Progress in the Legislation of Assisted Reproductive Technology in Victoria, Australia:
Guaranteeing Donor-Conceived Offspring's Right to Know Their Origin

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1. Introduction

Australia, especially the state of Victoria, has led the world in the area of assisted reproductive technology (ART), putting a major focus on developing legislation regulating the use of ART. Among ART-related issues, third party assisted reproduction raises serious ethical questions about how to guarantee offspring's right to know their (sperm/egg) donors. Victoria's progress in the legislation concerning ART using the third party's gametes (donor conception) reflects a change in the concept of families using ART and the surrounding society. ART was first developed as a cure for couples suffering from infertility, and the legislation was aimed at ensuring the right of infertile couples to have access to ART. Now the focus has shifted from the parents to the offspring, and the guiding principle of the Victorian legislation clearly states that "the welfare and interests of persons born or to be born as a result of treatment procedures are paramount" and that "children born as the result of the use of donated gametes have a right to information about their genetic parents" (Assisted Reproductive Treatment Act 2008, s.5). This principle implies that Victorian society places its priority on the right of offspring born by donor conception (donor-conceived offspring) to know their genetic origin, and even goes as far as to recognize their right to acquire at a young age the knowledge about their origin. Victoria's progressive approach toward legislation can provide a helpful perspective for other jurisdictions around the world facing similar problems. Especially for Japan, where the need for legislation has been debated for more than a decade, the issues raised by the thirty-year experience of legislation in Victoria cannot simply be ignored. What influence ART will have on the Japanese family and society is still "uncharted territory," but the Victorian case constitutes a rich source of information showing how legislation can function in a real society, a process of evaluation which would usually extend over a few decades. As a pathfinder, Victoria has amended its legislation drastically almost every decade, and has tackled the very profound question of what role the government should play in the issues generated by the ART procedure. This paper will focus on a study of the ART-related legislative progress and its characteristics in guaranteeing donor-conceived offspring's right to know their origin, as seen in the case of Australia, especially the state of Victoria, and try to draw out and analyze hints that might be seen as contributing to the discussion on legislating on ART in Japan.

2. The legislation on ART and its background in Australia

The state of Victoria in Australia was the earliest jurisdiction in the world to regulate ART com-

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prehensively by means of legislation. What has made it possible for Victoria to abolish donor anonymity and allow the right of donor-conceived offspring to know their origin? The background will be analyzed from the perspective of the development of ART in the state of Victoria.

The longest history among ART-related issues is the use of artificial insemination for infertility treatment, but with the success of in vitro fertilization (IVF), ART has advanced to a new stage. The world's first IVF baby, Louise Brown, was born in the UK in 1978 (Steptoe & Edwards, 1978), but the world's first IVF pregnancy was achieved in Victoria in 1973 (De Kretzer et al., 1973). On June 23, 1980, Australia's first and the world's third IVF baby, Candice Reed, was born (Lopata, 1980; Herald Sun, 2010 June 23) and additionally, 12 out of the first 16 IVF babies born in the world were born in Victoria (Overduin & Fleming, 1982). The birth of the world's first frozen embryo baby was also achieved in Victoria (The Age, 1984 Apr. 11; The New York Times, 1984 Apr. 11). Against the background of these innovative technological developments, the need for legislation regulating ART was recognized very early on in Victoria. This recognition led to the implementation of the Infertility (Medical Procedures) Act 1984, which was the world's first comprehensive law regulating ART (including donor insemination and IVF). In Australia, the exact number of the offspring born by donor conception so far is unknown, and estimates range from around 20,000 to 60,000 (Senate Legal and Constitutional Affairs References Committee, 2011). In Victoria, the number of reported births resulting from donor conception in the fiscal year of July 1, 2012 to June 30, 2013 is 408 (278 from sperm donation, 96 from egg donation, 34 from both sperm & egg donation), and the total number of donor-conceived births registered since the establishment of the Central Register in 1988 is 5903 as at June 30, 2013 (VARTA, 2013).

2-1. The technological factors underlying ART development

What was the background for the early progressive development of ART in Australia? John Leeton (2004: 495) from Monash Medical Centre provides the following five reasons, emphasizing the fifth one as the most important.

1. Reduction in adoption, and the legalization of abortion
2. Poor results of surgery/microsurgery in cases of gross tubal disease
3. Failure of artificial fallopian tube (1970) and tubal transplant (1972)
4. Demand for pregnancy by infertile couples
5. Success of embryo culture studies on animals in Australia

In 1970, at the Australian Society for Reproductive Biology Conference, a successful example of IVF and embryo cultivation in animals was presented and discussed. This led Neil Moore to suggest to Carl Wood, who was then Chairman of Obstetrics and Gynaecology at Monash University and the Queen Victoria Medical Centre, that applying a similar approach to humans might be useful in infertility treatment (Cohen et al., 2005). Carl Wood was designated "the godfather of IVF" for his groundbreaking work in Australia (The Sydney Morning Herald, 2011 Sep. 27). Neil Moore was Professor in the University of Sydney, Department of Animal Husbandry and an acknowledged expert in agricultural reproductive biology (Kanegiesser, 1988: 324; Franklin, 2007), and his PhD student, Alan Trounson, later became a driving force in developing ART in Victoria together with Carl Wood (Kinjo, 1996).

