



Chapter 12

Recognising Non-birth Mothers

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The REAL MOTHER is the one who wakes in the night to change sheets, who comforts our child when she is sick, who contributes her entire wage to the support of our family, who teaches our child about her ancestors and who still loves her after a tantrum in public. Our child is fortunate because she has TWO REAL MOTHERS.

During our consultations we heard from many people who have had, or are planning to have, children using different types of ART: heterosexual couples, single women with different sexual orientations, same-sex couples (both male and female), women who were single at the time of conception or birth and have subsequently entered into a relationship, and groups of people such as two couples or a couple and a third person. Lesbian couples were the most prominent family type we encountered in our consultations. Of particular concern to these couples was the failure of the law to recognise the relationship between the child and the partner of the woman who gives birth.

A woman who gives birth to a child (the birth mother) is automatically recognised as the child's legal parent, irrespective of her sexuality or relationship status.¹ If she has a female partner (the non-birth mother), that woman is not recognised as the child's legal parent. In this chapter we consider whether the non-birth mother should be recognised as a legal parent of the child, and if so, how this should be achieved.

Statistics derived from the 2001 Australian Census indicate that nearly 17% of lesbian couples have a child living with them.² In some cases the child was born while the mother was in a previous heterosexual relationship. However, an increasing number of lesbian couples are choosing to have children in the context of their relationship.³ The 2005 'Private Lives' survey of 5476 gay, lesbian, bisexual, transgender and intersex people found that 25.6% of the women surveyed had children and 51% of women currently without children indicated they would like to have them in the future.⁴

It is impossible to quantify the number of same-sex couples with children in Victoria. A survey conducted by the Victorian Gay and Lesbian Rights Lobby in 2001 found that 63% of the 670 participants (both male and female) aged under 30 wanted children, usually with their partners.⁵

The commission received a significant number of submissions from and on behalf of Victorian women who have had or are planning to have children with their female partners. The submissions provided detailed personal accounts of couples' decisions to have children, the planning which follows, and the arrangements made to care for the children. A key point made in these submissions was that lesbian couples consider themselves to be equal parents and share financial and other responsibilities in caring for children.⁶

I have co-parented them from their birth and been involved in every aspect of their development and growth. I have changed countless nappies, given and received thousands of cuddles and kisses and watched with pride as my beautiful boys develop into happy, healthy, well-balanced young men. Yet I have no legal rights. I am not recognised on their birth certificates, could not be listed as a parent at their kindergarten or school, could not sign a permission form for one of them to receive an emergency operation, and so it goes on.⁷

It saddens me to hear ignorant people asking 'but who's the real mother' they would never ask that of an adopted child. I always answer that the REAL MOTHER is the one who wakes in the night to change sheets, who comforts our child when she is sick, who contributes her entire wage to the support of our family, who teaches our child about her ancestors and who still loves her after a tantrum in public. Our child is fortunate because she has TWO REAL MOTHERS.⁸

This is supported by research about lesbian-parented families.⁹ For example, one study reported that '[t]he fact that the social mother is not biologically linked to the child does not prevent her from taking equal responsibility toward the children she parents'.¹⁰

CURRENT LAW

As explained in Chapter 11, when a child is born to a woman who is in a de facto lesbian relationship, the relationship between the child and the birth mother's female partner is not recognised by the law. By contrast, when a child is conceived through the use of donor sperm by a woman who is married or in a de facto heterosexual relationship, the woman's husband or partner is presumed to be the father of the child for the purposes of Victorian law¹¹ and federal law,¹² and he is entitled to be registered as the father of the child on the register of births.¹³

It is possible for the non-birth mother to take steps to create limited legal obligations in respect of the child. For example, the Family Court may make a parenting order to recognise her parental role in the child's life.¹⁴ It is also possible for the non-birth mother to make a will leaving all or part of her estate to the child and for the birth mother to make a will appointing her partner as the child's guardian should she die. As noted in Chapter 11, the provisions of some specific pieces of legislation relating to the parent-child relationship will also apply to the non-birth mother.

PROBLEMS WITH THE LAW

The commission has identified a number of problems with the failure of the law to recognise the full parental role of the non-birth mother. Principally, it has important implications for children: it affects their rights to child support and inheritance, as well as their legal relationship with the extended family of the non-birth mother. It also has implications for parents and the community generally.

LEGAL IMPLICATIONS

Legal parental status is of particular significance if a child's parents separate. Recent amendments to the Family Law Act prioritise the concept of equal shared parental responsibility, and the potential for the child to spend equal (or

substantial and significant) time with each parent following separation, if this would be in the best interests of the child. A primary consideration in determining what is in a child's best interests is the benefit to the child of having a meaningful relationship with both parents.¹⁵

In determining an application for parenting time made by a person who is not recognised as a legal parent, the Family Court would not be obliged to apply a presumption of equal shared parental responsibility, or to give priority to the consideration of an ongoing meaningful relationship with that person. Instead, the court would take into account other considerations.¹⁶ In this way, an application by a non-birth mother for parenting time with the child may not be determined in the same way as a similar application made by a person who is recognised as a legal parent.

Parenting orders granted by the Family Court do not confer the full range of parental obligations and powers on the person in whose favour they are made and do not require a person to be recorded on the child's birth certificate.

