

DONORS AND DADS ONLINE: EMERGING TRENDS AND LEGAL IMPLICATIONS INVOLVING THE INTERNET IN THE CREATION OF NON-TRADITIONAL FAMILIES IN AUSTRALIA

ABSTRACT

In Australia, people are increasingly using the internet and online social media platforms to source sperm or seek a person with whom to co-parent a child — known as ‘elective co-parenting’. In this article, we examine these emerging informal avenues of family creation that, in some instances, circumvent the use of regulated fertility clinics. We argue that it is timely for the law, regulatory bodies, and the broader community to pay closer attention to the legal and ethical problems that may arise using these risky methods of family creation. This article is a call for action — we make some suggestions for legislative reform, greater public access to assisted reproductive treatment, public donor banks, and better awareness of family creation in wider society. By doing so, this might mitigate the use of informal avenues for family creation. Further, we argue that the law needs to keep pace to accurately reflect the dynamic and evolving nature of the family unit, which to date, it has either been unable or unwilling to do. This argument is especially relevant to the needs and preferences of non-traditional families.

I INTRODUCTION

What does *family* mean? Scholars have long discussed the origins and evolution of the meaning of family.¹ Recently, Alan Brown proposed that family is ‘central to our understanding and experience of human

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¹ Some scholars have observed that there is a lacuna in the law in relation to the lack of a single or unified statutory or common law definition of ‘family’: see Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State: Cases and Materials* (Hart Publishing, 3rd ed, 2012) 12–19. Jonathan Herring offers five definitions of ‘family’ that the law could adopt: see Jonathan Herring, *Law Express: Family Law* (Pearson Education, 7th ed, 2015).

existence'.² However, despite the ideology and experience of family having a profound impact on the lives of individuals, Scott Coltrane and Elaine Leeder suggest that the term itself is not easily definable, and has many variations across disciplines and literature.³ Over the past few decades, the concept of family has perhaps been best understood to resemble the archetypal 'nuclear family'.⁴ John Muncie and Roger Sapsford go so far as to state that the idea of the nuclear family 'retains a potency such that all other forms tend to be defined with reference to it'.⁵ There are several definitions to describe the traditional nuclear family. One definition that we provide below illustrates the composition of the nuclear family as

a young, similarly aged, [w]hite, married heterosexual couple with a small number of healthy children living in an adequate home. There is a clear division of responsibilities in which the male is primarily the full-time breadwinner and the female primarily the caregiver and perhaps a part-time or occasional income earner.⁶

Jon Bernardes notes that this perception of the nuclear family is unrealistic.⁷ We extend this further and contend that the notion of the nuclear family in contemporary Australia is wholly inaccurate. Ideology and community attitudes towards what family means and family configurations have significantly evolved over time.⁸ Today, the methods individuals or couples might use to conceive a child and create a family are changing. The definition and understanding of the concept of family, attribution of legal parentage, and the (re)construction of the role of a parent within the scope of the law require ongoing development, and where necessary, reform.⁹ What makes a family and/or a parent today, arguably defies the normative definition and rather requires more flexibility in its representation. This is a topical issue of growing academic, public, and policy debate with increasing social awareness.¹⁰

² Alan Brown, *What Is the Family of Law? The Influence of the Nuclear Family* (Hart Publishing, 2019) 21.

³ Scott Coltrane, *Gender and Families* (AltaMira Press, 2000) 5; Elaine Leeder, *The Family in Global Perspective: A Gendered Journey* (SAGE Publications, 2004) 1–2. For further discussion on the variety of definitions of the term 'family', see *ibid* 21–44.

⁴ Lawrence Stone, 'The Rise of the Nuclear Family in Early Modern England: The Patriarchal Stage' in Charles E Rosenberg (ed), *The Family in History* (University of Pennsylvania Press, 1975) 13. Cf Valerie Lehr, *Queer Family Values: Debunking the Myth of the Nuclear Family* (Temple University Press, 1999) 1–13.

⁵ John Muncie and Roger Sapsford, 'Issues in the Study of "the Family"' in John Muncie et al (eds), *Understanding the Family* (SAGE Publications, 1995) 7, 10.

⁶ Jon Bernardes, *Family Studies: An Introduction* (Routledge, 1997) 3.

⁷ *Ibid*.

⁸ See Brown (n 2) 19–76.

⁹ See *ibid*.

¹⁰ For example, there is growing awareness of same-sex and queer (LGBTQIA+) families in broader society: see Deborah Dempsey, 'Same-Sex Parented Families in Australia' (Research Paper No 18, Child Family Community Australia, Australian Institute of

The High Court was recently compelled to consider the evolving nature of the family unit in *Masson v Parsons* ('*Masson*').¹¹ The case propelled controversial and ethically-fraught issues into the judicial realm — matters traditionally confined to discussion in areas such as health, ethics, sociology, and philosophy. In this landmark decision, the High Court ruled that a man who provided sperm using home insemination,¹² resulting in the birth of a child, with the intention to co-parent was legally considered a 'parent' of the child within the meaning of the *Family Law Act 1975* (Cth) ('*FLA*')¹³ and not merely a sperm donor.

Masson shone a spotlight on the contentious issue of legal parentage and provided a platform for the deconstruction of the hetero-normative nuclear family.¹⁴ The judiciary gave serious consideration to the meaning of contemporary families — we contend that this arguably challenged hegemonic family structures — and is likely to have given greater recognition to same-sex and gender-diverse families (LGBTQIA+ families).¹⁵ The ruling in *Masson* and its potential future implications sent ripples through the legal profession, causing some concern among single

Family Studies, 2013); 'LGBTIQ+ Families: Services, Resources and Links', *raising-children.net.au* (Web Page, 13 April 2022) <<https://raisingchildren.net.au/grown-ups/family-diversity/LGBTIQ-families/LGBTIQ-families-services>>.

¹¹ (2019) 266 CLR 554 ('*Masson*'). See also: Katy Barnett, 'Masson v Parsons', *Opinions on High* (Blog Post, 2 July 2019) <<https://blogs.unimelb.edu.au/opinions/onhigh/2019/07/02/masson-v-parsons/>>; Fiona Kelly and Hannah Robert, 'Legal Parentage and Assisted Conception Following the High Court's Decision in *Masson v Parsons*' (2019) 33(2) *Australian Journal of Family Law* 144; Felicity Bell, 'What Does It Mean To Be a Parent? High Court Delivers Clarity in Sperm Donor Case' [2019] (58) *Law Society Journal* 89.

¹² Artificial insemination is the deliberate introduction of prepared (washed) sperm into the cervix or uterine cavity of a woman with the intention of achieving a pregnancy without sexual intercourse. There are several types of artificial insemination — they include in vitro fertilisation ('IVF') and intrauterine insemination that are performed by fertility specialists in clinics. This involves the use of fresh sperm provided by the woman's partner or frozen sperm from the partner or a donor. Home insemination is a method of achieving pregnancy without the use of fertility clinics. A common method of home insemination is intracervical insemination which involves the use of a needle-less syringe to inject sperm near the cervix.

¹³ See: *Family Law Act 1975* (Cth) ss 4, 60H, 69VA ('*FLA*'); *Masson* (n 11) 586 [55]. For further discussion of this case and its impact, see below Part IV.

¹⁴ *Masson* (n 11).

¹⁵ *Ibid.* We note that language used to describe different LGBTQIA+ people and language used by different parts of LGBTQIA+ communities evolves over time and can differ across cultures and generations. 'LGBTQIA+' is an initialism that stands for lesbian, gay, bisexual, transgender, queer/questioning, intersex, asexual, and which attempts to be inclusive. However, many other terms, such as non-binary and pansexual, are also used to describe people's experiences of their gender, sexuality, and physiological sex characteristics.

women and lesbian couples who had conceived a child using donor sperm.¹⁶ *Masson* exemplifies the importance of the law keeping pace with the dynamic and evolving nature of the family unit, which we argue, to date, it has either been unable or unwilling to do. This argument is especially relevant to the needs and preferences of non-traditional families.¹⁷

A *Aims and Structure of the Article*

In this article we examine two emerging avenues being used by individuals and couples in the creation of families that circumvent regulated fertility clinics and, in some cases, the law. Increasingly, people are turning to informal sperm donation or elective co-parenting in Australia and other jurisdictions such as the United Kingdom and the United States. These informal avenues are facilitated and accessed using the internet and social media platforms. In Part II, we concentrate on the use of co-parenting websites and the associated legal implications in family creation. We also consider informal and unregulated sperm donation via the internet and social media sites, such as Facebook, which are used to assist individuals in conceiving a child.

We focus on the laws of the State of Victoria in this article because a predominant part of our discussion is concentrated on a critique of the recommendations made by Michael Gorton in the *Final Report of the Independent Review of Assisted Reproductive Treatment* ('Review') — released by the Victorian Government in 2019.¹⁸ In Part III, we explore some of the reasons why people elect to engage in potentially risky practices outside the scope and protection of the law and regulation to conceive a child. In Part IV, we examine some of the relevant legislation to family creation including: (1) the *FLA*; (2) the *Status of Children Act 1996* (NSW) ('*SOCA (NSW)*'); (3) the *Assisted Reproductive Treatment Act 2008* (Vic) ('*ART Act*'); and (4) the *Child Support (Assessment) Act 1989* (Cth) ('*CSA Act*'), to gain a better understanding of the legal landscape and any potential deficits in the existing legislation that may impact family creation using informal avenues. We then turn to consider the ethical implications of using informal methods of family creation in Part V. We argue that it is timely for law and regulatory bodies to pay closer

¹⁶ See Julie Redman and Tayla Inglis, 'Thinking of Being a Sperm Donor? Do You Need a Sperm Donor Agreement?' (2022) 44(4) *Law Society of South Australia Bulletin* 14; Johanna Heaven, 'Recent High Court Decision Surrounding the Meaning of "Parent" Sparks Uncertainty: *Masson v Parsons*' (2019) 27(9) *Australian Health Law Bulletin* 146; Hannah Robert and Fiona Kelly, 'High Court Judgment Still Leaves Donor-Conceived Families in Limbo about Who Is a Legal Parent', *The Conversation* (online, 21 June 2019) <<https://theconversation.com/high-court-judgment-still-leaves-donor-conceived-families-in-limbo-about-who-is-a-legal-parent-119171>>.

¹⁷ We use this term 'non-traditional families' to describe a broad range of families, including LGBTQIA+ families, particularly those which may include same-sex couples or single persons who are unable to conceive a child without some form of intervention.

¹⁸ Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Report, May 2019) ('Review').

attention to the legal and ethical problems that may arise due to the increasing use of informal sperm donation and elective co-parenting facilitated by the internet and social media platforms.

It can reasonably be argued that decisions relating to the creation of families should not warrant intrusion from the law or regulators — given their intimate nature. However, we posit that there is potential for significant harm and risk to all parties involved where there is legal ambiguity and limited, or a lack of, access to assisted reproductive services, donor sperm, eggs, or embryos (donor gametes), or adequate information. Therefore, in Part VI we propose a number of recommendations to address some of the potentially problematic legal and ethical issues that we identify when using informal methods of family creation. We then make our concluding remarks in Part VII.

II INFORMAL TRENDS IN CREATING FAMILIES

In March 2021, a British television series, *Strangers Making Babies*, aired on Channel 4.¹⁹ In the series, two fertility experts sought to assist hopeful individuals wanting to become parents by finding a match — a person to have a child with — ‘without the complication of finding love first’.²⁰ The television series embarked on helping individuals create families with a platonic partner, with the sole intention to co-parent a child.

The series pitched itself as a ‘baby-making revolution’,²¹ noting that in the United Kingdom alone there are ‘currently 70,000 people signed up to co-parenting sites, looking for platonic partners to have children with’.²² The four-part series was not without controversy and polarised opinion amongst its viewers. Some were critical about its concept and aims.²³ Despite being labelled an ‘exploitative reality show, pseudo-social experiment and business pitch for a future co-parent matchmaking empire’,²⁴ it was perhaps most successful in showcasing the dynamic and diverse

¹⁹ *Strangers Making Babies* (Channel Four Television Corporation, 2021) <<https://www.channel4.com/programmes/strangers-making-babies>>.

²⁰ ‘Strangers Making Babies’, *All 4* (Web Page, 31 March 2021) <<https://www.channel4.com/programmes/strangers-making-babies>>.

