¹¹⁴ In the case of

111 Commission's Consultation Paper paras 5.67–5.77.

112 It does not attempt to address the related issue of a child's right to have contact with his or her biological/genetic parents, as this is quite a distinct issue.

113 See for example: M Blair, 'The Impact of Family Paradigms, Domestic Constitutions and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination' (2001) 22 *Michigan Journal of International Law* 587, 649—argues that the Convention does not support 'an unequivocal right of access to adoption records'; G van Bueren, *The International Law on the Rights of the Child* (1995) 120–127—examines legal bases on which to argue for the existence of such a right; M Freeman, 'The New Birth Right? Identity and the Child of the Reproduction Revolution' (1996) 4 *International Journal of Children's Rights* 273.

114 In the case of the *Adoption Act 1984* a child aged under 18 can apply for such information with the consent of both adoptive parents: s 94(2). In the case of the *Infertility Treatment Act 1995* such an application must be made by the child's parents on behalf of the child: s 74. The National Health and Medical Research Council Ethical Guidelines on Assisted Reproductive Technology 1996 provide that, 'children born from the use of ART procedures are entitled to knowledge of their biological parents': clause 3.1.5. The Guidelines do not suggest this right must only be exercised upon a child

adoptions, the relevant authority is not required to release the identifying information unless the biological parents have provided their consent.¹¹⁵ This was previously the case with respect to ART, however children conceived from gametes donated since 1 January 1998 have the right to access identifying information about donors *but only once they turn 18*.¹¹⁶ However as the Commission's Consultation paper points out, 'people who have children following a donation do not always tell them about their origins'.¹¹⁷ In such circumstances, the right to access identifying information is meaningless. Even more problematic is the potential for a person over the age of 18 to receive a request from the Infertility Treatment Authority to release information about his or her existence to the original donor.¹¹⁸ The current regime governing a child's right to receive information about the identity of his or her biological parents therefore raises an issue about whether children should have an unfettered right to receive such information before they turn 18.

DOES INTERNATIONAL LAW PROVIDE CHILDREN WITH A RIGHT TO RECEIVE INFORMATION IDENTIFYING THEIR PARENTS?

OVERVIEW

International law does not directly address the issue of a child's access to adoption records or the identity of gamete donors. It would be reasonable to assume that the article dealing with adoption, article 21, may have provided some guidance on this issue. But despite discussions during drafting as to whether this article should include a provision that required disclosure or mandated confidentiality, no consensus was reached.¹¹⁹ This does not mean that article 21 remains silent on this issue. On the contrary, it demands that a child's best interests must be *the paramount consideration* in any system of adoption. This is significant in resolving

reaching the age of 18 or subject to consent of a child's social parents. State law, that is, the *Infertility Treatment Act*, will prevail over the Guidelines: clause 1.1.

115 *Adoption Act 1984* (Vic) s 94(3).

116 *Infertility Treatment Act 1995* (Vic) ss 79, 80. Before a child turns 18, his or her parents can apply for identifying information but the release of the information remains subject to the donor's consent: s 75(2)(a).

117 Commission's Consultation Paper para 5.71.

118 *Infertility Treatment Act 1995* (Vic) ss 76, 77.

119 M Blair, 'The Impact of Family Paradigms, Domestic Constitutions and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination' (2001) 22 *Michigan Journal of International Law* 587, 645.

the debate about the competing rights between children and their biological parents should they wish to remain anonymous.

There is no equivalent to article 21 under the Convention with respect to children born as a result of an assisted reproductive procedure. However, the issue of their access to information identifying their biological parents remains subject to the general principle that their best interests shall be a primary consideration, and the *Infertility Treatment Act 1995* requires that the interests and welfare of a child born as a result of an assisted procedure are paramount.

When assessing a child's best interests in the context of access to identifying information, this determination has historically been informed by subjective assessments made by adults. In contrast, the Convention requires that empirical evidence and other articles under the Convention must inform decisions about a child's best interests. Particularly relevant in this context are:

- the right of a child to know his or her parents;
- the right of a child to preserve his or her identity; and
- the right to receive access to information and respect for family life.