Thus, in addition to the strong yearning for pregnancy on the part of infertile couples, success in the area of agricultural reproductive biology in Australia has contributed to the development of treatment aimed at widening the scope of human reproduction.

ART includes both treatments using only the couple's gametes, and treatments using gametes donated by a third party (a donor). Especially controversial in the legislation concerning ART are the issues concerning third-party assisted conception (donor conception). The usage of donor gametes ushers in a new problem in family relationships; a new relationship between a parent and a child, a new link between the donor (donor's family) and the family of donor-conceived offspring, and so on. This unprecedented issue stems from intentionally generating a child having no biological relationship with his or her parent, thus contravening the myth of the "normal family," based on genetic relatedness. In 1984, the Australian State of Victoria amended the Status of Children Act 1974 (Vic) in terms of making provision for artificial insemination, stipulating that a married woman's "husband shall be presumed, for all purposes, to have caused the pregnancy and to be the father of any child born as a result of the pregnancy" and that the donor shall "be presumed not to have caused the pregnancy and not to be the father of any child born as a result of the pregnancy" (s.10C). However, from the offspring's point of view, where the importance of offspring's right to know about their biological parents is gradually becoming recognized by analogy with cases of adoption, a biological parent cannot be reduced to the mere existence of a "donor." Subsequently, Victoria took the initiative in resolving the issue by legislating on ART, stressing donor-conceived offspring's right to know their origin. In advance of the 1984 Act, the Waller Committee (Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization) discussed donor-conceived offspring's right to know their genetic origin from the perspective of the welfare of the offspring born by donor conception. The Waller Committee was chaired by Louis Waller, Professor of Criminal Law at Monash University, and consisted of nine specialists from various areas including theology, social work, law and medicine (Kinjo, 1996). The Committee published three reports by 1984 (Waller Committee, 1982, 1983, 1984). The 1983 report says, "Whether or not a person pursues her or his origins, it should be possible for everyone to discover them. In this sense, everyone has a strong interest in being able to discover some information about her or his origin (Waller Committee, 1983: 26)." This view, which adheres to offspring's right to know, is said to have been strongly influenced by the adoption lobby (Szoke, 2004). Actually, in 1984, the Adoption Act was amended to recognize adoptees' right to know their birth parent. As can be seen in the Waller report (Waller Committee, 1983), the importance of guaranteeing offspring's right to know their origin was accepted by the Committee, and this led to the establishment of the Central Register, which recorded information on donors, offspring and parents, leading ultimately to the loss of donor anonymity, through legislation of the 1984 Act.

In recent years, the number of jurisdictions abolishing donor anonymity and allowing offspring the right to know their origin is increasing, and Victoria has been a pioneer in putting this right into practice by legislation. In 1984, Sweden enacted Lag (1984: 1140) om insemination and allowed offspring born by donor insemination the right to know their sperm donor, whereas the Victorian law (1984 Act) not only regulated donor insemination but also dealt comprehensively with ART, including IVF.

In the Waller report, on the other hand, it is mentioned that there was recognition by the committee that parents of donor-conceived children should not be compelled to tell their children about their donor-conceived origin (Waller Committee, 1983). This implies that at the time of legislation, issues such as how parents would tell their children about their origin, or what sort of family the parents would wish to build by being truthful and open, and how they would feel about their own children's donor under a legislative system allowing offspring's right to know, were all "uncharted territory" without any
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precedence in other jurisdictions around the world.

The 1984 Act left unresolved some issues concerning the guaranteeing of donor-conceived offspring’s right to know their origin. These included the specific nature of the donor’s consent requirement needed to enable offspring to access their donor’s identifying information, and the question of how the offspring would actually learn about their donor-conceived origin, a prerequisite for the offspring to exercise their right to know about their donors as guaranteed under the legislation.

3. Legislative progress of ART in Australia

In Australia, there is no federal regulation concerning ART, and each state government regulates ART individually. The National Health and Medical Research Council (NHMRC), which supports research on health and medical matters, and gives advice to the Australian community, health experts and the government, has produced national guidelines, entitled *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (revised in 2007); however, these are not legally binding. Concerning the offspring’s rights, the guidelines state: “Persons conceived using ART procedures are entitled to know their genetic parents. Clinics must not use donated gametes in reproductive procedures unless the donor has consented to the release of identifying information about himself or herself to the persons conceived using his or her gametes” (NHMRC, 2007: 25).

In Australia, other than in the state of Victoria, legislation regulating donor-conceived offspring’s right to know their origin has been enacted in New South Wales, Western Australia, and South Australia. The three states of Victoria, Western Australia and New South Wales allow offspring’s right to access the information on their donor including their identity, while South Australia allows offspring access to non-identifying donor information.