²¹ Annaleigh Rose Clarke, ‘Strangers Making Babies Episodes and All about Channel 4’s New Series’, *TellyMix* (online, 30 March 2021) <<https://tellymix.co.uk/tv/576212-strangers-making-babies-episodes-and-all-about-channel-4s-new-series.html>>.

²² *Ibid.*

²³ See Rishma Dosani, ‘Strangers Making Babies Viewers Convinced the “World Has Gone Mad” over New Co-Parenting Series’, *Metro* (online, 23 March 2021) <<https://metro.co.uk/2021/03/23/strangers-making-babies-fans-convinced-the-world-has-gone-mad-14294801/>>.

²⁴ Rachael Sigee, ‘Strangers Making Babies, Channel 4, Review: There’s Space on TV To Examine a Modern Families — This Is Not It’, *iNews* (online, 23 March 2021) <<https://inews.co.uk/culture/television/strangers-making-babies-channel-4-review-927173>>.

nature of the family structure to a mainstream audience. Additionally, the television series nationally publicised elective co-parenting as an emerging method of creating a family. For many viewers, the series may have been their first encounter with often nuanced or complex issues that can arise concerning parentage and parental responsibility in the context of non-traditional families. In this context, ‘non-traditional families’ might include same-sex couples, or single women or men, who are unable to conceive a child without some form of intervention such as assisted reproductive technology (‘ART’).

In the following discussion, we briefly discuss ART and the *Review* — which sought to make reforms to assist Victorians in the creation of a family using ART. It is important to briefly consider this, as we later go on to argue that greater access to ART and the implementation of the recommendations made in the *Review* might have gone some way in mitigating the use of informal methods of family creation as currently practised.

A *Assisted Reproductive Technology*

Over four decades ago the introduction of ART in Australia was considered a ‘reproductive revolution’ in medical science.²⁵ It changed the social, political, and legal construct of the family unit.²⁶ Initially, ART was limited in its accessibility in Victoria to heterosexual couples hoping to conceive a child, although this changed over time.²⁷ A shift in social and community attitudes, along with law reform, saw its availability broaden to include others, notably single women and lesbian couples.²⁸ According to the University of New South Wales Report, *Assisted Reproductive Technology in Australia and New Zealand 2019*, 16,927 births in Australia and New Zealand resulted from some form of ART treatment in 2019.²⁹ It has been reported elsewhere that the birth of almost one child in every Australian classroom has occurred using some form of ART.³⁰ We speculate these figures will increase

²⁵ Peter Singer and Deane Wells, *The Reproduction Revolution: New Ways of Making Babies* (Oxford University Press, 1984).

²⁶ Neera Bhatia and Lily Porceddu, ‘Emptying the Nest Egg To Fill the Nursery: Early Release of Superannuation To Fund Assisted Reproductive Technology’ (2021) 44(2) *University of New South Wales Law Journal* 513, 515.

²⁷ *Ibid.*

²⁸ See *McBain v Victoria* (2000) 99 FCR 116. Justice Sundberg held that a woman did not have to be married or in a de facto relationship to qualify for treatment for infertility under the *Infertility Treatment Act 1995* (Vic): at 123 [20]. See also Kristen L Walker, ‘Equal Access to Assisted Reproductive Services: The Effect of *McBain v Victoria*’ (2000) 25(6) *Alternative Law Journal* 288, 288.

²⁹ Jade E Newman, Repon C Paul and Georgina M Chambers, *Assisted Reproductive Technology in Australia and New Zealand 2019* (Report, National Perinatal Epidemiology and Statistics Unit, University of New South Wales, September 2021) 4.

³⁰ ‘Almost One in 20 Babies in Australia Born through IVF’, *UNSW Newsroom* (online, 6 September 2020) <<https://newsroom.unsw.edu.au/news/health/almost-one-20-babies-australia-born-through-ivf>>.

over time, due to the rapid developments in reproductive technologies and their widespread social acceptance.

The growth of the ART industry has not been without its own challenges and controversies, which we have discussed elsewhere.³¹ A wholesale review of ART, the fertility industry, and several areas in need of reform in relation to family creation were highlighted in the *Review*.³² We argue that the *Review* was a catalyst for broader social discussion about the modern family construct and the need for greater inclusivity of non-traditional families.

Additionally, the *Review* highlighted some of the outdated assisted reproductive treatment legislation in Victoria.³³ This was perhaps one of the first major milestones towards regulatory and legislative reform to reflect and recognise the modern Australian family, at least in Victoria. The *Review* was commissioned by the Victorian Government and its findings were published in May 2019. The issues raised and addressed in the *Review* have set a benchmark for improving the provision, access, and regulation nationally. The *Review* made 80 recommendations to improve ‘access, affordability, quality of care and support, understanding of infertility and treatments, respect for diverse family preferences, and the need for the highest standards of ethical practices in this field [of ART]’.³⁴

These recommendations were made after consultations with a wide range of stakeholders.³⁵ An issue identified in the *Review*, and recommended for reform, was the outdated perceptions of the family unit and the use of discriminatory language in the *ART Act*, noting that the language used is not reflective of the evolving family unit today.³⁶ The *Review* called for amendments to the legislation to make it more inclusive and accessible.³⁷ For example, it was recommended that the legislation ‘be amended to remove any discrimination against married women who wish to access assisted reproductive treatment following separation’.³⁸ That is, the legislation ‘should ensure that where a married couple have separated, the consent of a person who would otherwise meet the definition of a partner is not required to undertake treatment, provided that their gametes are not used without specific

³¹ See Bhatia and Porceddu (n 26) 513.

³² *Review* (n 18).

³³ Ibid 3–4.

³⁴ Ibid 173.

³⁵ The public consultation period involved more than 120 stakeholders: Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Interim Report of the Independent Review of Assisted Reproductive Treatment* (Report, October 2018) 1 (*Interim Report*). These stakeholders included, but were not limited to ‘clinics, practitioners, lawyers, regulators, parents and intended parents, donors, surrogates, and donor-conceived people’: ibid 3. Additional consultation was also conducted following the release of the *Interim Report* (n 35): ibid 4–5.

³⁶ *Review* (n 18) 1–2. See also *Interim Report* (n 35).

³⁷ *Review* (n 18) 61–8.

³⁸ Ibid vi, recommendation 4.

consent'.³⁹ Another significant recommendation, that was implemented in 2020 was the removal of the requirement for couples to undergo police and child protection order checks as they were recognised as being discriminatory.⁴⁰

While the *Review* is progressive and promising, as some of the examples above highlight, only a small number of the 80 recommendations have been implemented. A final handful of reform recommendations were implemented recently and are reflected in the *Assisted Reproductive Treatment Amendment Act 2021* (Vic) ('*ART Amendment Act*').⁴¹ However, we are not convinced that this is sufficient. We argue that the implementation of a small number of recommendations over a staggered period of time — almost four years since the *Review* was published — is disheartening. As we discuss later, had more of the recommendations been given serious and meaningful consideration in a timely manner, they might have gone some way in mitigating the use of risky options such as informal sperm donation or co-parenting websites in family creation. In Parts II(B)–(C), we consider these informal practices of creating a family outside the scope of the regulated fertility clinic environment.

B *Elective Platonic Co-Parenting Using the Internet*

Elective co-parenting is a 'relatively new phenomenon'.⁴² It is, however, becoming an increasingly attractive option for single people, not in a sexual relationship, or co-habiting, but seeking to have a child together, usually wanting to raise a child in separate households.⁴³ Choosing this type of family creation and subsequent parenting arrangement differs from the traditional notion of co-parenting involving

³⁹ Ibid vi–vii, recommendation 4. See also *Interim Report* (n 35) 47. Under the *Assisted Reproductive Treatment Amendment Act 2021* (Vic) ('*ART Amendment Act*') where a woman and her partner separate before the treatment procedure is carried out, consent given by the woman and her partner is taken to be withdrawn on their separation: at s 14, inserting *Assisted Reproductive Treatment Act 2008* (Vic) s 20A ('*ART Act*').

⁴⁰ See *Assisted Reproductive Treatment Amendment Act 2020* (Vic). These amendments removed the requirement that a woman and her partner, if any, and parties to a surrogacy arrangement must undergo a criminal records and child protection order check prior to accessing fertility treatment under the *ART Act*. In practice, this means that ART providers are no longer required to ask a woman seeking treatment and her partner, if any, or parties to a surrogacy arrangement to: (1) undergo a criminal records check; (2) arrange for a child protection order check to be undertaken by the Department of Health and Human Services; or (3) assess the checks to determine whether any offences or orders detailed in the checks give rise to a presumption against treatment.

⁴¹ For further discussion of these amendments, see below Part III.

⁴² V Jadvā et al, "Friendly Allies in Raising a Child": A Survey of Men and Women Seeking Elective Co-Parenting Arrangements via an Online Connection Website' (2015) 30(8) *Human Reproduction* 1896, 1897.

⁴³ Ibid 1897–8.

pre-existing parents entering into a co-parenting arrangement for a child after separation or dissolution of a marriage.⁴⁴ While elective co-parenting has been common for some time amongst LGBTQIA+ communities,⁴⁵ it is now being used more generally.⁴⁶ This method of family creation often circumvents the need for donor sperm banks, and in some instances the involvement of a regulated fertility clinic in situations where people decide to try to conceive via home insemination.⁴⁷

A growing number of co-parenting websites⁴⁸ and online forums⁴⁹ have arisen facilitating opportunities for like-minded people seeking to create non-traditional families to meet or be matched. Many co-parenting sites operate globally, with some online sites in Australia, the United Kingdom, and the United States serving multiple purposes — as co-parenting and sperm donation sites.⁵⁰ Sites such as ‘CoParents.com’ and ‘Co-ParentMatch.com’ have thousands of members across Australia, the United Kingdom, and the United States, and aim to provide ‘a common ground to free sperm donors’,⁵¹ and ‘a global community ... who all share one common goal of becoming a parent’.⁵² Likewise, ‘PollenTree.com’⁵³ has approximately 20,000 members in the United States alone and 30,000 in the United Kingdom.⁵⁴ Similar to conventional dating sites, members can post information as to what they are seeking in a prospective parent for the purposes of co-parenting. This might include preferences about ethnicity, sexuality, and geographic location.⁵⁵

⁴⁴ Ibid 1897.

⁴⁵ Ibid; Joyce Harper et al, ‘Using an Introduction Website To Start a Family: Implication for Users and Health Practitioners’ (2017) 7(4) *Reproductive Biomedicine and Society Online* 13, 13–15; Charlotte J Patterson, ‘Children of Lesbian and Gay Parents’ (1992) 63(5) *Child Development* 1025, 1026, 1038.

⁴⁶ See Jadvā et al (n 42) 1897.

⁴⁷ Ibid 1900; Harper et al (n 45) 13–15.

⁴⁸ Sometimes referred to as ‘introduction sites’: see Harper et al (n 45) 14. See, eg, ‘A Sperm Bank Alternative’, *Co-ParentMatch: Find Your Perfect Parenting Partner* (Web Page) <<https://www.co-parentmatch.com/>> (‘A Sperm Bank Alternative’).

⁴⁹ See, eg: ‘Forum’, *CoParents.com* (Web Page) <<https://www.coparents.com/forum/>>; ‘Prospective Lesbian Parents (PLP) VIC’, *Facebook* (Web Page) <<https://www.facebook.com/groups/plpaustralia>>.

⁵⁰ Harper et al (n 45) 14.

⁵¹ ‘Become a Parent!’, *CoParents.com* (Web Page) <<https://coparents.com/>>.

⁵² ‘A Sperm Bank Alternative’ (n 48).

⁵³ ‘The Fertility Network for Future Parents and Co-Parents’, *PollenTree.com* (Web Page) <<https://pollentree.com/>>.

⁵⁴ Emma Willing, “‘Strangers Making Babies’: The Rise and Legal Implications of Platonic Co-Parenting”, *Spears’s* (online, 26 August 2021) <<https://www.spearswms.com/strangers-making-babies-the-rise-and-legal-implications-of-platonic-co-parenting/>>.

⁵⁵ See, eg, ‘Profiles: Australia’, *Co-ParentMatch: Find Your Perfect Parenting Partner* (Web Page) <<https://www.co-parentmatch.com/Profiles.aspx?c=australia>>.