THE RIGHT OF A CHILD TO KNOW HIS OR HER PARENTS

Article 7 of the Convention provides children with a right to know their parents. Although this right is qualified by the phrase 'as far as possible', this is not to be taken as creating a presumption against disclosure subject to a State's exercise of discretion about when it deems disclosure possible or the recognition of a parent's absolute right to refuse access. Rather, it exists as recognition of the potential that the identity of a parent may be unknown for a variety of reasons¹²⁰ and it is thus impossible for a child to know that parent or indeed parents. As a result, article 7 should be interpreted to create a presumption in favour of providing children with access to information about their biological parents before they turn 18 where this is logistically possible, that is, if the information is available. Interestingly, article 7 is not qualified by any express requirement that the right to know a child's parents must be consistent with the child's best interests. This requirement would,

120 For example, the identity of the father may not be known by a mother who has a child as a result of a casual liaison with a man or who is raped by an unknown male. The identity of a mother may not be known in circumstances where a child is abandoned or the mother refuses to reveal her identity. The identity of the biological parents of a child conceived as a result of a donated sperm or ovum may also be unknown in the absence of proper records that detail the identity of the donors.

however, be implied by virtue of article 3 of the Convention which requires that the best interests of a child must be a primary consideration in all matters affecting the child. In other words, a 5-, 10- or even 15-year-old child could not demand access to identifying information about his or her biological parents if the receipt of such information was considered to be contrary to the child's best interests.

A CHILD'S RIGHT TO AN IDENTITY

The presumption in favour of access to identifying information created by article 7 is further supported by a child's right to an identity under article 8 of the Convention. Although it has been argued that the focus under article 8 is on States to create mechanisms to rectify situations where children are wrongfully separated from their parents,¹²¹ such an approach is unnecessarily restrictive. As noted above States have an obligation to take active measures to preserve a child's identity, and the Committee has stressed the need for States to maintain records critical to establishing the identity of a child, including details of a child's familial relations. It has also indicated that there is a contradiction between the right of a child to know his or her origins and policy that keeps the identity of a sperm donor secret,¹²² thereby indicating a strong presumption in favour of the full disclosure of a child's genetic/biological parents.

A number of commentators also support this view. Freeman for example argues that the right to identity 'is a right not be deceived about one's true origins',¹²³ while Woodhouse asserts:

...children's right to identity includes a right to claim their 'identity of origin' defined as a right to know and explore, commensurate with her evolving capacity for autonomy, her identity as a member of the family and group into which she was born. The trusteeship model of adult power implies that we adults...have a duty to recognise and protect the child's access to this heritage as well as recognising and protecting the young child's need for continuity in her psychological or social family'.¹²⁴

121 See n 119, 648.

122 See Committee on the Rights of the Child, Concluding Observations for Norway, CRC/C/15/Add23 para 10.

123 M Freeman, 'The New Birth Right? Identity and the Child of the Reproduction Revolution' (1996) 4 *International Journal of Children's Rights* 273, 291.

124 See n 106, 128.

Such arguments effectively demand a right to access information about a child's biological/genetic parents. Anything less would appear to deny the right of a child to preserve his or her identity. However, as is the case with article 7, the exercise of this right would still remain subject to the overriding caveat that the release of the identifying information was consistent with the best interests of the child.

A GENERAL RIGHT TO INFORMATION AND RESPECT FOR FAMILY AND PRIVATE LIFE

The notion that children have a *prima facie* right to obtain information about their parents is further supported by their right to seek and receive information¹²⁵ and their right to respect for private and family life,¹²⁶ which would extend to measures to facilitate access to information about a child's familial relations.¹²⁷ Unlike the right of a child to know his or her parents and preserve identity, the rights to seek information and demand respect for family and private life expressly allow for restrictions to ensure the protection of the rights of others. The most obvious competing right in the context of access to identifying information about a biological or gestational parent(s) is the right of that parent(s) to enjoy respect for their private and family life.

This is a complex debate, the details of which are beyond the scope of this paper. Suffice to say that it has been rendered mute with respect to children born as a result of assisted reproductive procedures using gametes donated after 1 January 1998, as the identity of those persons cannot be withheld from a child who seeks such information when he or she turns 18.¹²⁸ In other words, those persons who

125 Convention on the Rights of the Child, article 13(1)—‘The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds...’

126 Convention on the Rights of the Child, article 16(1)—‘No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, or correspondence...’.