The Australian parliament (the Senate) made a formal inquiry in June 2010 to the Senate Legal and Constitutional Affairs References Committee on the practice of donor conception in the past and the future in Australia. In February 2011, the committee released its final report in reply (Senate Legal and Constitutional Affairs References Committee, 2011). The report states that “the committee recommends that jurisdictions which do not already have legislation in place, namely Queensland, Tasmania, the Northern Territory, and the Australian Capital Territory, should, as a matter of priority, establish legislation to regulate donor conception in those jurisdictions,” and further recommends that “the Australian Government pursue all available policy and political options ... to ensure that nationally consistent legislation relating to donor conception is developed as a matter of priority.” These recommendations were supported by the Australian Government in principle. However, concerning nationally consistent legislation, the federal government responded that “the Australian Government does not have constitutional power to legislate comprehensively in this area to ensure that legislation is nationally consistent.”

Currently, the content of legislation in the four states which legally regulate offspring’s right to know is as follows:

- New South Wales: *Assisted Reproductive Technology Act 2007* (NSW) (enforced on January 1, 2010; adult offspring conceived after 2010 can obtain identifying information about their donors from NSW Health Department)
Western Australia: Human Reproductive Technology Amendment Act 1991 (WA) (amended in 2004; offspring conceived after 2004 (the law as of December 1, 2004 requires all would-be donors to consent to the release of identifying information) can obtain donor-identifying information once they reach the age of 16 from the Reproductive Technology Unit, Department of Health)

South Australia: Assisted Reproductive Treatment Act 1988 (SA) (enforced on September 1, 2010; although there is a donor conception register maintained by the Minister, offspring do not have the right to access donor-identifying information without the donor’s consent)

Among these states, Victoria has the longest history of legislation regulating ART. In 1984, the Infertility (Medical Procedures) Act 1984 (1984 Act) was enacted, followed by amending acts, namely the Infertility Treatment Act 1995 (1995 Act) and the Assisted Reproductive Treatment Act 2008 (2008 Act). By enacting a major amendment almost every decade, Victoria has improved the legislative system in the direction of further ensuring offspring’s right to know their origin, and has set out precedents in the area of regulating ART for the other states in Australia to refer to. By analyzing the legislative progress in Victoria and its noticeable characteristics, the issues contained in legislating ART will be discussed, mainly from the perspective of offspring’s right to know their origin.

4. Innovations aimed at guaranteeing offspring’s right to know their origin in Victoria, Australia

4-1. Legislative progress and offspring’s right to know their origin

1) The characteristics of the 1984 Act

Under the 1984 Act (enforced in July 1988), a donor-conceived offspring who is 18 years old and over has the right to access donor-identifying information with the consent of the donor. The offspring, the recipient parents, and the donor are compulsorily registered in the Victoria State Central Register. Donors also have the right to access the information of the offspring born as a result of their donation with the consent of the offspring. If the offspring is under 18, the donor can access information identifying the offspring with the offspring’s parent’s consent, and once the offspring reaches 18, with the offspring’s consent only. (Under the 2008 Act, in case the offspring is still under 18, not only the parent’s consent is required, but also the children’s intention should be considered. Disclosure of information to donor requires that “the child has not indicated to the Registrar that the child does not want the information disclosed (2008 Act s.58.”)

2) The characteristics of the 1995 Act

Offspring conceived using gametes donated under the conditions of the 1995 Act will unconditionally, even without the donor’s consent, be given access to information identifying the donor when they reach the age of 18. Under the 1995 Act, donors who donate their gametes after January 1, 1998 are required to consent, at the time of their gamete donation, to the release of their identifying information to adult offspring.

3) The characteristics of the 2008 Act

The 2008 Act came into force on January 1, 2010. Under this Act, the age requirement for the offspring’s access to the donor’s information was repealed. It says in the Act (s.59) that if the offspring who has applied for the disclosure of identifying information about the donor is under...
18, it can be allowed if "(A) the person’s parent or guardian has consented to the making of the application; or (B) a counsellor has provided counselling to the person and advised the Registrar, in writing, that the person is sufficiently mature to understand the consequences of the disclosure."

4-2. Innovation in the 2008 Act: Guaranteeing “offspring’s right to grow up with the knowledge of their origin”

In Victoria, under the 1984 Act, donor anonymity was abolished, and the offspring was allowed to apply for donor-identifying information, but in order for access to such identifying information to be actually granted, the donor’s consent was required. At the time of the enactment of the 1984 Act, the requirement for the donor’s consent had been a concession made so as to achieve a ban on anonymous gamete donation. After a decade, by the enforcement of the 1995 Act, it became possible to realize an environment which regarded it as natural that gamete donation would be made in the knowledge that identifying information would be released in the future. However, even at a point when 18 years were about to pass since the enforcement of the 1984 Act, it was revealed that many families with donor-conceived offspring had kept their children’s origin secret and had not told their children the truth about their conception (Victorian Law Reform Commission, 2007). The social atmosphere in which it was tacitly assumed that “parents should be encouraged to tell but cannot be forced to tell their offspring about their origin” prevailed even 18 years after the legislation abolishing donor anonymity. As a result, it was impossible to assert that the legislative system offering offspring the right to know their origin was working well.

With a view to resolving this legislative malfunction, Victoria launched the “Time to tell” campaign in 2006 to stimulate parents to tell their offspring about their origin. Fig. 1 is an advertisement for the “Time to tell” campaign by the Victorian Assisted Reproductive Treatment Authority (VARTA). It says, “We’re here to help you talk to your children about how you became a family.” Furthermore, the 1995 Act was revised in 2008 with the aim of further enforcing donor-conceived offspring’s right to know.