If the child's mother and partner separate, the partner is under no legal obligation to pay child support because she is not recognised as a parent under the *Child Support (Assessment) Act 1989*. This may seriously disadvantage the child.¹⁷

If parents die without leaving a will, their children are, under certain circumstances, entitled to a share of the estate.¹⁸ However, because a non-birth mother is not recognised as a parent for the purposes of the *Administration and Probate Act 1958*, if she dies without making a will, the child will not automatically be entitled to a share of her estate.¹⁹ If the non-birth mother's parents wish to leave part of their estate to the child and make a will to benefit their grandchild, the bequest will not be effective because the relationship is not legally recognised. A bequest which names the child would, however, be effective.

- 1 Although, it is important to note that in *Re Mark* (2003) 31 Fam LR 162 at 167–8, Brown J suggested that one interpretation of s 60H of the *Family Law Act* may lead to the birth mother not being recognised for the purposes of that Act. Justice Brown refers to the reasoning of Forgery J in *Re B and J* (1996) 21 Fam LR 186 and Guest J in *Re Patrick: An application concerning contact* (2002) 28 Fam LR 579 on this point.
- 2 David de Vaus, *Diversity and Change in Australian Families: Statistical Profiles* (2004) 84. For further breakdown of this figure see Australian Bureau of Statistics, *Year Book Australia 2005*, Catalogue No 1301.0 (2005), Same-sex couple families, 142–44.
- 3 See Jenni Millbank, 'Recognition of Lesbian and Gay Families in Australian Law—Part Two: Children' (2006) 34 *Federal Law Review* 205, 207.
- 4 Australian Research Centre in Sex, Health and Society, La Trobe University, *Private Lives: a Report on the Health and Wellbeing of GLBTI Australians* (2006) 36.
- 5 Ruth McNair et al, 'Lesbian Parenting: Issues, Strengths and Challenges' (2002) 63 *Family Matters* 40, 43.
- 6 Ruth McNair, *Outcomes for Children Born of A.R.T. in a Diverse Range of Families* (2004) 59; submission CP 198 (Dr Elizabeth Short).
- 7 Submission PP2 88 (Helen Thompson).
- 8 Submission PP2 87 (Anonymous).
- 9 Victorian Gay and Lesbian Rights Lobby, *Everyday Experiments, Report of a Survey into Same-Sex Domestic Partnerships in Victoria* (2001) 14; see also Appendix 1, Table 1.
- 10 Katrien Vanfraussen et al, 'Family Functioning in Lesbian Families Created by Donor Insemination' (2003) 73(1) *American Journal of Orthopsychiatry* 78, 89.
- 11 *Status of Children Act 1974* ss 10C(2)(a), 10D(2)(a).
- 12 *Family Law Act 1975* (Cth) s 60H(1); *Child Support (Assessment Act) 1989* (Cth) s 5(b).
- 13 *Births, Deaths and Marriages Registration Act 1996* s 16(1)(f).
- 14 Under s 65G of the *Family Law Act 1975* (Cth). See *Re J and M* (2004) 32 Fam LR 668. At the Melbourne and Dandenong registries of the Family Court, an artificial conception consent procedure is available to simplify this application.
- 15 *Family Law Act 1975* (Cth) s 60CC(2).
- 16 A primary consideration is the need to protect a child from harm: *Family Law Act 1975* (Cth) s 60CC(2). Additional considerations are outlined in s 60CC(3)–(4), including the views expressed by the child, the nature of the relationship with the child, and the likely effect of any changes in circumstances.
- 17 If the couple have made an explicit agreement that the partner will financially support the child, this agreement will probably be enforceable, either as a contract or under the equitable doctrine of estoppel: see *W v G* (1996) 20 Fam LR 49. It may also be possible for the Family Court to order the non-birth mother to pay child maintenance under s 66E of the *Family Law Act 1975* (Cth), but it would need to find that she was a parent for the purposes of that Act.
- 18 *Administration and Probate Act 1958* s 52(f).
- 19 The child may, however, have a claim for family provision under the *Administration and Probate Act 1958* pt IV.

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... obtaining the court order was very stressful and involved some cost. It should not be necessary for me to go to court to have my relationship to my son recognised. Further, the parenting order did nothing to recognise P's relationship with his extended family, particularly his grandparents (my parents) with whom he has a very close relationship.

The *Marriage Act 1958* makes provision for the guardianship of children if one or both of their parents die.²⁰ If a child's mother dies, the father is deemed to be the child's guardian. If a child's father dies, the mother is deemed to be the child's guardian. The parents can appoint a person, by deed or will, to be the guardian of the child if they die. In lesbian parent families, if the birth mother of the child dies and she has not appointed the non-birth mother as the guardian of the child, the non-birth mother is not recognised as having any status in relation to the child unless she obtains a parenting order from the Family Court. In such circumstances the child would be left in what has been described as a 'legal vacuum'.²¹

The various statutory compensation schemes which operate in Victoria make provision for benefits to be paid to a child if a parent dies in a workplace or transport accident. If the non-birth mother dies in an accident, the child will not automatically be entitled to compensation, but will be required to prove that he or she was economically dependent on the deceased's earnings.

As discussed in Chapter 11, there is a detailed set of legal obligations and entitlements which arise out of the parent-child relationship. Most of these obligations and entitlements are intended to protect children and ensure they are adequately cared for. However, some of these laws have other policy objectives. For example, a legislative provision may require a person to disclose any interests of his or her relatives or family members, including parents and children, or may rely on the existence or non-existence of a prescribed relationship such as a parent-child relationship. Because the relationship between a non-birth mother and a child is often not recognised under this legislation, the policy objectives underpinning these laws may be compromised.