127 See: *Gaskin v United Kingdom* (1989) 12 EHRR (no 16, ser A) 36. The European Court of Human Rights held that the refusal to allow a young man access to information about the identity of those persons who cared for him while he was in the care of the State was a violation of his right to privacy; the European Commission on Human Rights stated that: respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from such very basic information without specific justification: para 89.

128 This position under the *Infertility Treatment Act 1995* reflects the requirement under the National Health and Medical Research Council Ethical Guidelines on Assisted Reproductive Technology 1996 that: ‘any person, and his or her spouse, donating gametes and consenting to their use in an ART

have donated gametes after 1 January 1998 have waived any right to remain unknown.

Persons who donated gametes prior to this date have capacity to consent to the release of identifying information. However, there are potential contractual and social policy reasons as to why they cannot be compelled to do so. When persons agreed to donate their gametes they did so on the understanding their identity would not be disclosed without their consent. This raises a question as to whether a child's right to know the identity of his or her genetic parents is greater than the right of a donor to insist on anonymity, the answer to which would be determined by any pre-existing contractual relationship between the donor and the Infertility Treatment Authority. Even in the absence of any contractual agreement, there are strong policy grounds on which to refrain from the retrospective application of contemporary policies and values. It is important to keep in mind that the Convention itself has no retrospective application in this context.

A similar line of reasoning would also apply to those parents who have already consented to allow their children to be made available for adoption. Although there may be no formal contract in such circumstances, there may be strong public policy grounds for protecting the right of such persons to anonymity. It must be remembered that despite the presumption in favour of disclosure under international law, the Convention only applies prospectively. As a consequence, the competing rights debate is relevant, but only in the context of determining the *future policy direction* with respect to a child's right to access identifying information. Without wishing to engage in the details of this debate, it is sufficient to note that a child's best interests must be the paramount consideration in any system of adoption. As a consequence, a parent(s) would carry a heavy onus if they wished to displace the presumption under international law that a child has a right to preserve his or her identity and know his or her parents.

IS IT IN A CHILD'S BEST INTERESTS TO DENY ACCESS TO IDENTIFYING INFORMATION UNTIL THEY TURN 18?

OVERVIEW

It has been suggested above that international law creates a presumption in favour of the release of information to children who wish to know the identity of their

procedure where the intention is that a child may be born must, in addition to the information specified in this section, be informed children may receive identifying information about them'.

biological parents, subject to the rights of others and the requirement that disclosure is consistent with a child's best interests. At present, Victorian law refuses to allow children to gain access to identifying information in their own right until they turn 18. If they receive such information it will be because the adoptive parents and biological parents have consented to its release. This effectively creates an irrebuttable presumption that disclosure before the age of 18 without the consent of a child's parents (adoptive/biological) is contrary to a child's best interests. This section of the paper considers whether this presumption is justified.

WHAT ARE A CHILD'S BEST INTERESTS?

The determination of a child's best interests with respect to the release of information concerning the identity of his or her biological parents must be based on empirical evidence, a detailed review of which is provided in Ruth McNair's occasional paper. Importantly, the Convention also requires that in the collection of such information and assessment of a child's best interests, the views of children must be given due weight according to their age and level of maturity.¹²⁹ Historically, this was not the case and there appears to have been an assumption, unsupported by any evidence or articulated reasons but presumably driven by an overriding paternalism, that access to identifying information for children should be denied because it was contrary to their best interests.¹³⁰

129 Convention on the Rights of the Child, article 12.

130 W Carp, 'Adoption Blood Kinship Stigma and the Adoption Reform Movement: A Historical Perspective' (2002) 36 *Law and Society Review* 433, 438–431. Traces history of access to adoption records in the USA (which would presumably have some parallels with the situation in Australia) and notes that adoption records were originally open to all members of the adoption triad, and indeed the general public, but records were sealed off from the public early in the 20th century because of the social stigma attached to adoption and 'illegitimate children'. Access to adult adoptees remained open until the mid 20th century but was then denied as 'adoption agencies began to use secrecy as a promotional tool to attract adoptive parents as clients'. Notably absent from the history, however, is any discussion of why children were always denied access to identifying information, even when adoptees had access, this right was and is confined to adult adoptees). E Samuels, 'The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records' (2001) 53 *Rutgers Law Review* 367, 370–371—suggests the closing of access to adult adoptees was not the result of articulated reasons but perhaps a consequence of the social context in which adoption occurred, ie the regime of public secrecy influenced social perceptions of adoption such that rather than seeing attempts by adoptees to identify their biological families as being natural, they acquired negative social meanings: 'they were the psychologically unhealthy product of unsuccessful adoptions that had failed to create perfect substitutes for natural families created by childbirth and they indicated adoptees' rejection of and ingratitude toward adoptive parents'.