C Informal Sperm Donation Using Online Platforms and Marketplaces

Online informal sperm donation has been described as a ‘phenomenon enabled by online platforms (social media or introductory websites) that provide direct connections between sperm donors and recipients, facilitating donation [or sale of sperm] outside of formal [clinics or banks]’.⁵⁶

Social media groups advertise those seeking to source or to donate sperm. At the time of writing, there are more than 2,000 members of the social media group ‘Sperm Donors Uk Only’,⁵⁷ 3,000 members of the ‘FREE Sperm Donors + Donation UK’,⁵⁸ and 15,000 members of Australia’s ‘Sperm Donation Australia’ group.⁵⁹ The administrator of the Australian Facebook group reportedly facilitated the birth of 437 children in 2020 alone via informal sperm donation.⁶⁰ Similar to elective co-parenting sites, donors can upload photos, a brief description of themselves, medical history, and preferred method of donation (artificial or natural insemination).⁶¹ Potential recipients can indicate interest or request further information.⁶² It has been observed by Joyce Harper et al that sophisticated online sites readily ‘ship sperm worldwide for home insemination’.⁶³ Most commonly, sperm is delivered in

⁵⁶ Nicole Bergan and Céline Delacroix, ‘Bypassing the Sperm Bank: Documenting the Experiences of Online Informal Sperm Donors’ (2019) 29(5) *Critical Public Health* 584, 584.

⁵⁷ ‘Sperm Donors Uk Only’, *Facebook* (Web Page) <https://www.facebook.com/groups/298143140707365/?ref=br_rs>. See also Hussein Kesvani, ‘Inside the British Black-Market for Homegrown Sperm’, *MEL Magazine* (online, 15 September 2018) <<https://melmagazine.com/en-us/story/inside-the-british-black-market-for-home-grown-sperm>>.

⁵⁸ ‘FREE Sperm Donors + Donation UK’, *Facebook* (Web Page) <<https://www.facebook.com/groups/FreespermdonorsAionlyUK>>. See also Kesvani (n 57).

⁵⁹ ‘Sperm Donation Australia’, *Facebook* (Web Page) <<https://www.facebook.com/groups/spermdonationaustralia/members>>.

⁶⁰ Henrietta Cook and Farrah Tomazin, ‘The Man behind Australia’s Private Sperm Donor Boom’, *The Age* (online, 23 May 2021) <<https://www.theage.com.au/national/victoria/the-man-behind-australias-private-sperm-donor-boom-20210521-p57u1q.html>>.

⁶¹ Ally Foster, ‘Experts Warn against Murky World of Private Sperm Donation in Australia’, *News.com.au* (online, 23 Feb 2021) <<https://www.news.com.au/lifestyle/parenting/pregnancy/experts-warn-against-murky-world-of-private-sperm-donation-in-australia/news-story/c8e1b697cbb4566b4cdecabbd8e593db>>. Natural insemination is a term that is used to describe sexual intercourse between a sperm donor and a female recipient for the purposes of achieving a pregnancy.

⁶² *Ibid.*

⁶³ Harper et al (n 45) 13.

syringes ready for home insemination via kits purchased online.⁶⁴ Home insemination kits are available online via shopping websites such as Amazon.⁶⁵

On 19 February 2017, the mobile phone app ‘Just a Baby’ was launched by app developer Paul Ryan at the Sydney Gay and Lesbian Mardi Gras Fair Day.⁶⁶ The app operates in a similar way to the dating app Tinder, with a location-driven swiping interface allowing people to meet potential egg or sperm donors, surrogates, or those seeking to enter co-parenting arrangements.⁶⁷ Ryan notes that people using the app may eventually seek assistance from fertility clinics if the need arises in the creation of a family.⁶⁸ The app has been met with criticism by fertility experts.⁶⁹ Additionally, concern has been raised about sperm being sold via online marketplaces, such as Gumtree, with evocative advertisements containing catchy tag lines for ‘penetrative sex without [a] condom’ such as: “‘want to get pregnant”, which offers “Guaranteed results!” ... [and] [I]looking for a guy to get me pregnant ...’.⁷⁰ Ingrid Holme has referred to this as the ‘black-market’ for sperm given its forbidden and unlawful sale.⁷¹ It is difficult to attribute the increasing prevalence of informal sperm donation to one specific cause, as it is likely the result of a culmination of interposing factors encouraging individuals or couples to pursue this avenue or co-parenting arrangements, rather than using regulated fertility clinics. It is the consideration of these factors to which our discussion now turns.

III CONTRIBUTING FACTORS FOR USING INFORMAL SPERM DONATION AND ELECTIVE CO-PARENTING TO CREATE FAMILIES

We consider that there might be a range of contributing factors as to why individuals or couples might turn to informal and risky methods of family creation.

⁶⁴ Kesvani (n 57).

⁶⁵ Ibid; ‘Spermix Private, Insemination Kit’, *Amazon.co.uk* (Web Page) <<https://www.amazon.co.uk/MeDesign-MED1000005-Spermix-Private-Insemination/dp/B0041MFXWS>>.

⁶⁶ ‘Our Stories’, *Just a Baby* (Web Page) <<https://www.justababy.io/media/>>.

⁶⁷ Marina Kamenev, ‘The Sperm Drought’, *The Monthly* (online, August 2019) <<https://www.themonthly.com.au/issue/2019/august/1564581600/marina-kamenev/sperm-drought#mtr>>.

⁶⁸ Ibid.

⁶⁹ Briana Fiore, ‘WA Entrepreneur Says His Just a Baby App Has Facilitated 1,000 Births, but AMA Urges Caution’, *ABC News* (online, 7 September 2022) <<https://www.abc.net.au/news/2022-09-07/just-a-baby-app-ivf-sperm-donor-1000-births/101408256>>; ‘Just a Baby App That Matches Hopeful Parents Criticised by Fertility Experts: The App Promises To “Find Someone To Help You Make a Baby”’, *Goodto Know* (online, 25 May 2017) <<https://www.goodto.com/family/just-a-baby-app-2975>>.

⁷⁰ Ingrid Holme, ‘Sperm Exchange on the Black Market: Exploring Informal Sperm Donation through Online Advertisements’ (2017) 1(1) *Sexuality, Gender, and Policy* 31, 42.

⁷¹ Ibid 34–7.

These include, amongst other factors which we discuss below: (1) the excessive cost and long waitlists for the use of ART via regulated fertility clinics; (2) a shortage of sperm donors; and (3) a lack of diversity of donors. We reiterate that the use of informal practices in family creation might have been mitigated if more of the *Review*'s recommendations were implemented, or had been implemented earlier.

A *The Prohibitive Cost of ART*

The Fertility Society of Australia and New Zealand estimates that one in six couples in Australia and New Zealand experience infertility.⁷² Additionally, single people or same-sex couples may also seek assistance to conceive a child. In Australia, fertility clinics are commercially and profit-driven businesses, with several listed on the ASX.⁷³ The revenue generated by the fertility industry in Australia, as of May 2019, was more than \$550 million annually.⁷⁴ It was expected to grow to \$630 million by 2022.⁷⁵ In August 2019, the industry was predicted to be worth more than \$65 billion globally by 2026.⁷⁶

While the business of babies is booming, access to ART in Australia via regulated fertility clinics is prohibitively expensive. At the time of writing, an initial in vitro fertilisation ('IVF') cycle costs approximately \$10,532 leaving individuals \$5,478 out of pocket after a Medicare rebate of \$5,054.⁷⁷ Due to the significant cost, some individuals or couples have sought early access to their superannuation funds for assisted reproductive treatment,⁷⁸ or are choosing a less expensive means altogether,

⁷² 'One in Six Couples Suffer from Infertility', *Fertility Society of Australia and New Zealand* (Web Page) <<https://www.fertilitysociety.com.au/>>.

⁷³ See, eg: 'Monash IVF Group Limited: MVF', *ASX* (Web Page) <<https://www2.asx.com.au/markets/company/mvf/>>; 'Healius Limited: HLS', *ASX* (Web Page) <<https://www2.asx.com.au/markets/company/hls/>>. See generally: 'Monash IVF Group', *Monash IVF Group* (Web Page, 2022) <<https://www.monashivfgroup.com.au/>>; 'Healius', *Healius* (Web Page, 2022) <<https://www.healius.com.au/>>.

⁷⁴ *Review* (n 18) 12.

⁷⁵ *Ibid.*

⁷⁶ 'The Fertility Business Is Booming', *The Economist* (online, 8 August 2019) <<https://www.economist.com/business/2019/08/08/the-fertility-business-is-booming>>. See also 'Fertility Services Market: Global Industry Trends, Share, Size, Growth, Opportunity and Forecast 2022–2027', *Research and Markets* (Web Page, August 2022) <https://www.researchandmarkets.com/reports/5647776/fertility-services-market-global-industry?utm_source=dynamic&utm_medium=BW&utm_code=nhjscq&utm_campaign=1321362+-+Global+Fertility+Services+Market+Report+2019-2024+-+Analysis+by+Cause+of+Infertility%2c+Procedure%2c+Service%2c+End-user+%26+Region&utm_exec=joca220bwd>.

⁷⁷ 'IVF Treatment Costs', *IVF Australia* (Web Page) <<https://www.ivf.com.au/ivf-cost/ivf-costs>> ('IVF Treatment Costs').

⁷⁸ For further discussion of these issues in detail, see generally Bhatia and Porceddu (n 26).

such as sourcing sperm online and home insemination. Both raise a number of ethical and legal concerns.

Amendments to the *ART Act* will allow more people in Victoria to access low-cost fertility treatments. This will include a broadened range of professionals who will be able to perform artificial insemination. The final suite of reform recommendations from the *Review* has recently been implemented.⁷⁹ One recommendation implemented is that nurses and other trained health professionals can carry out artificial insemination provided it is under the supervision and direction of a doctor in an assisted reproductive treatment clinic.⁸⁰ Additionally, the reform suggestion to scrap the requirements for people to undergo counselling at a registered assisted reproductive treatment clinic has also been implemented.⁸¹

The Victorian Government recently began the rollout of public fertility services.⁸² The program is currently small in scale, operating from two metropolitan hospitals with specific eligibility for access to free public fertility services.⁸³ A person must: be a resident of Victoria, hold a Medicare card, and have a specialist or GP referral.⁸⁴ Further, eligibility criteria state that at the time of treatment the person must be a maximum age of 42 years old, and there is a lifetime cycle limit of two IVF or intra-cytoplasmic sperm injection cycles per person.⁸⁵ For some hopeful individuals or couples, this might assist in creating a family, however, for others, these criteria might be considered too restrictive, especially where fertility treatments are used by those that are over the age of 42 years or indeed where there is a need for several cycles of fertility treatment due to infertility conditions. Once fully operational, the rollout is estimated to assist up to 4,000 Victorians annually with an average annual cost saving of \$10,000.⁸⁶

While these services are welcomed, the *Review* recommendations for such were made almost four years ago,⁸⁷ and the rollout of the full suite of services will take

⁷⁹ See *ART Amendment Act* (n 39).

⁸⁰ *Ibid* s 6. See also *ART Act* (n 39) s 8.

⁸¹ *ART Amendment Act* (n 39) s 8. See also *ART Act* (n 39) s 13.

⁸² ‘Public Fertility Care Services’, *Victorian Department of Health* (Web Page, 14 October 2022) <<https://www.health.vic.gov.au/public-health/public-fertility-care-services>> (‘Public Fertility Care Services’).

⁸³ *Ibid*.

⁸⁴ *Ibid*.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*. Services will include: ‘[d]onor services through the establishment of Victoria’s first public sperm and egg bank’, ‘[a]ltruistic surrogacy services’, ‘[f]ertility preservation where medical treatment may compromise fertility including cancer treatment and gender reassignment treatment’, and ‘[g]enetic testing where people are known carriers of serious medical conditions’.

⁸⁷ *Review* (n 18) xx–i, recommendations 41–4.

time with limitations on who can access the services.⁸⁸ From a cost perspective, for comparative purposes, individuals might be more attracted to sourcing sperm online via donation or even unlawfully purchasing sperm on the black-market, with home insemination kits costing as little as \$46.15,⁸⁹ as opposed to those of out-of-pocket costs, conservatively, at approximately \$5,478 for one cycle of IVF at a regulated fertility clinic.⁹⁰ With no guarantee of success through IVF, some people may choose the avenue of informal sperm donation, costing significantly less in comparison.⁹¹

B *Elective Co-Parenting: Biological Connection to Parents and Potential Siblings (without Romantic Relationship)*

Several international studies have explored the motivations of individuals that have used co-parenting sites for family creation.⁹² Vasanti Jadva et al surveyed 61 men and 41 women who used the United Kingdom co-parenting site Pride Angel ('Jadva et al study').⁹³ There was a mix of heterosexual, lesbian/gay, and bisexual participants, ranging from ages 18–54 and of various ethnicities.⁹⁴ The primary motivation for using the site was to ensure that any child born as a result would have two biological parents in their life.⁹⁵ Further, participants wanted to know the person who had provided the sperm or egg to create the child, rather than using anonymously donated gametes.⁹⁶ Most participants were seeking single co-parents or a gay/lesbian couple.⁹⁷ Also, most participants had established expectations about what they sought from potential co-parents ranging from friendship to partnership and lastly, civil, good, or positive relationships.⁹⁸ Further, most of those surveyed preferred home insemination (by artificial means) as a method of conceiving a child⁹⁹ — presumably saving on assisted reproductive treatment costs.