PRACTICAL IMPLICATIONS

We received many submissions from women who described the practical consequences for them and their children of the absence of legal recognition of non-birth mothers. These submissions reported that they often encounter obstacles and ignorance, and at times hostility, in their dealings with government agencies

and service providers where legal status is a relevant factor. Because a non-birth mother cannot be named as a parent on the child's birth certificate, she is unable to produce evidence of her relationship to the child unless she has taken steps to obtain a Family Court parenting order or some form of written authority from the birth mother. These steps involve expense, effort and stress and are often inadequate for a variety of purposes. As one submission explained:

*obtaining the court order was very stressful and involved some cost. It should not be necessary for me to go to court to have my relationship to my son recognised. Further, the parenting order did nothing to recognise P's relationship with his extended family, particularly his grandparents (my parents) with whom he has a very close relationship.*²²

If she has not obtained any formal authority, the non-birth mother has no status to consent to medical treatment for the child. Some women report having experienced problems with hospital staff and doctors who have not disclosed medical information to them.²³ Some couples choose to give their child the non-birth mother's surname to avoid some of the difficulties that can arise in these situations.²⁴ In one case, related to us by a friend of the couple concerned, the non-birth mother encountered difficulties when collecting her child from school:

*Our neighbours recently recounted to us a story that so perplexed me that I have thought about it often. When their first child started school, my neighbours S and R attended the school to explain their child's family situation and to alert the school that they were both G's parents. Some months later G fell ill while at school ... When R arrived at the school to pick her sick daughter up she was confronted by a member of staff at the school unaware of G's family structure. R was asked for identification and questioned as to her relationship with G. Despite telling the school staff member that she was G's mother the fact that she and G did not share a surname and R was not considered a legal guardian made the school office reluctant to permit R to take her sick daughter out of the school.*²⁵

SOCIAL IMPLICATIONS

The commission received numerous submissions from lesbian mothers describing strong and happy families which are generally respected and supported within their communities and by health professionals, teachers and childcare workers:

Our daughter's life is rich with loving adults and she is bright and well adjusted. Our daughter's conservative traditional school respects and includes all 4 of our daughter's parents and accommodates her family by getting her to make multiple mothers and fathers day presents. The parents at the school also include our daughter in all the activities external to school regardless of the parent who is caring for her that day. We all work hard as a family to ensure that our relationships are strong with organisations and institutions in which our daughter comes in contact.²⁶

Similarly, the 2005 'Private Lives' survey reported relatively high levels of satisfaction with pregnancy and obstetric services.²⁷ In 66% of cases where a woman who was not in a heterosexual relationship gave birth to a child, the hospital acknowledged the woman's partner. The survey report notes that '[w]hile it is not clear how many women did not have a partner, concern must be expressed for any women who were not acknowledged as a couple at this important time of family formation'.²⁸

We also received many accounts of the social, emotional and symbolic effects on the parents and the child of the non-recognition of the non-birth mother. Non-recognition of the role and status of the non-birth mother is equivalent to non-recognition of the reality of the child's family structure. This in turn reinforces the social stigma which same-sex parents and their children experience. As one submission stated:

The lack of legal recognition of and support for our families translates, in practice, to some people regarding our families as deficient, and problematic ... Laws that aim to discourage our families from existing or that don't recognise our families as families make it harder for or more awkward for some people to include us or interact with us and our children, and can make some people feel that they can or should treat us with a lack of respect or as though we are invisible or deficient. Clearly, this state of affairs is detrimental to us, to our children and to our broader society.²⁹

Same-sex parents feel very strongly about their inability to obtain birth certificates for their children which name both women as parents. In addition to the practical consequences of this, many women believe it serves as a very powerful symbolic denial of the reality of their families.

Non-recognition can diminish the non-birth mother's role as a parent in the eyes of extended family members and the community. It may also cause her to feel that her role in the child's life is vulnerable, which can lead to stress and anxiety, relationship problems and disputes about contact with the child if she and the birth mother separate, or if the birth mother dies:

A day doesn't go by when I don't think about the fact that as things stand at the moment, the legal connection I have with my son is tenuous. In the back of my mind there is a constant, nagging worry that if things all went terribly wrong, I could lose him ... I find this an appalling situation to be in, and one that is very far from protecting the best interests of my child.³⁰

The Bouverie Centre, a state-wide clinical and research agency specialising in family approaches in mental health service provision, reported an increased incidence of lesbian parents seeking counselling due to stress and anxiety about their lack of legal status.³¹ The centre also reported situations of non-birth mothers severing all contact with the child after separating from the birth mother, which may cause significant distress to children. In other cases, non-birth mothers have been denied contact with children after separation, and have declined to proceed with Family Court proceedings, believing they have no legal standing to maintain contact with the children. We received a submission from a non-birth mother who separated from her partner, the birth mother of their 14-month-old child, and was subsequently prevented from having any contact with the child:

My grief has been overwhelming, but more than this, my child has lost a parent to which she had a significant bond, as well as her extended family. My parents were her grandparents, my sister was her godmother (her naming day was held at my parents' house) and my family was her family. I hope that one day down the track she will be able to rediscover this. It is with this history that I strongly advocate for the role of the birth mother's partner to be legally recognised, to ensure that the children in these families are provided with stability and ongoing relationships with those significant to them.³²

20 *Marriage Act 1958* pt VII.