Some commentators have suggested that even in the case of adult adoptees there are no explicit reasons as to why they were historically denied access to their birth records.¹³¹ Rather, measures were implemented to restrict public access to adoption records for reasons such as the need to protect children against the social stigma of illegitimacy and the possibility that birth parents may interfere with their adoptive families, which had the effect of gradually fostering an expectation of lifelong secrecy.¹³² According to Samuels, the result of this increasing culture of secrecy was:

Lifelong secrecy apparently came to ‘appear natural or necessary or uncontested’ so natural or uncontested that eventually the distinction between sealing court records from all inspection and sealing birth records from inspection even by adult adoptees became lost.¹³³

In the same way, it would appear the historical denial of a child’s right to access information about his or her biological family in Victoria and other jurisdictions was assumed to be a natural, necessary or uncontested requirement. The provisions of the *Adoption Act 1984* that restrict children’s access to information about their natural parents are arguably a reflection of this historical position.¹³⁴ This is despite the absence of any evidence that it would necessarily be contrary to a child’s best interests to have access to such information.

But this idea that children who are adopted must be protected from or denied access to information about their biological heritage is entirely out of step with current research and best practice of how to address this issue. As McNair explains:

The adoption experience reveals to us that regardless of the strength of connection with their non-biological parents, many children base at least some of their identity formation on knowledge of the identity of their biological parents...Adoptive children

131 E Samuels, ‘The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records’ (2001) 53 *Rutgers Law Review* 367, 403.

132 Ibid.

133 Ibid 403–404.

134 An adopted child under the age of 18 may only access information with the consent of both adoptive parents or a guardian: *Adoption Act 1984* (Vic) s 94(2), and in the case of information revealing the identity of either of the natural parents: s 94(1)(b), the relevant authority must also obtain the consent of that natural parent, or evidence of his or her death: s 94(3).

who are not told early in life about being adopted are more likely to develop behavioural and emotional problems.¹³⁵

Given such findings it is hardly surprising the AAP has recommended that, ‘Even before a child understands the words “adoption”, “adopted”, and “biological family” or “birth family”, it is important that these words be part of a family’s natural conversation’.¹³⁶ ‘[F]amilies should be discouraged from waiting until just the right minute’ to tell a child he or she is adopted, in favour of an open discussion with a child in order to establish trust and security within a family.¹³⁷ The Academy has therefore concluded:

Open acknowledgement of the adoptive relationship helps nurture a child’s self esteem as he or she grows in the understanding of what it means to join a family through adoption. Effective communication about adoption is important for the long term mental and physical health and well being of each child and family.¹³⁸

Contemporary research therefore appears to favour a climate of openness and honesty rather than secrecy and denial with respect to children who are raised in families where their social parents are not necessarily their biological parents. The current practice in Victoria is to provide the parents of an adopted child with an entire history of the child’s biological parents, which is to be disclosed to the child as he or she matures. In such circumstances, it almost seems perverse for the law to insist on an irrebuttable presumption that children should not have access to identifying information about their parents until they turn 18. It also seems to be entirely at odds with the Academy’s observation that ‘as children move into adolescence and adulthood, adoptive children may wish to seek out more information about their biological families’.¹³⁹

It therefore remains difficult to justify the denial of access to identifying information, especially when commentators explain that the search for such information is not to be taken as a sign of rejection of adoptive parents and ‘is

135 See n 52, 39.

136 American Academy of Pediatrics ‘Families and Adoption: The Pediatrician’s Role in Supporting Communication’ (2003) 112 *Pediatrics* 1437, 1439.