⁸⁸ 'Public Fertility Care Services' (n 82).

⁸⁹ 'New Standard Insemination Kit', *Pride Angel* (Web Page) <<https://www.prideangel.com/Shop/Insemination-Kits/Standard-Insemination-Kit-1.aspx>>.

⁹⁰ 'IVF Treatment Costs' (n 77).

⁹¹ We note that there are potentially serious health risks to recipients and any child born by sourcing informal sperm donation online rather than using regulated clinics, as there is no screening of informal sperm donations: see generally Stephen Whyte, David A Savage and Benno Torgler, 'Online Sperm Donors: The Impact of Family, Friends, Personality and Risk Perception on Behaviour' (2017) 35(6) *Reproductive BioMedicine Online* 723.

⁹² See, eg: Jadva et al (n 42) 1896; Harper et al (n 45) 13–15. See also Bergan and Delacroix (n 56) 584.

⁹³ Jadva et al (n 42) 1898.

⁹⁴ *Ibid.*

⁹⁵ *Ibid* 1899.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid* 1903.

⁹⁹ *Ibid* 1900.

An Israeli study comprising ten heterosexual women, who co-parented with gay men, revealed that their desire to do so arose from a wish to raise a child to have both a ‘mother’ and a ‘father’.¹⁰⁰ For female participants, co-parenting also enabled the parenting burden to be shared with another adult and increased financial security.¹⁰¹ Additionally, a small Belgian study of nine gay and lesbian participants by Cathy Herbrand found that a desire to have biologically related children, and for the children to know one another, was a key determination in elective co-parenting.¹⁰²

The Jadva et al study revealed that individuals preferred using online introduction sites as it allowed them to set restrictions and filters on matters such as medical history and co-parenting expectations.¹⁰³ However, this might put the parties at risk. Some elective co-parenting arrangements might be made where the parties agree to simple blood tests, but more rigorous screening for genetic conditions, for example, is not performed. Alternatively, a person entering such an arrangement may misrepresent screening results of family history of genetic conditions to the other party.

C Shortage of Sperm Donors

Recently, Australia has seen a significant decrease in sperm donations made to regulated fertility clinics. In 2020, the Victorian Assisted Reproductive Treatment Authority (‘VARTA’) reported an annual 21% decrease in sperm donors, noting 335 donors on 1 July 2020 compared to 424 in the year prior.¹⁰⁴ One clinic reported a 90% decrease in sperm donor inquiries during the COVID-19 pandemic.¹⁰⁵ According to VARTA, the demand for donor sperm has outstripped supply by single women and same-sex couples seeking to conceive a child.¹⁰⁶ One Victorian clinic noted

¹⁰⁰ Dorit Segal-Engelchin, Pauline I Erera and Julie Cwikel, ‘Having It All? Unmarried Women Choosing Hetero-Gay Families’ (2012) 27(4) *Affilia* 391, 395. See *ibid* 1897.

¹⁰¹ Segal-Engelchin, Erera and Cwikel (n 100) 396. See Jadva et al (n 42) 1897.

¹⁰² Cathy Herbrand, ‘Les Normes Familiales à L’épreuve du Droit et des Pratiques: Analyse de la Parenté Sociale et de la Pluriparentalité Homosexuelles’ (PhD Thesis, Université Libre de Bruxelles, 2008). See Jadva et al (n 42) 1897.

¹⁰³ Jadva et al (n 42) 1900.

¹⁰⁴ Victorian Assisted Reproductive Treatment Authority, *VARTA: 2020 Annual Report* (Report, 2020) 28.

¹⁰⁵ Shona Hendley, ‘Too Many Women, Not Enough Sperm: The Victorian Donor Dilemma’, *The Sydney Morning Herald* (online, 17 September 2022) <<https://www.smh.com.au/lifestyle/health-and-wellness/too-many-women-not-enough-sperm-the-victorian-donor-dilemma-20220906-p5bfqy.html>>.

¹⁰⁶ Beau Donelly, ‘Victoria Clinic Sperm Demand Prompts Calls To Use Overseas Donors’, *The Age* (online, 10 November 2014) <<https://www.theage.com.au/national/victoria/victoria-clinic-sperm-demand-prompts-calls-to-use-overseas-donors-20141110-11xmj.html>>; Nicola Berkovic, ‘Baby Backlog: COVID-19 Causes Plunge in IVF Donors as Demand Increases’, *The Australian* (online, 26 December 2020) <<https://www.theaustralian.com.au/nation/baby-backlog-covid-causes-plunge-in-ivf-donors-as-demand-increases/news-story/2b2e44eeb220a5a5dcc0101158b4b176>>.

‘a three-month waitlist’ in 2019 for women seeking the use of ART.¹⁰⁷ VARTA has noted that, in 2019, the largest cohort of women seeking donor sperm were single (54%), followed by those in same-sex relationships (32%), and lastly those in heterosexual relationships (13%).¹⁰⁸ In the discussion below in Parts III(C)(1)–(3), we explore three contributing factors that might influence individuals to source sperm online: (1) potential donors’ perspectives; (2) the impact of COVID-19 and its restriction of travel and the importation of gametes; and (3) regulatory changes to donor anonymity.

1 *The Donor’s Experience*

Some online sperm donors (generally donating informally) are principally motivated by altruism,¹⁰⁹ whilst others opt to donate informally because they want to know some information about the prospective parents of the child born of their sperm.¹¹⁰ A study by Nicole Bergan and Céline Delacroix found that donors felt that informal donation allowed greater control over the process, which regulated clinics could not provide,¹¹¹ and allowed them to be a gatekeeper with personal agency.¹¹² When donating through regulated fertility clinics, donors effectively relinquish control of their gametes and are provided limited information about the recipient and any resulting offspring.¹¹³ Some donors in the study wanted to pass on genetic characteristics and continue their genetic lineage,¹¹⁴ whilst others were motivated by money.¹¹⁵ Accordingly, donors may be electing to donate via informal channels online where they have control as to who they donate sperm to — a choice that

¹⁰⁷ Kamenev (n 67).

¹⁰⁸ Victorian Assisted Reproductive Treatment Authority, ‘Victorians Warned about Risks of Informal Sperm Donation’ (Media Release, 2020) <<https://www.varta.org.au/resources/news-and-blogs/media-release-victorians-warned-about-risks-informal-sperm-donation>> (‘VARTA Media Release’).

¹⁰⁹ U Van den Broeck et al, ‘A Systematic Review of Sperm Donors: Demographic Characteristics, Attitudes, Motivations and Experiences of the Process of Sperm Donation’ (2013) 19(1) *Human Reproduction Update* 37, 48.

¹¹⁰ See Bergan and Delacroix (n 56) 587.

¹¹¹ See Nicolette OM Woestenburg, Heinrich B Winter and Pim MW Janssens, ‘What Motivates Men To Offer Sperm Donation via the Internet?’ (2016) 21(4) *Psychology, Health and Medicine* 424, 426–7.

¹¹² Bergan and Delacroix (n 56) 587.

¹¹³ See Whyte, Savage and Torgler (n 91) 724.

¹¹⁴ Bergan and Delacroix (n 56) 591. See also: T Freeman et al, ‘Online Sperm Donation: A Survey of the Demographic Characteristics, Motivations, Preferences and Experiences of Sperm Donors on a Connection Website’ (2016) 31(9) *Human Reproduction* 2082, 2084; Woestenburg, Winter and Janssens (n 111) 427.

¹¹⁵ Bergan and Delacroix (n 56) 585. See also Samantha Yee, ‘“Gift without a Price Tag”: Altruism in Anonymous Semen Donation’ (2009) 24(1) *Human Reproduction* 3, 6–7. This is not relevant to Australia, where all donations to fertility clinics must be made altruistically: ‘Reimbursement’, *Sperm Donors Australia* (Web Page) <<https://www.spermdonorsaustralia.com.au/how-to-donate/reimbursement/>>.

would otherwise be out of their control — allowing them to consider whether the recipient would be a ‘fit mother’.¹¹⁶

2 Donor Anonymity

On 1 March 2017, Victoria retrospectively removed donor anonymity making it the second jurisdiction in the world to do so.¹¹⁷ This legislation, the *Assisted Reproductive Treatment Amendment Act 2016* (Vic), allowed people conceived of donor eggs or sperm to legally obtain identifiable information about their donors. Specifically, while anonymous donation has not been permitted in Victoria since 1998,¹¹⁸ under the new legislation, donor-conceived people born using gametes anonymously donated prior to 1998 are able to apply for identifiable information about their donor — even if the donor had not consented to being identifiable.¹¹⁹

We contend that the explicit removal of donor anonymity may be one contributing factor to the shortage of sperm donors.¹²⁰ In light of this, potential donors might be less willing to donate in the knowledge that donor-conceived persons might be more likely to seek identifiable information about them when they turn 18 years of age,¹²¹ leading to some shortage of sperm donors in regulated fertility clinics. Additionally, with a decreasing donor sperm pool, the diversity of available donations is limited, resulting in individuals or couples seeking sperm donors with specific racial, cultural, or linguistically diverse characteristics through informal channels such as sourcing sperm online.¹²²

¹¹⁶ Bergan and Delacroix (n 56) 587.

¹¹⁷ Fiona Kelly et al, ‘From Stranger to Family or Something in Between: Donor Linking in an Era of Retrospective Access to Anonymous Sperm Donor Records in Victoria, Australia’ (2019) 33(3) *International Journal of Law, Policy and the Family* 277, 279.

¹¹⁸ See Fiona Kelly and Deborah Dempsey, ‘The Family Law Implications of Early Contact between Sperm Donors and Their Donor Offspring’ (2016) 98(1) *Family Matters* 56, 57.

¹¹⁹ See *Assisted Reproductive Treatment Amendment Act 2016* (Vic) s 23, repealing *ART Act* (n 39) s 63, inserting *ART Act* (n 39) ss 63(1), 63B(1).

¹²⁰ Berkovic (n 106).

¹²¹ The *Assisted Reproductive Treatment Amendment Act 2016* (Vic) came into force in Victoria in March 2017: at s 2(2). VARTA manages a voluntary register and a central register. The voluntary register exists as a free tool to facilitate contact between individuals linked through donor conception treatment if two people have listed themselves on the register and have matched. Medical history, one’s family tree, information about interests, hobbies and personality as well as photographs and videos can be lodged on the register for access by the matched donors, donor-conceived adults, parents and relatives. The central register is an outreach service which involves the payment of a fee to obtain information: ‘Donor Conception Register Services’, VARTA (Web Page, 2021) <<https://www.varta.org.au/donor-conception-register-services>>.

¹²² See Jaya Keaney and Tessa Moll, ‘Fertility Care in the Era of COVID-19’ (Briefing Paper No 4, ADI Policy Briefing Papers, 2020) 5.

