



EMBARGO: FOR IMMEDIATE RELEASE

**MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION
ISSUE PAPER 32 ON THE RIGHT TO KNOW ONE'S OWN BIOLOGICAL ORIGINS**

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act 19 of 1973. The objective of the SALRC is to do research with reference to all branches of law in order to make recommendations to government for the development of the law of South Africa on a continuous basis.

In 2016, the SALRC commenced an investigation into the The Right to Know One's Own Biological Origins (Project 140). The object of the investigation is to perform research to ascertain whether a child should have legal right to know his or her biological origins.

The project leader responsible for this investigation is Judge Thina Siwendu. The SALRC researcher assigned to this investigation is Miss Veruksha Bhana. On 20 May 2017, the SALRC considered and approved the publication of Issue Paper 32 which will serve as the basis for the SALRC's deliberations on this investigation. The SALRC hereby releases Issue Paper 32 for general information and comment.

The Project 140 investigation is important in an age of cutting-edge and ever advancing science in the field of assisted reproduction. Assisted reproduction is used to treat infertility and entails the use of fertility medications and medical techniques to bring about the conception and birth of a child. Children are conceived using donor gametes in techniques such as in vitro fertilization, mitochondrial replacement therapy and genetic surrogacy.

Assisted reproduction in South Africa is regulated by the National Health Act 61 of 2003 and the Regulations Relating to Artificial Fertilization of Persons, 2012 as well as the Children's Act 38 of 2005 and the regulations thereto. The legal position in South Africa is that gamete donors and surrogate mothers must be anonymous and it is an offence to reveal the identity of a gamete donor or surrogate mother. Further, gamete donation and surrogate motherhood should be altruistic and not for commercial purposes.

South Africa is State Party to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, however; clauses in the Conventions are open to interpretation in deciding whether or not a child has a legal right to know his or her biological origins.

When heterosexual infertile persons and homosexual couples have children, obvious questions arise as to how these children were conceived and their biological origins. Innovations in genetic testing also means that the chances of donor-conceived children discovering that they are not biologically related to one or both of their parents are higher than before and this raises the question as to whether donor anonymity should remain the legal position as is the case in South Africa currently.

Mitochondrial replacement therapy is sometimes called three-parent IVF. It is a form of in vitro fertilization in which the future baby's mitochondrial DNA comes from a donor. This technique is used in cases when mothers carry genes for mitochondrial diseases. Therefore, mitochondrial DNA from a healthy donor egg is used to attempt to prevent the transmission of mitochondrial disease from one generation to the next. Mitochondrial replacement therapy involves the introduction of foreign mitochondrial DNA into the germ line that will be inherited by all children in downstream generations. Ethical concerns relate to the alteration of germ line genetics and the dilemma of children inheriting DNA material from three instead of two parents. Mitochondrial transfer has also been closely associated with reproductive cloning which is regulated differently worldwide. Children born from these techniques might experience an identity crisis. The use of donors also raises the question of what information should be available about them to the children born from their eggs and vice versa. In light of Chapter 8 of the National Health Act 61 of 2003, questions are asked as to whether the legislative framework in South Africa allows for the use of mitochondrial replacement therapy in South Africa.

Practical considerations come into play in deciding whether or not to disclose information to a child regarding his or her conception. It is clear that one cannot simply emphasize a child's right to know but there must also be consideration of broader social issues such as the relationship with the wider family, the community, financial issues and the ability of the donor-conceived child to deal with information regarding his or her biological origins.

In the case of *AB and Surrogacy Advocacy Group v the Minister of Social Development* (CCT155/15) [2016] ZACC 43; 2017 (3) BCLR 267 (CC), AB who is both conception and pregnancy infertile, challenged the constitutionality of S294 of the Children's Act 38 of 2005.

Section 294 requires that a child contemplated in terms of a valid surrogate motherhood agreement must be genetically related to both the commissioning parents or, if this is impossible as a result of medical or biological or other valid reasons, related to at least one of the commissioning parents. Where the commissioning parent is a single person, the child must be genetically related to the commissioning single parent. On 29 November 2016, the Constitutional Court held that a genetic link is required between the intended parent and the child. The Constitutional Court adopted a more impartial approach in deciding the matter. Rather than focussing only on the rights of the intended parent, the Court considered the best interests of the intended child.

In light of the judgment of the Constitutional Court one could argue that a more balanced approach is necessary when weighing the rights of a person or couple who wish to have a child via assisted reproduction and that of the intended child. The Court held that clarity regarding the origin of a child is important to the self-identity and self-respect of the child. Given this Constitutional Court decision, it is clear that South Africa needs to reconsider anonymous gamete donation in surrogacy and in other types of assisted reproduction.