21 *Re J and M* (2004) 32 Fam LR 668, 673.

22 Submission CP 93 (Anonymous).

23 Submission CP 179 (Lesbian Parents Project Group).

24 Submission CP 198 (Dr Elizabeth Short).

25 Submission PP2 36 (Mark Neeson).

26 Submission PP2 87 (Anonymous).

27 Australian Research Centre in Sex, Health and Society, La Trobe University, *Private Lives: a Report on the Health and Wellbeing of GLBTI Australians* (2006) 40.

28 *Ibid.*

29 Submission CP 179 (Lesbian Parents Project Group).

30 Submission CP 38 (Jacqueline Tomlins).

31 Submission CP 143 (The Bouverie Centre).

32 Submission CP 101 (Anonymous).

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We would like to see this law changed to recognise both parents legally, because this would acknowledge and confirm the reality of their family situation, and would assist to counteract the discrimination that exists in our society towards lesbian parented families. At the same time, these changes would give us, as the non biological grandparents, the security of knowing that we can be legal grandparents, to the child that we love, support and accept into our large extended family.

It is clearly not in the best interests of children to be detrimentally affected by instability in their parents' relationships, or to be separated from parents with whom they have established significant bonds.

Many submissions argued that legal recognition of non-birth mothers would provide children with affirmation and recognition of their family structure and would help other people to understand, recognise and respect their families. A submission made by a group of lesbian parents stated:

we feel that legal recognition of our role as parents to our children is essential for their safety and social wellbeing. It is critical to children that they have reflected back to them the value and integrity of their lives, including the legitimacy of their families ... Equal familial status sends a powerfully positive message to all social institutions that have an influence on our children's lives. It obliges them to acknowledge and respect the families our children live in.³³

RECOMMENDATIONS

NON-BIRTH MOTHER RECOGNITION

The principle which has guided the commission throughout this reference is the protection of the best interests of the child. This principle is central to the question of who should be recognised as the parents of children born to same-sex couples.

It is evident that children born to same-sex couples currently lack the full range of rights and protections that are afforded to children born to heterosexual couples. These children are legally disadvantaged as a result of the legislature's disapproval or neglect of their parents' relationship, in the same way as the law once punished children born outside marriage. This is unacceptable and is inconsistent with the *Convention on the Rights of the Child* which requires parties to 'take all appropriate measures to ensure the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members'.³⁴

It is also evident that the law is lagging behind social and attitudinal change and is contributing to ongoing stigmatisation of children born to same-sex couples. The failure of the law to recognise the parental status of non-birth mothers does not prevent lesbian women from

having children, but it does have detrimental effects for the children in several respects. Legal recognition also serves a very important symbolic purpose.

Legal recognition of non-birth mothers is also important to the children's extended family members, such as grandparents:

We write in support of our own adopted daughter, who has been in a committed relationship with her female partner for 5 years. Her partner has recently given birth to a baby daughter. Under present laws, our daughter, as the non biological mother, has no legal rights of adoption to her daughter, even though she has made a commitment to support and love their child. We would like to see this law changed to recognise both parents legally, because this would acknowledge and confirm the reality of their family situation, and would assist to counteract the discrimination that exists in our society towards lesbian parented families. At the same time, these changes would give us, as the non biological grandparents, the security of knowing that we can be legal grandparents, to the child that we love, support and accept into our large extended family.³⁵

We are the parents of a non-birth mother in a same sex relationship and the very proud grandparents to our very beautiful Grandson. We also have a lovely and loving relationship with his birth mum, as do our daughter's siblings—what a gift our 'daughter-in-law' has given us! ... Our hope is to see our daughter accepted as a mother, to be able to adopt their son, to be given the right to see her name on his Birth Certificate, to sign legal documents, to take all a parent's responsibilities (which she already does) and be recognised for it by law.³⁶

We also received submissions from some teachers, childcare workers and others who support reform to this area of the law:

I am a school teacher who has taught students who live in diverse families, including many non-traditional groupings such as families with single-sex parents. I observe that a wide variety of non-traditional families already exists in our society, and I believe that it is incumbent upon us to grant them equal recognition and equal protection before the law.³⁷

I am a heterosexual woman who works within the education industry where I manage an after-school sport program. I come into daily contact with children and their families and over two years ago met a lesbian couple and their daughter who participate in the program. Since meeting the family I have been deeply impressed by the couple's parenting and how well adjusted and 'normal' they all are. It is with concern that I learnt of the complications they face as a lesbian couple raising a child.³⁸

I am aware that R is not H's birth mother, but that the decision she and H made to create a family was as planned, considered, desired and welcomed as the decision my husband and I made. I can see no logical reason to disadvantage R's family, and in particular their daughter H, by not legally recognising and protecting them as a family unit with the same rights as my family. It can only be in H's best interests that she has certainty about her parents' legal status, just as my children have with their parents.³⁹

The following organisations expressed support for the recognition of non-birth mothers as parents in their submissions: Victorian Biotechnology Ethics Advisory Committee, ACCESS, Law Institute of Victoria, Equal Opportunity Commission of Victoria, Victoria Legal Aid and Fertility Society of Australia (FSA), which said:

The FSA supports the recommendation that the law should recognise the birth mother's female partner as a parent of the child.