3 *Impact of COVID-19 and Sperm Donation Shortage*

An existing shortage of donor gametes (sperm, eggs, and embryos) has been further exacerbated by the global COVID-19 pandemic.¹²³ Some fertility clinics experienced a decrease in sperm donations due to state lockdowns.¹²⁴ This is especially pertinent to Victoria having undergone several lockdowns.¹²⁵ As discussed earlier, this has had a ‘supply and demand’ impact on fertility clinics with a recent surge in the number of single women and same-sex female couples seeking to conceive a child, however, unable to proceed with assisted reproductive treatments due to donor sperm shortages in fertility clinics.¹²⁶

Due to their scarcity in Australia, gametes might be imported from overseas. However, with national and international border closures during the height of the pandemic, imported gametes remained offshore and inaccessible — potentially leaving individuals and couples with no chance of starting fertility treatment to conceive a child. According to Jaya Keaney and Tessa Moll, the global pandemic ‘intensified economic and geopolitical inequalities’ in fertility care, with ‘[m]any intending parents hav[ing] had their fertility treatment interrupted due to international border closures’.¹²⁷

To seek approval to import donor gametes from any interstate counterpart, a Victorian fertility clinic must complete an application which is submitted to VARTA, in accordance with s 36 of the *ART Act*.¹²⁸ However, the legislation does not provide specific determining factors that VARTA must consider when approving donor gamete or embryo applications.¹²⁹ Thus, the process might be considered unduly vague, impacting an individual’s ability to access donor gametes and further contributing to donor gamete shortages. Given the shortage of sperm donated through

¹²³ Emily McPherson, ‘Australian IVF Clinics Can’t Keep Up with the Demand for Donor Sperm: Here’s Why’, *9News* (online, 11 June 2022) <<https://www.9news.com.au/national/why-australian-ivf-clinics-cant-keep-up-with-the-demand-for-donor-sperm/61bffa87-6f2b-491e-8afd-bbe94ba390ac>>.

¹²⁴ *Ibid.*

¹²⁵ See ‘The Timeline’, *Lockdown Stats Melbourne* (Web Page, 6 November 2021) <<https://lockdownstats.melbourne/timeline/>>.

¹²⁶ See: Berkovic (n 106); McPherson (n 123).

¹²⁷ Keaney and Moll (n 122) 2.

¹²⁸ See ‘Importing and Exporting Donor Material’, *VARTA* (Web Page, 2022) <<https://www.varta.org.au/regulation/importing-and-exporting-donor-material>>.

¹²⁹ Cf *ART Act* (n 39) s 36.

regulated fertility clinics¹³⁰ and the impact of age and fertility success,¹³¹ people might feel compelled to turn to riskier avenues such as online informal sperm donation or co-parenting arrangements in order to start a family.

In January 2022, the Victorian Government placed a blanket ban on IVF treatment, cancelling IVF treatments and defining such treatments as ‘non-urgent elective surgeries’, in order to divert resources to COVID-19 healthcare.¹³² This led to public outcry among IVF patients and there were calls for its immediate reinstatement.¹³³ Arguably, this is another demonstration of ‘geopolitical inequalit[y]’ in fertility care.¹³⁴ An online petition garnered more than 135,000 signatures¹³⁵ and the Victorian Government promptly reinstated IVF.¹³⁶

D Donor’s Withdrawal of Consent

Single women or lesbian couples might use informal sperm donation instead of regulated fertility clinics as donors have been able to withdraw consent to the use

¹³⁰ ‘Figures from VARTA show that there were only 335 sperm donors available in Victoria at the start of the financial year, down from 424 at the start of 2018–19. There were also fewer sperm donors recruited this year (81) compared with the previous year (128)’: Henrietta Cook and Farrah Tomazin, ‘Sperm Drought Fuels Unregulated Online Market and Sex Assault Concerns’, *The Age* (online, 22 May 2021) <<https://www.theage.com.au/national/victoria/sperm-drought-fuels-unregulated-online-market-and-sex-assault-concerns-20210521-p57u0s.html>> (‘Sperm Drought’). ‘[C]linics are reporting that demand for donor sperm is outstripping supply, which may be prompting some people to seek donors through unregulated channels’: Victorian Assisted Reproductive Treatment Authority, ‘VARTA Media Release’ (n 108).

¹³¹ The success rate of each IVF cycle in women under the age of 30 is approximately 29% which drops to 16.5% in women between the ages of 35–9 and 5.2% between the ages of 40–4. The chances of a woman conceiving a child naturally between the ages of 19–25 decrease by almost half when age increases to 30–5: Lindsay Wu, ‘IVF Success in Older Women is Low: Can New Insights into Egg Cell Ageing Reverse This?’, *UNSW Newsroom* (online, 12 February 2020) <<https://newsroom.unsw.edu.au/news/health/ivf-success-older-women-low-%E2%80%93-can-new-insights-egg-cell-ageing-reverse>>.

¹³² See Kristian Silva, ‘Reinstate IVF Treatment, Victorian Woman Pleads as Government Halts Non-Urgent Elective Surgeries’, *ABC News* (online, 18 January 2022) <<https://www.abc.net.au/news/2022-01-18/victoria-ivf-treatments-paused-90-days/100763802>>.

¹³³ *Ibid.*

¹³⁴ Keaney and Moll (n 122) 2.

¹³⁵ ‘Reinstate Fertility/IVF Treatments in Victoria: An Essential Service for Many’, *Change.org* (Web Page, 2022) <<https://www.change.org/p/daniel-andrews-reinstate-fertility-ivf-treatments-in-victoria-an-essential-service-for-many>>.

¹³⁶ ‘Andrews Apologises for Ban, Reinstates Victorian IVF Services’, *Sky News* (online, 20 January 2022) <<https://www.skynews.com.au/australia-news/coronavirus/andrews-apologises-for-ban-reinstates-victorian-ivf-services/video/9alc5b7a68cf977259a3842638afba19>>.

of gametes created using their genetic material. In 2021, it was reported that some Victorian fertility clinics were compelled to destroy embryos created using donor sperm/eggs as donors had withdrawn consent for their use, causing significant financial and emotional distress to those undergoing IVF.¹³⁷ This significant issue has been reformed under the *ART Amendment Act* to provide greater certainty to fertility clinic patients. The amendment provides that a person who has donated gametes may *only* withdraw consent to the use of the gametes *up until* they are used in a treatment procedure or are used to form an embryo.¹³⁸ Even with the reform, individuals might opt for informal sperm donation and home insemination as it does not pose any risk of confusion or error in donated sperm being destroyed. Alternatively, they may opt for elective co-parenting where both parties proactively seek to parent a child together using home insemination — without the emotional or financial uncertainty or risk of sperm being destroyed.

E *Limits of Sperm Donation for Family Creation via Regulated Clinics*

Section 29(1) of the *ART Act* provided that no more than ‘10 women’ could undergo assisted reproductive treatment using donor eggs, sperm or embryos produced using the same donor. The reason for this was to limit the risk of donor-conceived people who shared the same donor to unknowingly enter into a relationship with their sibling and conceive a child, sharing the same blood line (consanguinity).¹³⁹ The effect of this ‘10 limit’ rule, however disadvantaged lesbian couples who might have *both* wished to carry a child using the same donor sperm to create genetic siblings. This is because they were not considered as one family, rather, each woman was considered independently and separately as two different families. However, this has been amended in the legislation to include exceptions to the offence for use of donated gametes in treatment procedures in s 29(1) of the *ART Act* which may result in more than 10 women having children who are genetic siblings.¹⁴⁰ Previously, this might have been a reason for lesbian couples to elect to source sperm online, where a limitation on donation would perhaps not be a primary concern. People may still

¹³⁷ Henrietta Cook and Farrah Tomazin, ‘IVF Clinics Forced To Destroy Embryos Due to “Cruel and Crushing” Laws’, *The Age* (online, 27 June 2021) <<https://www.theage.com.au/national/victoria/ivf-clinics-forced-to-destroy-embryos-due-to-cruel-and-crushing-laws-20210625-p584ac.html>>.

¹³⁸ *ART Act* (n 39) s 20(1A)(a), as amended by *ART Amendment Act* (n 39) s 13.

¹³⁹ Under recently amended legislation in Victoria, a donor can donate to 10 ‘families’ as opposed to the previous 10 ‘women’ rule: see *ART Amendment Act* (n 39) s 19, amending *ART Act* (n 39) s 29(2). This enables existing families to create siblings related to their existing children using the same donor. Further, it allows both women in a same-sex female relationship to have children using the same donor, even if the 10 women limit has been reached. For other jurisdiction family creation limits using donor sperm see: *New South Wales Assisted Reproductive Technology Act 2007* (NSW) s 27(3); ‘Human Reproductive Technology Act 1991: Human Reproductive Technology Directions 2021’ in Western Australia, *Western Australian Government Gazette*, No 112, 23 June 2021, 2663, 2664 [8.1].

¹⁴⁰ *ART Act* (n 39) s 29(3), as inserted by *ART Amendment Act* (n 39) s 19.

choose to use informal avenues to source sperm where they are reluctant to use fertility clinics due to cost, waitlists, or where there is a preferred donor who is not registered with a fertility clinic.

This is, however, of concern, and risky in terms of the number of children created by a sperm donor. One report from the Donor Sibling Registry in Queensland found that prior to the family limits guidelines one donor's sperm was used to create 48 children.¹⁴¹ The risk of consanguinity is not farfetched, as in this case the children created by this prolific donor discovered they were neighbours in a Brisbane suburb.¹⁴² Fiona Kelly notes that there are in fact 'clusters of "rainbow suburbs" with sizeable LGBTI populations', which record 'potentially high rates of reproductive assistance'.¹⁴³ She also states that the parents 'all send their children to the same schools — often intentionally'.¹⁴⁴ Thus, the chances of donor-conceived children meeting others born of the same donor is relatively high.

F *Unwanted Side Effects of IVF*

Home-based informal methods of conception may be more attractive as they can avoid invasive pre- and post-procedures such as egg retrieval for IVF that occur via regulated fertility clinics. Further, a range of side effects from such treatments might be avoided; these might include effects such as: soreness or bruising from injections, nausea, breast tenderness, bloating, hot flushes, mood swings, fatigue, allergic reactions, pelvic and abdominal pain and emotional stress. More serious issues arising from IVF treatment can include ovarian hyperstimulation syndrome, where the body responds to the medication adversely, which in rare circumstances can cause death.¹⁴⁵ Informal methods of sourcing sperm online and home insemination by tracking ovulation dates might be an attractive method of family creation without the invasive procedures, the unpleasant side effects, and the additional risks associated with IVF treatment via regulated clinics.

We have discussed a range of contributing factors as to why individuals or couples might resort to using informal methods of family creation such as informal sperm donation. We have also noted that the demand for informal sperm donation might decrease in the future with amendments to the *ART Act*. While this is favourable, this only provides a small window to a much broader issue that requires further examination. In the section below we turn to discuss the relevant legislation and legal implications when using informal avenues for family creation.

¹⁴¹ Kamenev (n 67).

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ning Wang et al, 'Sudden Death Due to Severe Ovarian Hyperstimulation Syndrome: An Autopsy-Centric Case Report' (2021) 42(1) *American Journal of Forensic Medicine and Pathology* 88.

IV THE LEGAL LANDSCAPE

In Part III we discussed a range of factors that might influence individuals and couples to seek informal methods of family creation — namely informal sperm donation or elective co-parenting facilitated by the internet and/or social media platforms. In this Part, we explore the legal implications of using potentially risky strategies in family creation.

In 1990, Australia ratified¹⁴⁶ the *Convention on the Rights of the Child* ('CRC').¹⁴⁷ It is bound by art 3 which states that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.¹⁴⁸

Accordingly, the *FLA* provides that the overall objective relating to children is to 'ensure that the best interests of children are met',¹⁴⁹ and also provides that the interests of a child are paramount when making a parenting order with respect to a child.¹⁵⁰ Further, the *ART Act* provides that 'the welfare and interests of persons born or to be born as a result of treatment procedures are paramount' in administering and carrying out functions under that Act.¹⁵¹

The primary intention of the aforementioned legislation is to ensure that the child's interests are principal. The status of a child's parents is critical in ensuring a child's best interests are met under various legislation, given the substantial responsibilities and rights conferred on parents including all 'powers, responsibilities and authority which, by law, parents have in relation to children'¹⁵² under ss 61B–61C of the *FLA* and the responsibility to pay child support pursuant to s 77 of the *CSA Act*.¹⁵³ These Acts provide presumptions as to what is in the child's best interests or require factors for consideration in determining what is in a child's best interests. For example, it is in the child's best interests to have a meaningful relationship with both parents according to the *FLA*.¹⁵⁴ Our discussion now returns to the High Court

¹⁴⁶ '11. Convention on the Rights of the Child', *United Nations Treaty Collection* (Web Page, 14 October 2022) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4>.

¹⁴⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').

¹⁴⁸ Ibid art 3(1).

¹⁴⁹ *FLA* (n 13) s 60B(1).

¹⁵⁰ Ibid s 60CA.

¹⁵¹ *ART Act* (n 39) s 5(a).

¹⁵² *FLA* (n 13) s 61B.

¹⁵³ *Child Support (Assessment) Act 1989* (Cth) ss 5 (definition of 'liable parent'), 77 ('*CSA Act*').