The guiding principle of the 2008 Act clearly states: “children born as the result of the use of donated gametes have a right to information about their genetic parents (s.5).” Here, “children” are defined as persons who are less than 18 years of age (s.3). The most noticeable feature of the 2008 Act is that children under 18 have the right to grow up knowing their donor-conceived origin. In the brochure “Talking to your child about donor assisted conception” published by VARTA in March 2010 (VARTA, 2010 Mar.), it says, “It is best to tell your children when they are young and just make it a part of their birth story.”

Under the 2008 Act, offspring conceived by using donor gametes or a donor embryo will be registered as “donor conceived” at the time of birth registration, and an addendum stating that further information is available about their birth will be attached to the certificate in the event that donor-conceived offspring apply for a copy by themselves (the Birth, Deaths and Marriage Registration Act 1996, s.17B, inserted by the 2008 Act). The 2008 Act ensured offspring’s right to know their origin by giving
them the chance to know about their donor-conceived origin at the time of being issued with their own birth certificate.

Thus, in Victoria, the revision of the Act in 2008 strengthened the right of donor-conceived children to grow up knowing the truth of their origin by abandoning the criterion of an age requirement as a proviso to obtaining information on donors, and by attaching to the birth certificate an addendum indicating that further information could be provided on request (Fig. 2).

![Diagram of Legislation ensuring donor-conceived offspring’s right to know their origin in Victoria](image)

**Fig. 2.** Legislation ensuring donor-conceived offspring’s right to know their origin in Victoria.

5. Legislative amendment enacted in Victoria, Australia aimed at retrospectively extending the right of offspring born under donor anonymity to know their origin

5-1. The recommendation by the Victorian Law Reform Committee

Reforms made under the 2008 Act further extended offspring’s right to know their origin. However, offspring conceived before the enactment of the 1984 Act in 1988 were born under conditions of donor anonymity and their right to know their origin was not recognized even in the 2008 Act. Those offspring are the ones left behind by the legislation. To resolve this situation, Victoria has further tried to amend the ART legislation.

In Victoria, several thousand offspring are said to have been born before 1988, and around 500 to 1,000 donors are estimated to have donated their gametes anonymously; in those days, donor insemination to counter the effects of male infertility was a major practice (Victorian Law Reform Committee, 2012; VARTA, 2013 Jan. 14). Even in cases where offspring are told about their origin by their parents, offspring born before the enforcement of legislation cannot have access to donor-identifying information, since the Act does not recognize their right to know.

The following words by the mother of a donor-conceived adult son born before the enforcement of the legislation indicate the dilemma of her status as a parent.

“He does not know the truth of his conception. ... As time went by I began to have deep reservations about this secret which we were keeping from him. ... Every few years the issue arises for me again and keeps rearing its ugly head. There is a nagging feeling there that he has the right to know. ... I do not want him to spend the rest of his life longing to know about half his origins, when legislation won’t allow him that access. ... I do not want him to be like some children, who
search forever.” (Name withheld, 2010 July 28)

To resolve this situation, the Victorian Law Reform Committee tabled a report (*Inquiry into Access by Donor-Conceived People to Information about Donors: Final Report*) recommending that donor-conceived offspring are retrospectively allowed the right to know their origin (Victorian Law Reform Committee, 2012; Victorian Law Reform Committee, 2012 Mar. 28).

The committee chair, Clem Newton-Brown says in the report: “the Committee unanimously reached the conclusion that the state has a responsibility to provide all donor-conceived people with an opportunity to access information, including identifying information, about their donors” (Victorian Law Reform Committee, 2012).

This report was recognized to be groundbreaking in abolishing past donors’ anonymity retrospectively, and without precedence throughout the world (The Age, 2012 Mar. 28).

The recommendation consists of 30 recommendations; the main points are as follows.

1. The Victorian Government to introduce legislation to allow all donor-conceived people to obtain donor-identifying information. (Recommendation 1)

   Recommendation 1 wants offspring born under the 1984 Act who have limited access to donor-identifying information according to the consent-based approach taken by the 1984 Act, or those born before the enforcement of the 1984 Act and have no legislative right to know their origin because of past donor anonymity, to have unconditional access to donor-identifying information.

2. The Victorian Government to introduce provisions for contact vetoes that may be lodged by a donor or a donor-conceived person following counselling. Contact vetoes will only be available to people conceived from gametes donated prior to 1998, and the donors of those gametes. (Recommendation 4)

   Recommendation 4 gives the donors who consented to the donation of their gametes before January 1, 1998, i.e. donors who donated under the 1984 Act and those who donated before the enforcement of the 1984 Act, the right to declare a contact veto while allowing offspring the retrospective right to access donor-identifying information.

3. The Victorian Government to introduce a mechanism for medical information from a donor to be provided to a donor-conceived person, where there is evidence of hereditary or genetic disease or risks to the health of the donor-conceived person (Recommendation 9), and from a donor-conceived person to that person’s donor-conceived siblings as well (Recommendation 13).