This proposal will assist in the protection of the child's legal rights and re-enforce the partner's role as an integral member of the family unit.⁴⁰

As noted in Chapter 11, some people believe that a non-birth mother's relationship with a child should not be recognised by the law. Some submissions we received in response to our interim recommendations objected to the proposal to recognise non-birth mothers as legal parents, arguing that it is more appropriate for non-biological parents to obtain parenting orders from the Family Court, which are flexible and do not involve the substitution of one parent for another, as occurs with adoption.⁴¹

Others opposed the recommendation based on their views about parenting by same-sex couples and attitudes to homosexuality in general. These people are concerned that if laws which recognise the non-birth mother are introduced, this will condone and encourage a family type to which they are fundamentally opposed. We received numerous standard form submissions stating:

It is my firmly held belief, according to God's word (the Bible), that parents of children must be a properly married man and woman: husband and wife. Every child has the right to be born with both a father and a mother who will be actively involved in their day-to-day life (excepting unforeseen eventualities e.g. death of a parent) ... The deliberate creation of single-parent families, and the creation of same-sex parent families or multi-parent families is grossly immoral and must be totally prohibited.⁴²

The organisation Salt Shakers argued in its submission that the law should not be changed to support same-sex couples because they represent only a minority of the population. They also argued that recognition of non-birth mothers would lead to confusion for children:

There are many points of concern in recognising this parental 'right' of giving this 'status' to the birth mother's female partner. The effects of legalising lesbian parenthood clearly go beyond 'access' issues or financial benefits for the adults involved ... moving to legislate on this issue will only create more confusion and ambiguity within the law, especially in consideration of the biological father. The child is likely to have to deal with confusing issues of access, imposed upon him with the possibility of three (or more) legal parents. When relationships break down these issues will be compounded. The recognition of people as parents who do not have a biological link to the child is a retrograde step for the protection of the child.⁴³

The commission has taken these views into account, but has concluded that legal recognition of the status of non-birth mothers is vital for protecting the best interests of children. In this respect we agree with the sentiments expressed by Sarah Nichols in her submission:

One issue which seems to be of tremendous concern to those opposed to such recommendations is that to entrench

- 33 Submission CP 179 (Lesbian Parents Project Group).
- 34 Article 2. See further John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (2004) 28–34. The *Charter of Human Rights and Responsibilities Act 2006* s 17 also provides that every child has the right to protection of his or her best interests.
- 35 Submission PP2 34 (Peter and Catherine).
- 36 Submission PP2 205 (Anonymous).
- 37 Submission PP2 224 (Anonymous).
- 38 Submission CP 163 (Carol Osborn).
- 39 Submission PP2 208 (Jane Gibson).
- 40 Submission PP2 72 (Fertility Society of Australia).
- 41 Submissions PP2 58 (Helen Kane), PP2 170 (VSCAAF, Victorian Standing Committee on Adoption & Alternative Families).
- 42 The commission received 93 standard form submissions including this paragraph to Position Paper Two.
- 43 Submission PP2 189 (Salt Shakers).

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RECOMMENDATIONS

72. The law should recognise a birth mother's female partner (non-birth mother) as a parent of the child.
73. A non-birth mother should be presumed for all purposes to be a parent of the child where:
 - she is the domestic partner of the mother of the child
 - she consented to the treatment procedure by which the mother conceived the child, at the time the procedure was carried out.
74. The existence of a non-birth mother's consent at the relevant time should be presumed, but able to be rebutted. The presumption of parentage should otherwise be conclusive.

recognition of non-biological parents in law will be seen as support and even encouragement of same-sex relationships, gay marriage and the like. What needs to be very clearly understood is that my children already exist, and fundamentally it is their rights that are being denied. Not changing the law won't stop us forming partnerships, having families, or bearing children. What it will do is ensure that the children born into our families have the legal protection they deserve.⁴⁴

The commission therefore recommends that the status of children born to lesbian couples be brought into line with donor-conceived children born to heterosexual couples by giving legal recognition to non-birth mothers.

ADOPTION OR STATUTORY PRESUMPTION?

The commission gave detailed consideration to the most effective means to achieve legal parental status of non-birth mothers. As discussed in Chapter 11, the two principal ways in which legal parentage may be conferred on non-biological parents are the making of an adoption order and the application of a statutory presumption.⁴⁵

Some jurisdictions outside Victoria have legislated to recognise the parental status of non-birth mothers. In Western Australia and the Northern Territory, a woman who is in a de facto relationship with a woman who gives birth to a child, and who consented to the procedure by which the birth mother became pregnant, is conclusively presumed to be a parent of the child.⁴⁶ In the ACT, a woman who is the domestic partner of a woman who gives birth to a child is presumed to be a parent of the child if she consented to the procedure.⁴⁷ Western Australia, the ACT and Tasmania have all legislated to allow the same-sex partner of the parent of a child to apply to adopt the child. In Western Australia and the ACT a non-birth mother would only need to apply to adopt the child if she did not fall within the scope of the statutory presumptions in those jurisdictions, for example if she entered into a relationship with the child's birth mother after the child was born. The Victorian provisions that presume the male partner of a woman who has a child through donor insemination to be the father of the child are recognised federally for the purposes of the Family Law Act and Child Support (Assessment) Act.⁴⁸ The Victorian provisions which relate to the

parentage of a child born to a woman without a male partner are not recognised for the purposes of federal legislation,⁴⁹ and the commission is unable to make recommendations for reforms to federal law. Creating a deeming provision which mirrors the recognition of male partners as parents would therefore not result in full federal recognition of a female partner. Such a provision would be operative for the purposes of Victorian law, but would not make non-birth mothers liable for other responsibilities such as child support.⁵⁰

For these reasons the commission initially recommended, in Position Paper Two, that non-birth mothers gain legal recognition using a new form of adoption, called deemed adoption. Under this proposal, the non-birth mother would be deemed to be the adoptive parent of the child if the child was conceived with the assistance of a licensed clinic and the couple had complied with the requirements of the laws governing access to treatment. Women conceiving outside the clinic system would be able to apply to adopt the child through a modified and abridged process.