137 Ibid.

138 Ibid 1440.

139 Ibid.

actually a sign of healthy emotional growth in the search for an identity'.¹⁴⁰ As Professor Paul Sachdev has explained:

Ample evidence in the literature suggests that an adoptee's desire to know his [or her] biological roots is not idle curiosity of individuals who are psychologically and socially impaired...but is nearly a universal phenomenon in normal personality development.¹⁴¹

Such a view cannot be reconciled with an irrebuttable presumption against a child's right to gain access to identifying information about his or her biological parents.

Importantly, the research on adopted children and their desire to know their biological parents appears to be closely replicated with the experience of children born as a result of assisted reproductive procedures.¹⁴² McNair notes that a 'child's identity development may be compromised if they are not told of their donor status prior to puberty'.¹⁴³ Further research indicates that non disclosure and secrecy can cause psychological damage, undermine self esteem and weaken principles of trust and honesty held by persons conceived as a result of an assisted reproductive procedure.¹⁴⁴ Donor conceived people have consistently, although not universally, reported a need to know their genetic origins, an urge to search for their donors and a concomitant loss of agency because of the obstruction faced in trying to obtain identifying information about their donor.¹⁴⁵

Such findings seriously bring into question the legitimacy of the current legal regime which denies access to identifying information until a child turns 18, especially when the research that is available, albeit limited, reports no adverse effects when children are told of their origins.¹⁴⁶ This suggests the need for a

140 Ibid.

141 P Sachdev, *Unlocking the Adoption Files* (1989) 14–15.

142 See n 52, 43.

143 Ibid 5.

144 A Turner and A Coyle, 'What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications for counseling and therapy' (2000) 15 *Human Reproduction* 2041, 2049. (citing relevant studies)

145 Ibid.

146 See for example J Blood and P Pitt, 'Parents of Donor Conceived Children: The Experience of Telling' (unpublished manuscript—copy on file with author)—notes that in study of 76 children told of their origins, their reaction as reported by their parents was a positive one and that telling a child at a younger age coincided with lower levels of initial anger, shock and disbelief which in any event were resolved in time; S Golombok, A Brewaeys, M Giavazzi, D Guerra, F MacCallum and J Rust, 'The

serious re-evaluation of whether there is any legitimate basis to deny children access to identifying information at any age, should they actively seek it.

IF CHILDREN ARE GIVEN A RIGHT TO ACCESS IDENTIFYING INFORMATION BEFORE THEY TURN 18 MUST THEY HAVE THE CONSENT OF THEIR SOCIAL PARENTS?

The existing regime in Victoria allows for children who are adopted or born as a result of an assisted reproduction procedure to apply for *non-identifying* information about their biological parents before they turn 18, provided they have the consent of their social parents. There is an issue, however, as to whether this requirement of parental consent is necessary to secure the best interests of a child, whether in the context of access to identifying or non-identifying information.

The Convention provides that parents, or other persons responsible for the care of a child, have the right to provide children with appropriate direction and guidance in the exercise of their rights.¹⁴⁷ Thus it is entirely appropriate and in fact incumbent on parents to assist and support children who want to access information about the identity of their biological parents. As noted above, current practice in Victoria and the literature on this matter encourages adoptive parents to ‘relate the story of how their family came to be’¹⁴⁸ as, ‘[t]hese foundations are important in the later development of positive attitudes about adoption, a child’s birth parents and himself or herself’.¹⁴⁹

The exercise of this responsibility by adoptive parents is constrained by a requirement to provide direction and guidance subject to a child’s evolving capacities and an overriding requirement that the best interests of a child must be the parents’ basic concern.¹⁵⁰ But under the present regime in Victoria parents are

European Study of Assisted Reproduction Families: The Transition to Adolescence’ (2002) 17 *Human Reproduction* 830, 837—study in which children who were told of their conception via an assisted reproductive procedure had no differences in their outcome variables to children who were not told but they did have less frequent and less severe disputes with their mothers compared to children who had not been told.

147 Convention on the Rights of the Child, article 5—‘State parties shall respect the responsibilities, rights and duties of parents or where applicable the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child or the rights recognised in the present Convention’.