On the day following the release of the report, The Age, a Victorian newspaper, reported that “the recommendation by the cross-party law reform committee has been hailed by donor-conceived children” (The Age, 2012 Mar. 29).

The welcome given by offspring to the report can also be seen from comments like the following on their website: “I am so relieved and happy that the committee has recommended a change to the cruel laws which denied people like me who were born before the arbitrary date of 1988 the right to information.” “Before this inquiry we had no rights and faced a bureaucratic black hole if we wanted to know where we came from. It was horrible being treated as a second class citizen.” (Lauren Burns, a 28-year old donor-conceived offspring, Tangled Webs Press Release, 2012 Mar. 28)

A sperm donor who supports the recommendation says, “Some sperm donors wish to retain anonymity. … Disruption and unsettlement from the appearance of their donor offspring – maybe so. But weighing that against the rights of the offspring to have knowledge of their biological parentage – as the
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Victorian parliamentary inquiry has done – must lead to a judgment that human rights are paramount in this case” (The Age. 2012 Apr. 9).

On the other hand, some opposition was voiced by a person from a medical institution. John McBain, a director of Melbourne IVF and a pioneer in the treatment of infertility, called for reconsideration. “The young men who were recruited were promised anonymity forever. ... Please, parliamentarians, pause to consider the great harm you may do to many by trying to satisfy the needs of a few on a dubious principle. Bad law is not the solution” (The Age. 2012 Apr. 11).

The opposers respect donor privacy and insist that donor privacy is of primary importance and that the past promise of donor anonymity should be preserved. Thus there are both people who give full support to the recommendation and those who take a cautious attitude toward it. Next, the response of the Victorian Government to the recommendation will be analyzed.

5-2. The response of the Victorian Government to the committee recommendation

The Government decided that the opinions of past donors had not been heard to a sufficient extent to make a final decision possible (Victorian Government, 2012 Oct. 11) and asked VARTA, the Government institution regulating assisted reproductive treatment in Victoria, to inquire into the opinions of past donors about the recommendation. Fig. 3 shows an advertisement by VARTA inviting donors to participate in the research. It says, “The Victorian Government wants to hear what you think about the possibility of the law being changed, allowing your donor-conceived offspring access to identifying details about you.”

The research was conducted by VARTA in collaboration with Monash University, and the result was reported to the Victorian Government in May 2013. According to the report (Consultation with donors who donated gametes in Victoria, Australia before 1998: Access by donor-conceived people to information about donors), 42 donors who donated their gametes before the enforcement of the 1995 Act (donation year: 1970-1997) were interviewed. Of the 42 participants, 36 were sperm donors and 6 were egg donors, and just over half were against the recommendation, with about half of those opposed insisting that the donors’ intention should be respected and that they should not be compelled by law to release their identity to the offspring (VARTA, 2013 May; Hammarberg et al., 2014).

The following donor’s opinion shows the opposition toward abolishing the anonymity of past donors.

“Now I have my own family and I will NEVER, EVER share this information with them. ... These proposed changes in legislation will threaten the health of many innocent families in Victoria or Australia.” (sperm donor of 1980s, VARTA, 2013 May)

For some donors who donated under the condition of anonymity in the past, and kept their donation secret from their own family.
even the slightest possibility of sudden contact from offspring is regarded as a threat to their present family lives. For donors who are desperately against the retrospective granting of offspring's right to know their identity, to “release identifying information” means “contact” and the “contact veto” which aimed to protect their privacy did not seem to be enough.

What we can learn from the opinions of stakeholders concerning the past cases of donor conception carried out under conditions of donor anonymity is that even if thirty years have passed since the date of conception, the donor’s right to privacy should be respected. On the other hand, there are offspring who have been deprived of their right to know, and who are now calling for this right to be respected, since their opinions were totally ignored at the time the contract was agreed before their birth. This is the ethical question which requires a “delicate balance of rights” (Fig. 4). An essential prerequisite to solving this problem seems to be obtaining the support and understanding of the families and society toward respecting the rights of both offspring and donors.

On August 20, 2013, taking into account the report submitted by VARTA, the Government presented its final response to the committee’s recommendations (Victorian Government, 2013 Aug.). It basically supported Recommendation 1 of the committee report and said that the right of offspring born before the implementation of the 1984 Act to know their origin would be allowed retrospectively. However, accessing donor-identifying information would be based on donor consent, and the donor’s right to maintain anonymity would be protected. The access to non-identifying information about their donors, on the other hand, was allowed to the offspring without donor consent. Hence, the Victorian Government’s response was to allow offspring born before enforcement of the 1984 Act the same right as possessed by offspring born under the 1984 Act, and unification of the offspring’s right to know to the post-1998 level was rejected. The Government’s decision was to respect donors’ and the donor families’ right to privacy which might not be sufficiently protected by the contact veto proposed by the committee.

Thus, the Victorian Government’s response “falls short” of the recommendation by the committee which tried to protect the right of “all donor-conceived people” equally (The Age, 2013 Aug. 21). The proposed legislative introduction of the contact veto proposed in Recommendation 4 was regarded as unnecessary and Recommendations 9 and 13, mentioned above, were supported.