The question of the right to know one's own biological origins is also applicable as regards adoption, registration of birth, disputed paternity and child abandonment and all of these topics are dealt with in Issue Paper 32.

Birth registration is necessary to concretize a child's rights to a name and nationality. A birth certificate is a vital record that documents the birth of a child and is the means by which the State recognizes the existence and status of a child. A birth certificate provides a child with an identity of their own and allows a child to access key social services such as education, health care and social grants. Issues related to registration of birth and disputed paternity affects all children and not just donor-conceived children.

Section 10 of the Births and Deaths Registration Act 51 of 1992 deals with how a child is to be registered when the parents are not married each other. Where the parents are not married, the mother must register the child under her surname or, the child may be registered under the surname of the biological father provided that the father acknowledges paternity and both the father and the mother consent to the registration of the child under the father's surname in the presence of a Home Affairs official. Questions of equality can be raised in that an unmarried mother must register the birth of her child under her surname whereas the unmarried father must first acknowledge paternity and he has the option of whether or not his details appear on the birth certificate.

Questions are asked as to whether Courts should still use legal presumptions to determine paternity in the case of disputed paternity or whether a scientific approach should be adopted given the certainty that scientific tests provide.

Regarding abandoned children, questions are asked as to whether baby hatches should be established and whether safe haven laws (as in the United States of America) and confidential birth laws (as in Germany) should be enacted in South Africa.

Issue paper 32 also deals with the ethics and regulation of inter-country medically assisted reproduction. Over the past decade, there has been a steady growth in a new global market of cross-border medical travel for repro-genetic purposes (medical tourism). Many practices of inter-country medically assisted reproduction involve 'third-party' individuals acting as surrogate mothers and gamete providers in reproductive collaborations for the benefit of other individuals and couples who wish to have children. Arrangements between intended parents and third-party reproductive collaborators create a special kind of agreement that needs regulation so as to protect the interests of all the involved persons: the intended parents, the third-party collaborators and the children. In inter-country settings, under conditions of geographical distance, cultural differences and economic disparity, the for-profit motivation of medical entrepreneurs and intermediary agents exacerbates the potential commodification and abuse of women and children.

Human relationships are complex and, while the law does regulate various areas of life, the general consensus is that the law should not intrude too deeply into family relationships. However, where the State plays an active role either by way of public funding, research (legal or scientific), provision of health care services, legal regulation of service providers and the administration of registration of birth and nationality, one could confidently argue that the State is obliged to be proactive in order to protect the interests of children who, by their disposition, are dependent on the State to protect their interests.

This investigation cuts across law (the right to reproductive health care, the right to privacy in respect of one's health or family life, the right to know one's biological origins and the right to economic activity), sociology and science. In each chapter of Issue Paper 32 questions are asked regarding the content of the chapter in order to assess whether a child should have a legal right to know his or her biological origins and how such a right could be enforced and whether the law in this regard should be amended in light of prevailing and anticipated circumstances and contemporary mores and thinking.

The SALRC invites written comments on Issue Paper 32. Respondents are requested to submit their written comments, representations or requests to the SALRC (citing reference to Issue Paper 32) by **31 August 2017** at the following address:

Post: The Secretary: SA Law Reform Commission, Private Bag X668, Pretoria, 0001
E-mail: VBhana@justice.gov.za
Fax: 086 216 7313 or 012 622 6362/6261
Tel: 012 622 6332
Website: <http://www.justice.gov.za/salrc/index.htm>
<http://salawreform.justice.gov.za/index.htm>

Issue Paper 32 will be made available on the internet at <http://salawreform.justice.gov.za/ipapers.htm>. A hardcopy may be obtained free of charge upon request to Mr Jacob Kabini on telephone 012 662 6327 or via email on JaKabini@justice.gov.za.

The Commission will be conducting workshops on Issue Paper 32 likely in July and August 2017 and further information in this regard will be communicated in due course.

Following the issue paper, the SALRC will publish a discussion paper setting out preliminary proposals and draft legislation, if necessary. The discussion paper will take the public response on the issue paper into account and will test public opinion on solutions identified by the SALRC. On the strength of responses on the discussion paper, a report will be prepared which will contain the SALRC's final recommendations. The report (which may include draft legislation, if necessary) will be submitted to the Minister of Justice and Correctional Services for his consideration and onward transmission to the Minister of Social Development, Minister of Home Affairs and Minister of Health.

For enquiries regarding the workshops and this media statement, contact Miss Veruksha Bhana on telephone 012 622 6332 or via email at VBhana@justice.gov.za.

ISSUED BY THE SECRETARY: SA LAW REFORM COMMISSION AT CENTURION
DATE: 1 JUNE 2017

EMBARGO: FOR IMMEDIATE RELEASE