These interim recommendations were criticised in submissions on a number of grounds, including the following:

- The proposed mechanisms would set up a system which is different from that which applies to donor-conceived children born to heterosexual couples (who have automatic recognition under the *Status of Children Act 1974*) and would therefore contradict the principle of non-discrimination, and would consequently have a negative impact on children.
- The proposed mechanisms would not have universal coverage. They would create an artificial distinction between parents based on the place of conception. Some children would be disadvantaged because of the decisions made by their parents not to conceive in a clinic and not to apply to adopt them.
- Linking parental recognition to clinic treatment would be coercive—many women will continue to conceive without the assistance of clinics, even if they become eligible to access clinic services.
- Requiring the non-birth mother to receive counselling is unnecessary and patronising; other prospective parents do not need counselling to appreciate the gravity of the decision to parent.

- Adoption is an inappropriate mechanism because it was developed for a different purpose and is now considered an option of last resort. There are complex social and psychological implications associated with past adoption practices and the harmful effects secrecy has had on many adopted people.
- There was uncertainty about whether deemed adoption would be accepted by the courts.

For example, the Lesbian Parents Project Group wrote:

The proposal for either deemed, or abridged adoption is fundamentally discriminatory because it imposes a new discriminatory regime on lesbian parents that does not apply to heterosexual parents. Further, it creates at least three categories of lesbian families, those who can 'gain' deemed adoption if they use a clinic, those who may access abridged adoption if they don't use a clinic and those who don't use a clinic and don't apply for abridged adoption.

If all children in lesbian-parented families are to benefit from legal recognition of their families, we need a simple procedure that will cover everyone, not one that may depend on: a) individuals being able to access and make sense of a relatively high level of fairly complex information; and b) individuals' willingness to initiate processes that they may find onerous, intimidating and intrusive.⁵¹

It was apparent from the submissions received in response to the interim recommendations that many people in the community would not avail themselves of the proposed mechanism, should it become available in the future. This would leave many children without the legal protections the commission was seeking to have implemented.

The commission therefore reconsidered the proposal and concluded that recognition of non-birth mothers should be by statutory presumption. This is the same mechanism that applies to heterosexual couples who have donor-conceived children. The principal factor influencing the commission's decision is the importance of extending legal protection to all children born to same-sex couples, without the need to consider their parents' decisions about the place of conception. The commission does, however, remain concerned about the limitations of this approach under federal law; these concerns are discussed below.

Statutory Presumption

The commission believes a woman should be presumed to be a parent of a child where she is the domestic partner of the child's birth mother and has consented to the treatment procedure as a result of which the child was conceived. A domestic partner is a person who lives with another person as a couple on a genuine domestic basis, irrespective of gender.⁵²

Consent is the key requirement of the presumption, as it is for the presumption that applies to heterosexual couples. In this way, if a woman becomes pregnant without the knowledge or consent of her partner, her partner will not assume the legal responsibilities of parenthood once the child is born.

If a dispute were to arise about whether the presumption applied in a particular case, the commission believes the existence of consent should be presumed, but be able to be rebutted, as is the case in Western Australia and the ACT.⁵³ If a couple has used the services of a clinic, the signed consent form required will be clear evidence that the non-birth mother has consented to the treatment procedure. If the child was conceived without clinic assistance, the evidence that the non-birth mother consented to the child's conception could be provided in different ways, including registration as a parent of the child on the register of births (see Chapter 11). The burden of proving the operation of the presumption should be on the balance of probabilities. The onus of proof may depend on who is seeking to rely on the presumption.

Our recommended provision would only apply to a woman who is in a relationship with the birth mother at the time of the procedure by which the birth mother becomes pregnant. If the birth mother is single at the time of conception and subsequently forms a relationship with a woman, either before or after the child's birth, her partner will not be recognised as a parent of the child as a consequence of the presumption.

This is the same outcome for single women who enter into a relationship with a man following the conception or birth of a child conceived using ART. In such cases, if the couple agrees that the new partner will take on parenting responsibilities for the child, the only way to formalise such an arrangement is to obtain parenting orders from the Family Court. In the case of heterosexual couples, the new partner has the option of applying to adopt the child (step-parent adoption). As recommended in Chapter 10, the commission is of the view that step-parent adoption should also be available to the same-sex partner of a child's parent, to bring their options into line with those of heterosexual couples.⁵⁴