5-3. Passage of the 2008 Act Amendment Bill by the Victorian Government

The Assisted Reproductive Treatment Further Amendment Bill 2013 which was based on the Government response to the Recommendation was introduced into the state parliament in December 2013. The Bill passed the Legislative Assembly on August 7, 2014 and the Legislative Council on August 21, 2014. (The Bill will be

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put into force on June 29, 2015 at the latest). The main purpose of this Act is “to amend the *Assisted Reproductive Treatment Act 2008* in relation to access to information, including access to information about treatment procedures using gametes donated before July 1988 (s.1).”

By the revision of the Act, donor-conceived offspring who have not previously been covered by legislation will have their rights recognized, and the information concerning their donor conception will be registered on the Central Register, which is maintained by the Registry of Births, Deaths and Marriages. Offspring will be able to apply for their donor’s information through this Government institution.

David Davis, the Minister for Health, has said: “The new laws will enable people born prior to 1988 to access, for the first time, identifying information where available with the donor’s consent” (Victorian Government, 2013 Dec. 11). Provisions concerning the information exchange of genetic and genealogical disease between donors and donor-conceived offspring and their donor siblings are also stipulated.

The reformed law will still maintain the two-tier system of offspring’s right to access donor-identifying information: the donor-conceived offspring who need the donor’s consent to have access to donor-identifying information (offspring born before the enforcement of the 1995 Act), and those who do not need donor consent (offspring born after the enforcement of the 1995 Act). However, the current amendment is commendable as it recognizes for the first time the right of offspring who were left out of legislation in the past. The second reading of the bill in the both houses of parliament says: “The bill gives effect to the government’s response, balancing the rights of all donor conception stakeholders whilst establishing a legal right of access to information for those conceived from gametes donated prior to 1988 where none existed before” (Wooldridge, 2013 Dec. 11: 4549; Rich-Phillips, 2014 Aug. 7: 2450).

As David Davis says in the media release reporting the passage of the amendment bill, “Changes in legislation reflect the changing attitudes to donor-conception and donor-conceived people’s right to information about their donor (Victorian Government, 2014 Aug. 21).” The amendment can be seen as what Victoria has achieved by 30 years of grappling with the incorporation into its legislation of offspring’s right to know their origin.

### 6. The effects of Victorian legislation reform on other states in Australia: the case of New South Wales

How has the progressive case of Victoria concerning legislation on ART affected other states in Australia? In recent years, New South Wales has also begun to develop a system aimed at securing donor-conceived offspring’s right to know their origin, and seems to be greatly influenced by the Victorian precedent.

In New South Wales, legislation of ART was discussed in the 1980s, just as in Victoria, and the New South Wales Law Reform Commission submitted a report *Artificial Conception: Human Artificial Insemination* in 1986 (NSW Law Reform Commission, 1986 June). However, with the strong resistance from practitioners in New South Wales, who were opposed to instituting a statutory regulatory framework for the provision of ART (Szoke, 2004), it took until 2007 for the legislation to be enacted. By the *Assisted Reproductive Technology Act 2007* and the *Assisted Reproductive Technology Regulation 2009*, recognition is accorded to the right of all donor-conceived offspring conceived after 2010 in New South Wales to access information about their donors when they turn 18 years of age. However, as in the case of Victoria, there are some unresolved issues regarding offspring’s right to know their origin: (1) there is no guarantee that parents will tell the offspring about their donor-conceived origin, (2) the
right of donor-conceived offspring conceived before 2010 is not recognized by the law.

In New South Wales, since around 1997, most infertility clinics have required donors to consent at the time of donation to being identified to adult donor-conceived offspring (The Sydney Morning Herald. 2013 May 8). However, until the enforcement of the 2007 Act, the use of anonymous donor sperm was still in practice in some clinics (ABC Television, 2005 Oct. 24). In order to solve the problems concerning donor-conceived offspring's right to know their origin, the New South Wales Legislative Assembly Committee on Law and Safety inquired into donor conception and released two reports. The first report was released in October 2012, and the second in October 2013.

The first report (Inclusion of Donor Details on the Register of Births) was mainly about managing donor conception information (NSW Legislative Assembly Committee on Law and Safety, 2012 Oct.). Its key point is a change in birth certificates, and the following recommendations aimed at amending the Act.

1. If a birth registration statement specifies that a child was donor-conceived, the Registrar of Births, Deaths and Marriages is to note that the child was donor-conceived in the entry about that child's birth on the register of births. (Recommendation 2)
2. The Registrar of Births, Deaths and Marriages is to issue an addendum on a separate page, indicating that further information is available, when a donor-conceived individual aged 18 or over applies for a birth certificate. (Recommendation 3)

In the second report (Managing Donor Conception Information) released in October 2013, the key points concern the retrospective right of donor-conceived offspring to know their origin, as shown in the following recommendations (NSW Legislative Assembly Committee on Law and Safety, 2013 Oct.).