¹⁵⁴ See *FLA* (n 13) s 60CC(2)(a).

decision in *Masson* discussed in Part I above, highlighting the importance placed on the definition of a parent in relation to the presumptions discussed above.

A *Who Is a Parent: Masson*

The decision in *Masson* resulted in the High Court broadening the definition of ‘parent’ under the *FLA* and the *SOCA (NSW)*, and therefore altering its application in Australia. While here the *SOCA (NSW)* is state legislation pertaining to New South Wales, we note that other Australian jurisdictions have similar legislation with consistent provisions.¹⁵⁵

As briefly discussed in the Introduction of this article, Robert Masson provided sperm to Susan Parsons for the purposes of conceiving a child by way of artificial insemination.¹⁵⁶ The intention of the parties was to co-parent a child.¹⁵⁷ The procedure proved successful, and a baby girl was born.¹⁵⁸ Masson’s name was entered as the ‘father’ on the birth certificate.¹⁵⁹ Parsons, having found a partner since the birth of the baby, sought to relocate with the child and her new partner to New Zealand.¹⁶⁰ Masson initiated proceedings in the Family Court seeking orders to restrain the relocation of the child on the basis that he shared parental responsibilities and the child was to spend time with him on a fortnightly basis.¹⁶¹ Parsons argued that Masson was merely a sperm donor and not a parent of the child.¹⁶²

Parsons argued that s 14(2) of the *SOCA (NSW)* should apply which provides an irrebuttable presumption that a person who provides their genetic material for artificial insemination is considered a sperm donor and is not the father of a child born as a result if they are not in a relationship with the mother as at the time of insemination.¹⁶³ An in-depth analysis of the legislation and the definition of ‘parent’ ensued. Initially, Cleary J found Masson was a parent,¹⁶⁴ but on appeal to the Full Court of the Family Court by Parson, the primary judge’s ruling was overturned.¹⁶⁵

¹⁵⁵ *Parentage Act 2004* (ACT); *Status of Children Act 1978* (NT); *Status of Children Act 1978* (Qld); *Family Relationship Act 1975* (SA); *Status of Children Act 1974* (Tas); *Status of Children Act 1974* (Vic); *Artificial Conception Act 1985* (WA).

¹⁵⁶ *Masson* (n 11) 564 [3].

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid* 564 [3]–[4].

¹⁶¹ *Ibid* 564–5 [3]–[4].

¹⁶² *Parsons v Masson* (2018) 334 FLR 381, 397 [95] (Thackray J, Murphy J agreeing at 400 [114], Aldridge J agreeing at 400 [115]) (*‘Masson (Full Court)’*).

¹⁶³ *Masson v Parsons* (2017) 58 Fam LR 1, 12 [98].

¹⁶⁴ *Ibid* 13 [102].

¹⁶⁵ See *Masson (Full Court)* (n 162) 391 [48]–[49] (Thackray J, Murphy J agreeing at 400 [114], Aldridge J agreeing at 400 [115]).

On further appeal to the High Court, the decision was again overturned, with the High Court concluding Masson was the parent of the child.¹⁶⁶

It is prudent to examine the *FLA* and *SOCA (NSW)* that were considered in *Masson* before examining the respective Court interpretations and arrivals at their conclusions. We will then turn to examine the definition of ‘parent’ in the context of informal avenues of family creation, paying particular attention to elective co-parenting.

1 *The SOCA (NSW)*

The *SOCA (NSW)* replaced the *Children (Equality of Status) Act 1976 (NSW)* and was designed to bring ‘parentage presumptions which apply in relation to children born as a result of artificial conception procedures up to date with current medical technology’ and ‘promote consistency in registration of findings of parentage across Australia’.¹⁶⁷ The *SOCA (NSW)* was designed to ‘allow presumptions about a child’s parentage to be made in a broader range of circumstances, depending upon the circumstances in which the child is conceived’.¹⁶⁸ We explore these presumptions below. Section 14(2) of the *SOCA (NSW)* provides:

14 Presumptions of parentage arising out of use of fertilisation procedures

- (2) If a woman ... becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.

Section 14(4) further provides that ‘[a]ny presumption arising under subsections (1)–(3) is irrebuttable’.

On a literal reading of this provision, it appears that any male who has provided sperm for artificial insemination with the intention of co-parenting the child born as a result, is presumed — irrefutably — not to be the father of that child. Rather, the presumed parents of a child born as a result of artificial insemination are the woman who gives birth to the child and her partner — whether that partner is female or male.¹⁶⁹

The *SOCA (NSW)* does provide that a man is the presumed parent of a child born as a result of artificial procedures if ‘the man executes a formal paternity acknowledgment or any other instrument acknowledging that he is the child’s father’.¹⁷⁰ It also provides that a person is a presumed parent if their name is entered on the

¹⁶⁶ *Masson* (n 11) 586 [55]–[56].

¹⁶⁷ New South Wales, *Parliamentary Debates*, Legislative Council, 29 May 1996, 1 (Jeffrey William Shaw).

¹⁶⁸ *Ibid* 2.

¹⁶⁹ See *Status of Children Act 1996 (NSW)* ss 14(1)–(1A), (6) (*‘SOCA (NSW)’*).

¹⁷⁰ *Ibid* s 13(1).

child's birth certificate,¹⁷¹ although we note both are 'rebuttable presumption[s]'.¹⁷² By virtue of s 17(2) of the *SOCA (NSW)*, the irrebuttable presumption in s 14 is to prevail where irrebuttable and rebuttable presumptions conflict. The High Court took the view that ultimately the *SOCA (NSW)* did not apply in the case and it was to be determined in accordance with the *FLA*.¹⁷³ We, therefore, now consider provisions under the *FLA*, specifically s 60H and its provisions regarding artificial insemination procedures.

2 *The FLA*

Under s 60H(1) of the *FLA* where a child is born as a result of artificial conception procedures, the person with whom the woman is either married to or in a de facto relationship with, is a parent of the child, and the person who provided the genetic material is not. Section 60H(3) says that where state legislation provides that a man is a parent, whether or not he provided genetic material, then he too is a parent for the purposes of the *FLA*.

However, the above provisions in s 60H do not capture those in co-parenting circumstances. Accordingly, the High Court in *Masson* was clear that if the 'class ... of persons' is not covered in the provisions in s 60H, then 'the question of whether a person is a parent of a child born of an artificial conception procedure depends on whether' they are a parent in accordance with the ordinary meaning of 'parent'.¹⁷⁴ The High Court concluded that s 60H is not an exhaustive list of people who may have parental responsibilities.¹⁷⁵ The Court said s 60H expands the definition of parent, rather than confines it,¹⁷⁶ summarising that

whether a person qualifies under the *Family Law Act* as a parent ... is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of 'parent' and the relevant circumstances of the case at hand.¹⁷⁷

Thus, co-parenting arrangements will not be captured expressly by s 60H and therefore the facts of each co-parenting arrangement will require consideration to determine if the man is a 'parent' as in *Masson*. However, this case did not consider situations where a man has not had the opportunity (and is therefore unable to produce evidence) of playing a key father-figure role in a child's life.

¹⁷¹ Ibid s 11(1).

¹⁷² Ibid s 15(2).

¹⁷³ *Masson* (n 11) 585 [52].

¹⁷⁴ Ibid 580 [44].

¹⁷⁵ Ibid 572 [26].

¹⁷⁶ Ibid 574 [28].

¹⁷⁷ Ibid 574 [29].

In our illustrative case example, Masson was included on the child's birth certificate as the 'father'.¹⁷⁸ He spent considerable time with the child,¹⁷⁹ was called 'Daddy' by the child¹⁸⁰ and had a close bond with the child.¹⁸¹ All these factors allowed the High Court to conclude that he was a 'parent' in the ordinary meaning of the word.¹⁸² While this decision was rational, it might have limited application. There arguably remains some uncertainty as to whether a man who provides sperm to a woman or couple with the intention of co-parenting will be considered a parent without court intervention to determine so. This will be especially pertinent in cases where the facts are distinguishable from *Masson*, where the man (sperm donor) has not formed a relationship with the child and does not meet the definition of 'parent' within the ordinary meaning of the word. Nevertheless — whilst the decision in *Masson* is welcomed for its recognition of contemporary families — we consider that there is a need for further consideration and discussion to bring existing legislation in line with the common law, and provide more certainty for co-parents.¹⁸³

B Parenting Orders

A parenting order can be framed around a range of issues generally under the *FLA*.¹⁸⁴ These include matters pertaining to the person(s) with whom a child lives, the time a child spends with a person, and the parental responsibility for a child.¹⁸⁵ Additionally, a parenting order can take into consideration the communication a child has with another person and the maintenance of a child.¹⁸⁶ The best interests of the child are the paramount consideration in making a parenting order,¹⁸⁷ and the following are considered by a court in determining what is in the best interests of the child: 'the benefit to the child of having a meaningful relationship with both of the child's parents',¹⁸⁸ 'any views expressed by the child',¹⁸⁹ the nature of the parents' and others' relationships with the child,¹⁹⁰ 'the extent to which each of the child's parents has taken, or failed to take, the opportunity' to participate in

¹⁷⁸ See above n 159 and accompanying text.

¹⁷⁹ See *Masson v Parsons* (2017) 58 Fam LR 1, 19 [171]–[172].

¹⁸⁰ *Ibid* 4 [9].

¹⁸¹ *Masson* (n 11) 564 [3].

¹⁸² *Ibid* 585–6 [54]–[55].

¹⁸³ See below our discussion in Part IV(C) and our recommendations in Part VI.

¹⁸⁴ *FLA* (n 13) s 64B(2).

¹⁸⁵ *Ibid* ss 64B(2)(a)–(c). Regarding the presumption of equal shared parental responsibility when making a parenting order, see generally at s 61DA.

¹⁸⁶ *Ibid* ss 64B(2)(e)–(f).

¹⁸⁷ *Ibid* ss 60CA, 65AA.

¹⁸⁸ *Ibid* s 60CC(2)(a).

¹⁸⁹ *Ibid* s 60CC(3)(a).

¹⁹⁰ *Ibid* s 60CC(3)(b).

long-term decision making and ‘to spend time with the child’;¹⁹¹ and the extent to which a parent has fulfilled their ‘obligations to maintain the child’.¹⁹²

Section 65C of the *FLA* outlines the potential classes of applicants for a parenting order:

65C Who may apply for a parenting order

A parenting order in relation to a child may be applied for by:

- (a) either or both of the child’s parents; or
- (b) the child; or
- (ba) a grandparent of the child; or
- (c) any other person concerned with the care, welfare or development of the child.¹⁹³

However, a parenting order cannot be obtained prior to the child’s birth.¹⁹⁴ If the person is not a ‘parent’, the presumptions with respect to children and parenting orders do not apply. This might be an issue for men in co-parenting arrangements who are presumed not to be parents under the *SOCA (NSW)*.¹⁹⁵ Additionally, the *FLA* considers the role of parents in relation to the best interests of the child. For example, one of the objects of pt VII of the *FLA* is ‘ensuring ... that the best interests of children are met by’¹⁹⁶ ‘ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child’.¹⁹⁷

The underlying principles of this object are:

- ‘children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together’;¹⁹⁸

¹⁹¹ Ibid s 60CC(3)(c).

¹⁹² Ibid s 60CC(3)(ca).

¹⁹³ Ibid s 65C.

¹⁹⁴ It is established under the *FLA* that the definition of ‘child’ does not include the term foetus, unborn child or any other word referring to a child in utero. Therefore, the Family Court has no jurisdiction to make orders pertaining to unborn children: see *Talbot v Norman* (2012) 275 FLR 484, 489 [40]–[41].

¹⁹⁵ See below our discussion in Part V(B).

¹⁹⁶ *FLA* (n 13) s 60B(1).

¹⁹⁷ Ibid s 60B(1)(a).

¹⁹⁸ Ibid s 60B(2)(a).