148 See n 136, 1438.

149 Ibid.

150 Convention on the Rights of the Child, article 18.

effectively granted a power to veto and control the exercise of a child's right to access information concerning the identity of his or her biological parents. This is inconsistent with international law and creates a potential conflict between the rights of a child and the interests of his or her parents. It is quite normal for adoptive children in their adolescence to seek information about their biological families.¹⁵¹ Although this is a sign of healthy emotional growth, some adoptive parents may actually interpret this as a sign of rejection¹⁵² and thus refuse to provide their consent to a child's request to access information about the identity of their biological parents. The same concerns also apply to disclosure of information about the genetic origins of children born as a result of an assisted reproductive procedure.

This potential conflict of interest highlights the need to revisit the existing requirement that all children who seek access to information about the identity of their biological parents, whether in the context of adoption or ART, must have the consent of their social parents. Such a requirement is incompatible with international law and creates an unnecessary obstacle for a child with sufficient maturity to secure the realisation of his or her right to obtain identifying information. This paper does not attempt to prescribe an age as to when a child should have the right to receive identifying information irrespective of the consent of his or her social parents. Fixing an age of say 15 or 16 could be considered arbitrary and would not necessarily be a guarantee that a child has reached a level of maturity sufficient to enable him or her to exercise his or her rights without parental direction and guidance. There is a *prima facie* issue as to why a child of any age who requests information about their biological/genetic parents should be denied access to this information in the absence of consent from their social parents. The point to stress here is that there should be a re-evaluation of the existing assumption that parental consent is a legitimate constraint on a child's right to access identifying information about his or her biological parents.

151 See n 136, 1440.

152 *Ibid.*

CONVENTION ON THE RIGHTS OF THE CHILD

**ADOPTED AND OPENED FOR SIGNATURE, RATIFICATION AND ACCESSION
BY GENERAL ASSEMBLY RESOLUTION 44/25 OF 20 NOVEMBER 1989**

**ENTRY INTO FORCE 2 SEPTEMBER 1990, IN ACCORDANCE WITH
ARTICLE 49**

PREAMBLE

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,'

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the

status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

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

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

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 speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the

submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; or
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;

- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information

necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development
4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
 - (a) To diminish infant and child mortality;
 - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

- (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
 - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
 - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
 - (f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
 4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29 *General comment on its implementation*

1. States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to

interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment

without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
 - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
 - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
 - (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

- (a) The law of a State party; or
- (b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.
2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems. (amendment)
3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.
7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.
8. The Committee shall establish its own rules of procedure.
9. The Committee shall elect its officers for a period of two years.
10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.
11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.
12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which

give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

- (a) Within two years of the entry into force of the Convention for the State Party concerned;
 - (b) Thereafter every five years.
2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.
 3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.
 4. The Committee may request from States Parties further information relevant to the implementation of the Convention.
 5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.
 6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

- (a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;
- (b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

- (c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;
- (d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present

and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

Other VLRC Publications

Disputes Between Co-owners: Discussion Paper (June 2001)

Privacy Law: Options for Reform—Information Paper (July 2001)

Sexual Offences: Law and Procedure—Discussion Paper (September 2001)
(Outline also available)

Annual Report 2000–01 (October 2001)

Failure to Appear in Court in Response to Bail: Draft Recommendation Paper
(January 2002)

Disputes Between Co-owners: Report (March 2002)

Criminal Liability for Workplace Death and Serious Injury in the Public Sector: Report (May 2002)

Failure to Appear in Court in Response to Bail: Report (June 2002)

People with Intellectual Disabilities at Risk—A Legal Framework for Compulsory Care: Discussion Paper (June 2002)

What Should the Law Say About People with Intellectual Disabilities Who are at Risk of Hurting Themselves or Other People? Discussion Paper in Easy English (June 2002)

Defences to Homicide: Issues Paper (June 2002)

Who Kills Whom and Why: Looking Beyond Legal Categories by Associate Professor Jenny Morgan (June 2002)

Annual Report 2001–02 (October 2002)

Workplace Privacy: Issues Paper (October 2002)

Defining Privacy: Occasional Paper (October 2002)

Sexual Offences: Interim Report (June 2003)

Defences to Homicide: Options Paper (September 2003)

Annual Report 2002-03 (October 2003)

People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care (November 2003)

Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed? Consultation Paper (December 2003)

People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care Report in Easy English (July 2004)

Sexual Offences: Final Report (August 2004)

Workplace Privacy: Options Paper (September 2004)