1. Procedures that allow individuals conceived before January 1, 2010 to access non-identifying information about their donor, regardless of whether or not the donor consents to such information being released, should be implemented. (Recommendation 5)
2. Procedures allowing individuals conceived before January 1, 2010 to access donor-identifying information where the donor consents to such information being released should be implemented. (Recommendation 6)

In response to those recommendations made in the two reports, the Government of New South Wales gave its support in April 2013 and in April 2014, respectively. The New South Wales Government says in its response that, "The changes that the Government will be enacting in response to the Committee’s recommendations are a significant step in fulfilling the needs of donor-conceived people to know their genetic heritage whilst respecting the wishes of those donors who donated under a different system to maintain their anonymity" (New South Wales Government, 2014 Apr.). On May 11, 2014, it was reported that Health Minister Jillian Skinner plans to establish a central, government-run register of donor records, and the non-identifying information about donors maintained "could include medical history, ethnicity and physical characteristics such as eye and hair colour" (The Sydney Morning Herald, 2014 May 11).

The 2012 report and the 2013 report respectively, each took as a model the policy adopted in Victoria by the 2008 Act and the Assisted Reproductive Treatment Further Amendment Bill 2013, and followed suit on the main points. For example, in the 2013 report, which proposed a "consent-release" model for the donor conceived offspring's retrospective access to the donor information, it says, "The Committee feels there are many parallels in the experience of donors in Victoria and NSW and gives considerable weight to the results of the Victorian research into donor attitudes" (NSW Legislative
Assembly Committee on Law and Safety, 2013 Oct.). With frequent mentions of the case of Victoria, it is very clear from the reports by the Committee and the Government response that Victoria has exerted a considerable amount of influence on the policy adopted by New South Wales. What we can learn from the case of New South Wales is that the preceding case of Victoria has and is expected to exert a strong influence on the arguments in other Australian states.

7. Issues arising from an analysis of the case of Victoria, Australia

Up to this point, the paper has discussed the progress of the legislation on ART in Victoria and its characteristics. So what specific questions does the Victorian case pose to other jurisdictions which are considering how to develop their own legislation, especially Japan? There is no overall legislation regulating ART in Japan, and in accordance with the guidelines of the Japan Society of Obstetrics and Gynecology, hereafter JSOG, it is subject only to self-regulation (Minami, 2011). The demands for legislation on ART, especially legislation concerned with donor conception, date back for about a decade.

In Japan, donor insemination (DI) which uses the sperm of a donor is the only type of donor conception recognized by the JSOG guidelines (JSOG, 2006). Since the first birth from DI at Keio University Hospital in 1949, more than 10,000 offspring are said to have been born under conditions of donor anonymity (Minami, 2011). Additionally, the number of people going abroad to receive egg donation is increasing (The Asahi Shimbun, 2011 July 27). It is against this background that the Japanese Government made a move to introduce a bill legislating donor conception (The Asahi Shimbun, 2013 Nov. 3).

In discussing legislation on ART, the questions we have to ask concern the extent and the nature of social recognition of ART in Japan and in the light of the Victorian case, the kind of problems that Japan will confront. As early as 2003, the Assisted Reproductive Technology Committee of the Health Sciences Council of Japan Ministry of Health, Labour and Welfare (ART Committee) published a report recommending that ART using donor gametes and embryo should be made available to married heterosexual couples suffering from infertility and that the right of donor-conceived offspring to know their origin should be recognized (ART Committee, 2003). According to the report’s recommendations, identification of the donor should be disclosed to offspring once they become 15, and the right of offspring to access information identifying the donor without the consent of the donor should be recognized, which is closer to Victoria’s 1995 Act than to the 1984 Act. However, in the light of opposition from the Government party, saying that “the Government should not intervene in regulating people’s right to have children,” the submission of the report to the Diet was put on hold (The Chugoku Shimbun, 2004 Jan. 25). The report was issued when the recognition of offspring’s right to know their origin was deepening abroad, and it clearly states as its guiding principle that the welfare of the offspring to be born should be given priority (ART Committee, 2003), but the social environment in Japan was not ready to accept the progressive nature of the report.

Since the use of ART, especially the use of DI to produce children, is still a “family secret” in Japan (Kuji et al, 2000), the opinions of offspring born by DI (DI offspring) have not been sufficiently reflected in the discussion, and a perspective focusing on the welfare of DI offspring has been noticeably lacking. Recently, however, adult DI offspring are calling for their own right to know their origin in Japan as in other countries (DI Offspring Group & Nagaoki, 2014). Moreover, the need for legislation on donor-conceived offspring’s legal status within the context of the parent-child relationship has come to be highlighted (The Asahi Shimbun, 2013 Dec. 12), and with an increasing number of people going
abroad for egg donation, it is possible to see a gradual trend in the social environment toward favoring the establishment of legislation (Minami, 2011).

Taking into account the social context described here, the discussion will now turn to what can be gleaned from an analysis of the progress of Victorian legislation in terms of suggestions concerning legislation aimed at recognizing offspring’s right to know their origin in Japan.