- 44 Submission PP2 204 (Sarah Nichols).
- 45 There may be other mechanisms available. For example, in Canada a non-birth mother has been recognised as a parent of a child under the *parens patriae* jurisdiction of the Ontario Court of Appeal: *AA v BB* [2007] ONCA 2. The Court found that 'It is contrary to [the child's] best interests that he is deprived of the legal recognition of the parentage of one of his mothers. There is no other way to fill this deficiency except through the exercise of the *parens patriae* jurisdiction.' (Rosenberg JA)[37].
- 46 *Artificial Conception Act 1985* (WA) s 6A; *Status of Children Act 1979* (NT) s 5DA.
- 47 *Parentage Act 2004* (ACT) s 11(4).
- 48 *Family Law Act 1975* (Cth) s 60H(1); *Family Law Regulations 1984* (Cth) r 12C, sch 6.
- 49 This is because the federal government has not prescribed any relevant Victorian laws (*Status of Children Act* s 10F) pursuant to s 60H(2) or (3) of the *Family Law Act 1975* (Cth).
- 50 In the case of *B v J* (1996) 28 Fam LR 579, Fogarty J held that a person who did not fall within the scope of the definition of a parent in s 60H of the *Family Law Act* was not a parent for the purposes of the *Child Support (Assessment) Act* and was therefore not liable to pay child support.
- 51 Submission PP2 252 (Lesbian Parents Project Group).
- 52 *Statute Law Amendment (Relationships) Act 2001*; *Statute Law Further Amendment (Relationships) Act 2001*.
- 53 *Artificial Conception Act 1985* (WA) s 6A(2); *Parentage Act 2004* (ACT) s 11(6).
- 54 The nature and limitations of step-parent adoption are discussed in further detail in Chapter 10.

12

Chapter 12

Recognising Non-birth Mothers



RECOMMENDATIONS

75. The presumption of parentage should apply in respect of children born both before and after the introduction of the presumption. However, it should not affect any property rights or interests which existed prior to the introduction of the presumption.
76. The Supreme Court should be empowered to make declarations of parentage in relation to donor-conceived children to whom presumptions of parentage apply.
77. Consequential amendments should be made to the *Births, Deaths and Marriages Registration Act 1996* and, where appropriate, to all other Victorian legislation which contains provisions relating to parent-child relationships, to recognise that a child may have two parents of the same sex.
78. The Attorney-General should work with the Standing Committee of Attorneys-General and Family Law Council to seek reform of the *Family Law Act 1975* to ensure that non-birth mothers are recognised as parents for the purposes of that Act and the *Child Support (Assessment) Act 1989*.

Retrospective Application

The commission also considered whether the statutory presumption to recognise non-birth mothers should apply in respect of children born before the introduction of the presumption. That is, should legal parental status, and all its accompanying obligations, be imposed on non-birth mothers of children who have already been born? The women we heard from who are in this situation have a strong desire to be recognised as legal parents. However, some women may never have intended to take on legal responsibilities for children, and/or may now be separated from the child's birth mother and have no ongoing relationship with the child. The presumption could also potentially affect past distributions of deceased estates or wills executed before the introduction of the amendments.

The commission was guided in its consideration of this issue by presumptions of parentage introduced in the past. There are several examples of parental status being conferred on a person retrospectively. When the presumption that applies to the non-biological parent of a donor-conceived child born to a heterosexual couple was introduced in 1984, it applied in respect of all children born before the commencement of the new provisions.⁵⁵ Similarly, when the status of illegitimacy was abolished in 1974, it had retrospective effect.⁵⁶ In Western Australia and the ACT, where the non-birth mother is presumed to be a parent of the child, the presumption of parentage applied in respect of children born before its introduction.⁵⁷

The commission has concluded that the presumption of parentage should apply in respect of children who have already been born. Not only is this consistent with the operation of equivalent presumptions introduced in the past, it would also apply to a large number of women who currently lack legal status as parents, and would give their children additional legal protection. Concerns about the distribution of deceased estates or passing of property interests can be addressed by declaring that any property rights or interests which existed prior to the commencement of the provision remain unaffected.⁵⁸

PARENTAGE DECLARATIONS

The Supreme Court is currently able to make declarations of paternity where it is satisfied that the relationship of father and child exists.⁵⁹ Once obtained, a declaration of paternity can be used to prove that a man has parental responsibility in respect of a child. As already noted, a person is conclusively presumed to be a parent of a child for the purposes of the Family Law Act if a declaration of parentage has been made by a state court.⁶⁰

The Supreme Court should also be empowered to make a declaration of parentage to confirm the operation of a presumption in respect of donor-conceived children. Such a declaration would give rise to a conclusive presumption that a non-birth mother is a parent for the purposes of the Family Law Act. However, whether this presumption would actually be applied to a non-birth mother would depend on whether the Family Court chose to interpret section 60H as the exclusive source of parentage of a child born through the use of donated gametes. If this were the case, the declaration of parentage would not be relevant and would not be sufficient to confer liability on the non-birth mother to pay child support. We discuss section 60H in more detail in Chapter 13.

This same analysis applies to the presumption of parentage that arises from being named as a parent on the register of births. A person is presumed for the purposes of the Family Law Act to be a parent of a child if he or she is registered on a state birth register.⁶¹ If a non-birth mother is able to be registered as a child's parent (as we recommend she should), it would depend on the court's interpretation of section 60H as to whether this particular presumption would be operative. Again, registration as a parent would not be sufficient to confer liability on the non-birth mother to pay child support.

CONSEQUENTIAL AMENDMENTS

If the commission's recommendations are implemented, it will be necessary for all Victorian legislation to be reviewed to ensure all relevant legislation recognises that a child may have two parents of the same sex. Although many pieces of Victorian legislation already refer to a child's 'parent' or 'parents', there are also numerous references to a child's 'mother' and 'father'. We recommend that legislation referring to the parents of a child use gender-neutral language, unless gender-specific terms are necessary for a specific purpose.