- ‘children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives)’;¹⁹⁹
- ‘parents jointly share duties and responsibilities concerning the care, welfare and development of their children’;²⁰⁰
- ‘parents should agree about the future parenting of their children’;²⁰¹ and
- ‘children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture)’.²⁰²

Further, in certain circumstances, a court must consider making an order that a child is provided with equal time or substantial and significant time with each of its parents, if it is determined to be in the best interests of the child and it is reasonably practicable.²⁰³ We argue the definition of parent needs to clearly encompass men in co-parenting arrangements. If there is ambiguity around their status as a parent, the presumptions such as the presumption regarding equal shared parental responsibility at s 61DA of the *FLA*, for example, may not be applied by a court. In turn, this may affect the ability of a co-parenting father to obtain a court order for the child to spend significant or substantial time with him. This lack of clarity arguably operates to ignore the best interests of a child — contrary to obligations under the *CRC* — if the co-parenting father is held not to be a parent. What is demonstrative of legislation not operating appropriately is that none of the above are an issue where the child is conceived via natural insemination as opposed to artificial insemination. The intentions of two sets of co-parents may be identical, but the legal rights and responsibilities are completely different. The same issues arise with the legislation that governs child support in Australia, which we discuss in Part IV(C) below.

C *Child Support*

The *CSA Act* is designed to ensure that children receive a proper level of financial support from their parents,²⁰⁴ and stipulates that ‘parents of a child have the primary duty to maintain the child’.²⁰⁵ The same definition is adopted to define a ‘parent’ when referring to a child born because of the use of artificial conception procedures, as is used to define a person as a parent under s 60H of the *FLA*.²⁰⁶ Therefore, as discussed above, the definition of ‘parent’ is crucial to the operation of this legislation

¹⁹⁹ Ibid s 60B(2)(b).

²⁰⁰ Ibid s 60B(2)(c).

²⁰¹ Ibid s 60B(2)(d).

²⁰² Ibid s 60B(2)(e).

²⁰³ Ibid ss 65DAA(1)–(2).

²⁰⁴ *CSA Act* (n 153) s 4(1).

²⁰⁵ Ibid s 3(1).

²⁰⁶ Ibid s 5 (definition of ‘parent’ para (b)).

and therefore the definition under s 60H of the *FLA* could be clearer to ensure the *CSA Act* operates how it is intended.

Since *Masson*, potential legal uncertainty has been clarified and the legal position is less ambiguous: parents can include anyone within the ordinary meaning of the word in certain circumstances.²⁰⁷ If the definition of ‘parent’ under s 60H of the *FLA* on which the *CSA Act* relies is clear, this provides further clarity around who is therefore obliged to support a child financially. Prior to the High Court’s decision, however, a man who intended to co-parent could have been considered a ‘sperm donor’ if the child was conceived via artificial insemination and may not have been obliged to support the child financially, despite any opposing intention. If the child was conceived by natural insemination the man would be considered a parent and have financial responsibilities to the child which might pose an issue where the man donates his sperm with no intention to co-parent. The legislation, despite its intention to ensure every child is financially secure, requires greater consideration. This is an issue in relation to informal sperm donation arrangements and should be subject to further legal and academic discussion. The issue might still be clouded in relation to the application of the law and the legal differences arising from artificial versus natural insemination, which might have the following implications:

- a sperm donor with no intention to co-parent might be obliged to pay child support if the conception was natural but would not be if the conception was via artificial means; and
- a man providing his sperm for the intention to co-parent might not be financially obliged to look after a child if the conception is performed artificially but might be so obliged if conception is natural.

Whilst the High Court’s decision in *Masson* acknowledges the male as a parent in circumstances where there is intent to co-parent the child born as a result of the giving of his sperm, there remains some uncertainty. For example, a sperm donor who intended to co-parent but, for some reason, chooses or is unable to ‘parent’ in accordance with the ordinary meaning of the word could arguably still be required to financially maintain the child. When the intention of the legislation is to ensure a child is maintained by its parents, this raises the potential question as to how the legislation operates in practice. Having considered the legal landscape, we now turn to consider the ethical implications of informal methods of family creation.

V THE ETHICAL IMPLICATIONS

In Part IV, we highlighted several legal implications under existing legislation related to family creation and noted the importance of the High Court ruling in *Masson*, which we view as a positive shift towards recognition of non-traditional families. However, there are ethical implications that require exploration in relation to the use of informal sperm donation and elective co-parenting.

²⁰⁷ *Masson* (n 11) 572–3 [26]–[27], 574 [29].

A *Informal Sperm Donation*

In Parts II and III we considered informal sperm donation arrangements in detail. We noted that they tend to be based on sperm either being donated or sold without formal legal arrangements or contracts. The primary purpose of using an informal environment is probably to circumvent regulated fertility clinics or sperm banks. Of concern, however, is the absence of protections to safeguard donors, recipients, and donor-born children.

1 *Lack of Screening of Sperm Donors and Donated Sperm*

Prior to donating sperm via regulated fertility clinics and sperm banks, the donor is subject to routine screening processes. These include testing and screening for

HIV, hepatitis B and C, syphilis, Human T-lymphotropic Virus (HTLV) 1+2, cytomegalovirus (CMV), cystic fibrosis, karyotype, blood group, Fragile X syndrome (FXS), Spinal Muscular Atrophy (SMA), thrombophilia and full blood count (FBC).²⁰⁸

Further tests are conducted to check for chlamydia and gonorrhoea.²⁰⁹ If the sperm passes the required testing, the donor can then begin to donate.²¹⁰

Informal sperm donation is problematic and raises ethical and moral concerns. There is a lack of rigorous requirements or ability to screen donated sperm. Of concern is that some donors who have been rejected from donating through regulated fertility clinics or sperm banks due to failing relevant tests discussed above have gone on to donate informally. Scholars have also found that individuals who were reluctant to participate in the mandatory medical screening processes donated informally too.²¹¹ The obvious consequence is that unsafe and unscreened sperm with potential transmissible disease or genetic conditions is being used, putting the recipient and the potential child at risk.²¹²

Further, there is no avenue to vet the information that has been provided by informal sperm donors, and it is unlikely that there are any screening processes or any obligation for donors to disclose information to the recipients.²¹³ Thus, informal

²⁰⁸ 'Becoming a Sperm Donor: Step-By-Step Guide', *Sperm Donors Australia* (Web Page) <<https://www.spermdonorsaustralia.com.au/how-to-donate/donation-steps/>> ('Becoming a Sperm Donor').

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Kévin Lavoie, Isabel Côté and Francine de Montigny, 'Assisted Reproduction in the Digital Age: Stories of Canadian Sperm Donors Offering Their Gametes Online via Introduction Websites' (2018) 26(2) *Journal of Men's Studies* 184, 189, 193–4.

²¹² See also Harper et al (n 45) 15.

²¹³ See generally IVF Australia, *Using a Sperm Donor* (Booklet, 13 February 2017) 3 <https://www.ivf.com.au/sites/ivfa/files/2019-10/cln-096_using_a_sperm_donor_14feb17_0.pdf>.

avenues of sperm donation via the internet and social media platforms operate on an honour and trust system, meaning potential family histories of disease, for example, are undisclosed where they would otherwise be discovered by fertility clinics and sperm banks and disclosed to the recipient.

An additional issue relates to the lack of checks and balances regarding the donor's identity when using informal channels of family creation. Regulated fertility clinics require donations to occur at the fertility clinic to confirm the donor's identity as a way of guaranteeing the source of the donation.²¹⁴ However, with informal sperm donation, there is a level of uncertainty about whether the donated sperm belongs to the person professing to have made the donation. This leaves the sperm donor, recipient and potential donor-conceived child at risk. There are no assurances that the information provided about their genetic information, health, or their ethnicity is accurate via informal channels of donation. An example here can be found from Japan, where a woman has attempted to sue the sperm donor she found online for \$4 million for fraud and has given the child born up for adoption claiming she suffered 'emotional distress' after learning that he had lied about his ethnicity, marital status, and university education.²¹⁵

2 *Personal Safety of Donor Recipients*

People seeking informal sperm donors online might also be risking their personal safety in situations where they agree to meet donors in person after disclosing their personal details.²¹⁶ One woman reported allegations of sexual assault to VARTA 'against a man who offered to donate sperm informally' which were forwarded to police.²¹⁷ Also, there have been cases where women have been pressured towards natural insemination (sexual intercourse) by potential donors once they meet despite initially agreeing to artificial insemination.²¹⁸ Kelly observes that women 'end ... up feeling quite trapped' and '[s]ome pursue ... [sexual intercourse] because they presume it will result in conception'.²¹⁹ In the United Kingdom, the regulatory body, Human Fertilisation and Embryology Authority, has warned that '[u]nregulated "fertility" websites ... are exploiting vulnerable women and risking users' health and finances'.²²⁰ It has been reported that the unregulated sperm market is 'being

²¹⁴ See 'Becoming a Sperm Donor' (n 208).

²¹⁵ Hannah Sparks and NY Post, 'Woman Puts Baby Up for Adoption after Sperm Donor Lied about Ethnicity and Education', *News.com.au* (online, 14 January 2022) <<https://www.news.com.au/lifestyle/real-life/true-stories/woman-puts-baby-up-for-adoption-after-sperm-donor-lied-about-ethnicity-and-education/news-story/ca7e27ae9414a8fe232c1ade684f7ec7>>.

²¹⁶ See also Foster (n 61).

²¹⁷ Victorian Assisted Reproductive Treatment Authority, 'VARTA Media Release' (n 108).

²¹⁸ Cook and Tomazin, 'Sperm Drought' (n 130).

²¹⁹ *Ibid.*

²²⁰ 'Times Article on Unregulated Fertility Sites Quotes Natalie Gamble', *NGA Law* (Blog Post, 19 July 2010) <<https://www.ngalaw.co.uk/blog/2010/07/19/times-article-on-unregulated-fertility-sites-quotes-natalie-gamble>>.

used by men searching for nostrings [sic] unprotected sex'.²²¹ While conceiving a child and creating a family are important human experiences, we do not believe they should come at the cost of any woman's health and safety.²²²

3 *Lack of Formal Record Keeping of Children Conceived Using Donated Sperm*

In Victoria the regulatory body VARTA and fertility clinics work together to ensure they maintain formal records of donations made, who they are made by, how many live births result and the details of the donor-conceived child.²²³ There is no formal avenue to collect such data through informal sperm donations. As we have discussed earlier, this may pose a risk of consanguinity amongst donor-conceived children later in life.

Regulated fertility clinics limit the number of children created using donor sperm in accordance with legislation and guidelines.²²⁴ There are no such requirements for informal sperm donation. Under the *ART Act*, fertility clinics are required to keep records so that donor-conceived children can access information about their identity, genetic history, family medical history and who they are related to.²²⁵ We consider informal sperm donation to be a kind of 'wild west' — a lawless state where nothing is governed or monitored. There have been reported cases in the media of men who have fathered hundreds of children by making informal sperm donations, including one case concerning a man who fathered 600 children at his own fertility clinic.²²⁶ We anticipate there would be considerable difficulty trying to enforce record keeping with respect to informal sperm donation, and if attempted would drive the practice of informal sperm donation even further underground. Nevertheless, a register to establish the number of men who informally donate sperm was proposed to the Victorian Government recently but was rejected.²²⁷

²²¹ Ibid.

²²² See also Esther Han, 'Bioethicists Raise Alarm about Conflicts of Interest in Australia's IVF Industry', *The Sydney Morning Herald* (online, 1 November 2017) <<https://www.smh.com.au/healthcare/bioethicists-raise-alarm-about-conflicts-of-interest-in-australias-ivf-industry-20171101-gzcp8z.html>>.

²²³ See 'Donor Conception Register Services', *VARTA* (Web Page, 2021) <<https://www.varta.org.au/donor-conception-register-services>>.

²²⁴ See above our discussion in Part III(E). There are variations in different states and territories: see National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (Guidelines, 20 April 2017).

²²⁵ See *ART Act* (n 39) s 51.

²²⁶ Rebecca Smith, 'British Man "Fathered 600 Children" at Own Fertility Clinic', *The Telegraph* (online, 8 April 2012) <<https://www.telegraph.co.uk/news/9193014/British-man-fathered-600-children-at-own-fertility-clinic.html>>. See also Foster (n 61).

²²⁷ Farrah Tomazin and Henrietta Cook, 'No Register for Private Sperm Donors after Victorian Government Rejects Suggestion', *The Age* (online, 24 May 2021) <<https://www.theage.com.au/national/victoria/no-register-for-private-sperm-donors-after-victorian-government-rejects-suggestion-20210524-p57unh.html>>.

We argue that this was a poor decision, and while not all informal donors are likely to register, some may be willing to, which is better than the current position. We do think there is a need for further discussion about this issue within the broader community and by policy makers, given the enormity of consanguinity and health and safety concerns. In Part V(B) below we consider some of the ethical implications as they pertain to elective co-parenting.