As described above, Japan’s 2003 report, in the same way as the 1995 Act in Victoria, recommends that donor information should be kept and managed by the appropriate public authority, while allowing offspring to have access to their donor’s information. However, in Victoria, even after 18 years had passed since the passing of the 1984 Act, it was found that many offspring had not been told about the truth of their origin by their parents. The underlying, but unspoken premise of the Act was that somebody had to tell offspring about their donor-conceived origin in order for them to be able to exercise their right to know, but the outcome was that this duty was heavily laid on their parents without much social support. This has been a serious obstacle hampering offspring’s rights. Learning from the experience of Victoria, the Committee on Law and Safety of New South Wales stated that “the Committee believes strongly that parents should engender a sense of openness and be encouraged to tell children the truth about their conception and that the State should provide the necessary services to assist with this (NSW Legislative Assembly Committee on Law and Safety, 2013 Oct.).” The cases of Victoria and New South Wales, which exemplify radical reform of legislation on offspring’s rights, show that it is very likely indeed that the same situation will reappear in Japan when the donor-conceived offspring grow up if Japan enacts legislation without solving the issue of “telling.” To avoid such a legal void, there is a need for legal and social reform aimed at allowing offspring to grow up and accept the knowledge about their origin as a natural part of their makeup.

Another issue is that how the rights of offspring born under conditions of donor anonymity should be recognized. Outside Australia, the number of jurisdictions legislating on ART and recognizing offspring’s right to know their origin is gradually increasing, but the right of offspring born before the implementation of legislation is not guaranteed. In the past, anonymous donation has been the common practice of donor conception throughout the world, and past donors’ right to privacy has been one of the obstacles preventing offspring born under conditions of donor anonymity from having the right to know their origin.

In Japan, DI offspring continue to be born under conditions of donor anonymity, in keeping with the JSOG guidelines (JSOG, 2006). The 2003 report of the ART Committee makes no mention about developing the social and legal system that would be needed to recognize offspring’s right retrospectively. The revision of the Victorian 2008 Act in the form of enactment of the Assisted Reproductive Treatment Further Amendment Bill 2013 yields some clues as to how to solve this question.

To begin with, we should keep in mind that the Victorian legal reform was the fruit of 30 years of experience on the part of Victorian society, and that this amount of time was needed to get social recognition of the retrospective right of offspring to know their origin, because ART-related legislation is deeply connected with family lives, and requires the consent of society as a whole, including donors, the families and the practitioners. The case of Victoria shows that a necessary prerequisite to legislation on ART is a drastic change in our way of thinking, away from seeing assisted reproductive treatment as “infertility treatment” given to recipient parents and toward seeing it as a technology which will bring birth to a person who will grow up as an individual, and whose rights cannot be ignored. Therefore, like the “Time to tell” campaign in Victoria, public education aimed at deepening understanding toward the
offspring and families built through ART is indispensable.

For jurisdictions, especially for Japan, which are considering the enactment of legislation on ART, the way in which such legislation will influence families or donors is uncharted territory. Victoria’s progressive approach toward legislating on ART and its thirty-year experience in grappling with the improvement of the welfare of the offspring to be born, will be a precious guide in facilitating constructive debate on the future pattern of legislation.

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SUMMARY

Progress in the Legislation of Assisted Reproductive Technology in Victoria, Australia:
Guaranteeing Donor-Conceived Offspring's Right to Know Their Origin

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With the recent rapid increase in the number of families created through assisted reproductive technology (ART), the right of offspring born through the use of donated gametes (donor-conceived offspring) to know their origin is becoming a worldwide issue. Jurisdictions that have abolished the anonymity of gamete donors are gradually increasing, but is the offspring’s right to know actually being protected by the legislation?

The present study focuses on Victoria, Australia, which has one of the world’s most progressive legislative systems in terms of offspring’s rights, and analyzes the development and characteristics of the legislation surrounding ART in Victoria in order to clarify the problems concerning assurance of offspring’s right to know his or her origin. Victoria has led the world in legislating the Infertility (Medical Procedures) Act 1984 (1984 Act), which offers offspring the right to access information that will identify donors with the donor’s consent, and the subsequent Infertility Treatment Act 1995, which removed the requirement for the donor’s consent, but many parents still experience difficulty in telling offspring about their origin. With this problem in mind, the Assisted Reproductive Treatment Act 2008 (2008 Act) gave offspring under 18 years old the right to know about their origin; the method enabling offspring to know about their donor-conceived origin was by an addendum attached to their birth certificate. These innovations in the 2008 Act can be interpreted as a legal attempt to guarantee offspring’s right to grow up knowing about their origin. However, even by the implementation of the 2008 Act, the right of offspring born before the enforcement of the 1984 Act has not been covered. The Victorian Law Reform Committee therefore recommended in 2012 that donor-conceived offspring be retrospectively granted the right to know their origin. In response, the Victorian Government passed the Assisted Reproductive Treatment Further Amendment Bill 2013, allowing offspring born under conditions of donor anonymity to have access to identifying information about the donor with the donor’s consent.

A major law reform concerning ART has thus taken place in Victoria almost every decade, and the history of these legislative reforms demonstrates a continuing move toward further ensuring offspring’s right to know their origin. The case of Victoria has been a model for other states in Australia, especially New South Wales, and has set a precedent for jurisdictions around the world, including Japan. An analysis of legislative changes in Victoria can function to facilitate discussion of the problems surrounding the introduction of legislation regulating ART in Japan.

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