FEDERAL RECOGNITION

As discussed above, the primary limitation of using a statutory presumption to give legal status to non-birth mothers is that it would not be directly recognised for the purposes of federal law, in particular the *Child Support (Assessment) Act 1989*. This is because the definition of parent in that Act does not pick up the statutory recognition of non-birth mothers in any state legislation (by contrast, it does pick up the recognition of non-biological parents in heterosexual relationships).

The commission has concerns about the lack of coverage a statutory presumption would afford under federal law. We are mindful of the complexities which arise from the interaction between different state and federal definitions of a 'parent' and believe that consistency is an important objective for protecting the best interests of children. We do, however, concede that the scope of state law dealing with parentage is inherently limited (as is the role of a state law reform commission), and acknowledge the incremental nature of law reform in an area such as this.

Several Family Court judges have identified the need for the law in this area to be clarified.⁶² These comments have generally been made in the context of grappling with the status of donors whose sperm has been used by women in same-sex relationships, but they are equally applicable to the non-recognition of non-birth mothers. In *B and J* Justice Fogarty said:

*It is a reality of life that children are born as a result of a variety of artificial conception procedures, out of non-traditional circumstances, and into non-traditional families. Legislation which deals with the personal and financial responsibility for such children should be clear and exhaustive and should recognise the reality of these situations.*⁶³

In *Re Patrick*, Justice Guest discussed the broad and diverse nature of contemporary families and noted the inadequacy of section 60H of the Family Law Act for gay- and lesbian-parented families. He called on the legislature 'to reassess s 60H of the Act and to consider the ramifications of its application' for such families.⁶⁴

*Having regard to the issues addressed in this judgment, it is time that the legislature considered some of the matters raised, including the nature of parenthood, the meaning of 'family', and the role of the law in regulating arrangements in the gay and lesbian community. The child at the centre of this dispute is part of a new and rapidly increasing generation of children being conceived and raised by gay and lesbian parents. However, under the current legislative regime, Patrick's biological and social reality remains unrecognised. While the legislature may face unique challenges in drafting reform that acknowledges and protects children such as Patrick and the family units to which they belong, this is not a basis for inaction.*⁶⁵

In *Re Mark*, Justice Brown commented that it would be useful for Justice Guest's recommendations 'to be considered, and the anomalies, inconsistencies and uncertainties which bedevil this area removed'.⁶⁶

The commission echoes these calls for legislative clarification. Reform of federal law is essential to protect the rights and interests of children born to same-sex couples. The Child Support (Assessment) Act should ensure non-birth mothers are subject to the same child support obligations as all other parents. The Family Law Act should make it clear that non-birth mothers share parental responsibility for children. If our recommendations are implemented, four Australian jurisdictions will have recognised the legal status of non-birth mothers, providing a sound platform for federal recognition.⁶⁷

We also note that the Human Rights and Equal Opportunity Commission is currently reviewing federal legislation to identify where there may be discrimination against same-sex couples and their children in the context of financial benefits and entitlements.⁶⁸ This review is likely to identify a range of other ways in which the failure of federal law to recognise the relationship between children and their non-birth mothers disadvantages children.⁶⁹

We urge the Victorian Attorney-General to lobby for reform in this area, and recommend that the specific issue of the recognition of non-birth mothers under federal law be put on the agendas of the Standing Committee of Attorneys-General and the Family Law Council.

55 *Status of Children Act 1974* s 10B(1).

56 *Status of Children Act 1974* s 3(4).

57 *Artificial Conception Act 1985* (WA) s 4(1); *Parentage Act 2004* (ACT) s 8(2).

58 See, for example, *Status of Children Act 1974* s 10B(2), *Artificial Conception Act 1985* (WA) s 4(2).

59 *Status of Children Act 1974* s 10.

60 *Family Law Act 1975* (Cth) s 69S.

61 *Family Law Act 1975* (Cth) s 69R.

62 See Justice Kay and Mai Lin Yong, 'Science Meets Family Law: Genes, Sex and Jurisprudence: Homosexual Parents in the Family Court: The Past 30 Years', Conference Handbook, *Explore Family Law in 2004: 11th National Family Law Conference: Beyond the Horizon*, 26–30 September 2004, 217.

63 *Re B and J* (1996) 21 Fam LR 186, 198.

64 *Re Patrick* (2002) 28 Fam LR 579, 652.

65 *Re Patrick* 28 Fam LR 579, 653.

66 *Re Mark* (2003) 31 Fam LR 162, 174.

67 The necessary reform would involve amendment of s 60H of the Family Law Act and the inclusion of the relevant section of the Status of Children Act in the list of prescribed laws set out in the schedules to the Family Law Regulations 1984.

68 See *Same-Sex: Same Entitlements: A National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, <www.hreoc.gov.au/samesex/index.html> at 22 June 2006.

69 Some of the submissions to the inquiry raise the issue of the lack of recognition of same-sex parents under federal law: see Castan Centre for Human Rights Law, Monash University (submission 126), Human Rights Law Resource Centre (submission 160), Victorian Gay and Lesbian Rights Lobby (submission 256): <www.hreoc.gov.au/samesex/submissions.html> at 11 August 2006.