B Co-Parenting

1 *Recognition of Intentions To Co-Parent*

Some co-parenting websites advocate for people to enter co-parenting arrangements for the upbringing of any child conceived²²⁸ — although they are unlikely to be legally binding. This is due to the Federal Circuit and Family Court of Australia's lack of jurisdiction to make orders pertaining to an unborn child.²²⁹ The *FLA* can only make orders with respect to a 'living' child, and it has been established in historical case law that this does not extend to a foetus.²³⁰ Orders can be made once the child is born,²³¹ however there remains uncertainty and potential risk for circumstances to change or any agreements to be altered or revoked between the period of a child's conception and birth.

2 *Discrimination*

There is a need for further exploration of the wording in the legislation, which we consider discriminatory. The *SOCA (NSW)*, for example, contains provisions such as: 'A child born to a woman is presumed to be a man's child if, at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the man and the woman cohabit but are not married.'²³² We argue that this language is outdated and does not reflect society today or the diverse range of family situations and circumstances.

Further, we argue the legislation is discriminatory to men who choose to engage in co-parenting arrangements. This is because the state legislation deems a woman who has given birth to the child from artificial insemination procedures, even if not biologically her child, as the parent of that child.²³³ To the contrary, men in co-parenting arrangements arguably start off with the presumption of a sperm donor with no parental rights or responsibilities.²³⁴ This is the case unless the man

²²⁸ 'Legalities of Co-Parenting', *Co-ParentMatch* (Web Page) <<https://www.co-parentmatch.com/Legalities-of-Co-Parenting.aspx>>.

²²⁹ *Talbot v Norman* (2012) 275 FLR 484, 489 [40]–[41].

²³⁰ *Ibid* 487–9 [21]–[41].

²³¹ See *ibid* 488 [34].

²³² *SOCA (NSW)* (n 169) s 10.

²³³ *Ibid* ss 14(1)(b), 14(1A)(b).

²³⁴ *Ibid* s 14(2).

has previously been in a romantic relationship with the woman²³⁵ or if the child is conceived by natural insemination (given s 14 of the *SOCA* would not be enlivened as it applies to situations of artificial insemination²³⁶) in which case their legal position is different.

It is worth noting, for example, that the *SOCA (NSW)* does contemplate scenarios where two parents who are not in a romantic relationship are considered ‘parents’ for the purposes of the legislation, however the scope is limited to instances where the parties to a marriage have separated.²³⁷ We argue that if the legislation recognises co-parenting arrangements in some instances, it should recognise co-parenting arrangements in all instances. This would at least lead to greater consistency surrounding recognition of co-parenting arrangements.

3 *Where a Woman Changes Her Mind on a Co-Parenting Arrangement*

In *Masson*, whether Masson was considered a parent was evaluated with respect to the number of years he had spent engaged and involved in the child’s life.²³⁸ The decision in the case does however leave open issues pertaining to scenarios where a man has been denied the opportunity to demonstrate ‘parentage’ for the court to adequately assess the relationship between man and child. This is problematic in instances where the mother has decided not to continue the co-parenting arrangement prior to the birth of the child and does not insert the man’s name on the birth certificate as ‘father’ or allow the man to meet the child once born. In such cases, the man may face a significant challenge in establishing he was the intended parent and not a sperm donor.

4 *Where a Man Changes His Mind on a Co-Parenting Arrangement*

In the same vein, if the man decides against a co-parenting arrangement and refuses to support a child financially, the mother might have to carry the financial support of the child alone. It has not been established at law how these situations would be decided, and the court has no jurisdiction prior to the birth of a child to make any orders relating to the child’s parentage or care.²³⁹ Of interest and relevance here is that these risks and consequences do not apply if the parties conceived the child via natural insemination.²⁴⁰

²³⁵ See *ibid* s 14(1)(a).

²³⁶ See *ibid* s 3(1) (definition of ‘fertilisation procedure’).

²³⁷ *Ibid* s 9(4).

²³⁸ See *Masson* (n 11) 564 [3].

²³⁹ See above nn 229–30 and accompanying text.

²⁴⁰ See above Part IV(C).

5 *Best Interests of a Child*

Sections 60B(1) and 60CC(2) of the *FLA* provide that the best interests of a child are met, amongst other things, by ensuring they have meaningful relationships with each of their parents. If better protections are not in place to ensure the intentions of co-parenting arrangements are respected and recognised, it is arguable the best interests of the child born might be ignored — an outcome contrary to the agreement Australia committed to several decades ago under the *CRC*. We now turn to the penultimate Part of this article where we make a range of recommendations in relation to informal avenues of family creation.

VI RECOMMENDATIONS

As a consequence of the myriad of legal and ethical issues that arise in this area of law, we welcome the implementation of the small number of recommendations from the *Review* since its publication in May 2019. We argue that if the *Review* recommendations had been given greater consideration and had been implemented in a timely manner, they might have gone some way in mitigating against people using risky options of family creation. Further, we argue that the recent amendments under the *ART Amendment Act* do not go far enough to ensure greater access, equity, and adequate reform to reflect the diverse array of contemporary Australian families. We make a number of recommendations below which mirror some of those in the *Review* and some go further to recommend legislative reform.

A *Greater Public Accessibility to ART and Availability of Donor Gametes*

This recommendation is twofold. First, we call for a serious and meaningful discussion within the broader community, and amongst clinicians, fertility clinics and policymakers to work towards greater public access to regulated fertility clinics for ART and donor gametes via a public bank. We acknowledge that steps have been taken in Victoria towards greater public access to fertility services and public sperm and egg banks.²⁴¹ The rollout has just commenced and will take several years for its full implementation and there are strict eligibility criteria for access to services. This a move in right direction, nevertheless, where possible we call for eligibility and access to public fertility services to be broadened to capture and assist a diverse range of individuals and couples seeking to create families.

Second, we recommend easier gamete importation processes. Under the current *ART Act* importation of donor materials into Victoria requires approval from VARTA.²⁴² As noted in Part III(C)(3), the legislation pertaining to importation does not specify the determining factors for VARTA to consider when approving donor gamete or embryo applications. The 2019 *Review* recommended that a simpler streamlined process be implemented to approve the importation of donor gametes

²⁴¹ See above our discussion in Part III(A).

²⁴² *ART Act* (n 39) s 36.

into Victoria.²⁴³ However, the *ART Amendment Act* did not implement the recommendation to make the importation of donor gamete process simpler or to amend the current legislation ‘to set out the criteria that need to be satisfied in order to import gametes and embryos into Victoria, through a certification process that attests’ to certain matters being satisfied.²⁴⁴

We suggest the *Review* recommendation be reconsidered. Making the process of gamete importation simpler might mitigate against people resorting to using online sperm donation, and instead consider accessing available gametes via regulated fertility clinics, where appropriate checks and screenings can be conducted.

B *Further Removal of Discriminatory Language and Redefining ‘Parent’ in Legislation*

The *ART Amendment Act* modifies some discriminatory language in the legislation. This is welcomed as it has started to reflect diverse and non-traditional family creation. For example, under s 5 of the *ART Amendment Act* additional obligations ensure that a person is not to be discriminated against based upon their relationship status, gender identity, or sex characteristics.²⁴⁵

However, further reform is required. Independent political party leader Fiona Patten sought additional amendments while they were being discussed at the parliamentary Bill stage. These included: counselling to be made optional for women and their partners undergoing assisted reproductive treatment and the removal of the requirement for same-sex couples to obtain a letter from a doctor stating they are unable to become pregnant in order to undergo assisted reproductive treatment — both are demeaning and discriminatory to those in same-sex relationships.²⁴⁶

Although these modest and rational amendments would have made important and meaningful differences to the lives of same-sex couples in family creation, neither was included. We recommend that they should be considered. Further, the same principles should be applied to the *FLA* and the *SOCA (NSW)* and its equivalents in other jurisdictions, removing the outdated language that does not reflect current norms and attitudes of modern Australia. For example, s 24 of the *Status of Children Act 1978* (Qld) only contemplates heterosexual marriages in providing for presumptions of parentage ‘arising from marriage’. Given these legislative instruments are interrelated, we recommend a consistent approach should be taken to remove discriminatory language across each piece of legislation to ensure language and terminology is inclusive and accurately represents present day society.

²⁴³ *Review* (n 18) xxvii, recommendation 56.

²⁴⁴ *Ibid.*

²⁴⁵ See *ART Amendment Act* (n 39) s 5(c), amending *ART Act* (n 39) s 5(e).

²⁴⁶ Victoria, *Parliamentary Debates*, Legislative Council, 7 October 2021, 3635–6 (Fiona Patten).

1 *Redefinition of 'Parent'*

We recommend the definition of 'parent' should be given further consideration to ensure those in co-parenting arrangements do not have any uncertainty about their parentage status, or their 'duties, powers, responsibilities and authority ... in relation to children'.²⁴⁷ Ultimately, the legislation recognises 'the benefit to the child of having a meaningful relationship with' their parents,²⁴⁸ and acknowledges that a child has the 'right to maintain personal relations' with its parents 'on a regular basis'.²⁴⁹ The *CSA Act* is designed to ensure a child is adequately maintained financially by its parents also.²⁵⁰ The definition of 'parent' should operate to ensure those legislative objectives are met, not ignored. A broad definition of 'parent' which encompasses co-parenting arrangements could alleviate this issue. However, we note that this is an ambitious suggestion. It would also require an increased regulatory approach or involvement of the courts prior to conception to ensure that the intentions of the parties to the agreement are clear. There is the possibility that an increased regulatory approach might deter the pursuit of formal methods of family creation and/or drive informal methods further underground. It would however be preferable at this stage for more open dialogue about these informal practices.

We also recommend further exploration surrounding the differences concerning legal rights and responsibilities of a parent depending on whether a child is conceived artificially or is conceived naturally when the intention of the individuals is the same. As discussed in Part IV, under the current operation of the legislation there are clear legal rights and responsibilities when a child is born via natural conception, however the law is not entirely clear and remains ambiguous when a child is born as a result of artificial insemination (despite the decision in *Masson*). This requires greater clarity. While the core objective of the relevant legislation rests on the pillar of the 'best interests of the child',²⁵¹ it appears that maintaining a relationship with a parent or financial maintenance is currently determined based on the method of conception. We therefore suggest that the definition should be suitably broadened to capture arrangements facilitated by other means — such as elective co-parenting, or other emerging trends where both parties are in agreement and meet progressive societal values.

C *Better Education and Awareness of Informal Avenues of Family Creation*

There is a need for greater public, political and academic awareness of informal channels of family creation and the potential risks that it poses. This is especially pertinent to informal sperm donation and the risks to health, safety and wellbeing to the recipient and potential child born of such an arrangement. The most obvious

²⁴⁷ *FLA* (n 13) s 61B.

²⁴⁸ *Ibid* s 60CC(2)(a).

²⁴⁹ *Ibid* s 60CC(3)(e).

²⁵⁰ See above n 204.

²⁵¹ See above nn 149–51 and accompanying text.

starting point for this is for broader community conversations and awareness about the risks attached with informal sperm donation via the internet and social media platforms or elective co-parenting arrangements that are poorly formed. Further, awareness campaigns would be welcomed via VARTA and other regulatory bodies.

We note that a register for informal sperm donors to record their details involves a risk of driving the risky and informal practice further underground, although there might be some donors who are amenable to registering. This type of register would complement the current formal register used by regulated fertility clinics. Even if used by a limited number of informal sperm donors it would go some way to reduce risks of consanguinity and ensure donor-conceived children have the same access to information, whether their conception was facilitated by informal or formal process.

VII CONCLUSION

We have highlighted two emerging and informal avenues of family creation that are likely to circumvent regulated fertility clinics. There is a need for further consideration and possible legislative reform to accurately reflect contemporary Australian families. Further, we recommend greater public access to fertility services and donor gametes, consideration to redefine the meaning of ‘parent’ in the law and better education, and awareness for the public of the significant risks involved with informal methods of family creation.

We contend that the creation of new life is often precarious and emotionally fraught. It should not be further clouded by ambiguity or commenced with unnecessary risks that might be attached to practices such as online sperm donation or elective co-parenting. Additionally, informal family creation might endanger the lives and wellbeing of potential parents, donors, and any child conceived. It is timely for a range of stakeholders — including those seeking to start families, those wishing to donate gametes, fertility clinics, and regulatory bodies such as VARTA — to engage in wider community consultation about informal methods of family creation. This is especially important when considering the potential legal, social and psychological impact on the lives of all parties involved.