

Victorian
Law Reform
Commission

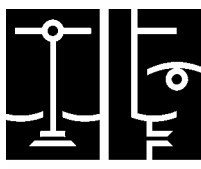
Assisted Reproductive Technology & Adoption
Position Paper Two: Parentage

Contributors

Reference Team	Mary Polis Kate Foord Sonia Magri Professor Marcia Neave AO
Editor	Alison Hetherington

Victorian Law Reform Commission

Chairperson	Professor Marcia Neave AO*
Full-time Commissioner	Judith Peirce
Part-time Commissioners	Paris Aristotle AM* Her Honour Judge Jennifer Coate The Honourable Justice David Harper Her Honour Judge Felicity Hampel* Professor Sam Ricketson* The Honourable Vice-President Iain Ross AO The Honourable Justice Tim Smith
Chief Executive Officer	Padma Raman
Operations Manager	Kathy Karlevski
Policy and Research Team Leaders	Angela Langan Mary Polis
Policy and Research Officers	Samantha Burchell Joanna Carr Susan Coleman Claire Downey Daniel Evans Kate Foord Sonia Magri Dr Zoë Morrison Priya SaratChandran Alison Hetherington Simone Marrocco Julie Bransden Vicki Christou Lorraine Pitman
Communications Officer	
Project Officer	
Librarian	
Administrative Officers	



Victorian Law Reform Commission

GPO Box 4637
Melbourne Victoria 3001
Australia
DX 144 Melbourne, Vic

Level 10
10–16 Queen Street
Melbourne Victoria 3000
Australia

Telephone +61 3 8619 8619
Facsimile +61 3 8619 8600
TTY 1300 666 557
1300 666 555 (within Victoria)
law.reform@lawreform.vic.gov.au
www.lawreform.vic.gov.au

*ART Division, constituted under section 13 of the *Victorian Law Reform Commission Act 2000*.
© July 2005 Victorian Law Reform Commission. This work is protected by the laws of copyright. Except for any uses permitted under the *Copyright Act 1968* (Cth) or equivalent overseas legislation, no part of this work may be reproduced, in any manner or in any medium, without the written permission of the publisher. All rights reserved.

Designed by Andrew Hogg Design, Linton (Aust) Pty Ltd

National Library of Australia

Cataloguing-in-Publication

Assisted reproductive technology & adoption: legal parentage: access to information and adoption. Position paper 2.

ISBN 0 9757006 3 4

1. Human reproductive technology - Law and legislation - Victoria. 2. Adoption - Law and legislation - Victoria. 3. Surrogate motherhood - Victoria. I. Title.

346.945017

Call for Submissions

It is important to us that all members of the community have the opportunity to express their views on this important area of the law. The Victorian Law Reform Commission therefore invites your comments in relation to the interim recommendations made in this Position Paper, and seeks your responses to the questions that are raised, before we write our Final Report to the government. If you would like a copy of the *Assisted Reproductive Technology & Adoption: Consultation Paper*, or any of our other publications, please contact us on (03) 8619 8619. All commission publications are also available on our website: <www.lawreform.vic.gov.au>.

HOW TO MAKE A SUBMISSION

A submission may be made in writing or by phone or in person.

You may choose to comment on all of the recommendations or alternatively only those recommendations in which you have expertise or a specific interest. There is no particular form or format you need to follow.

You may also choose to answer the questions set out in this paper. This list of questions is also available on the commission's website at <www.lawreform.vic.gov.au>.

Written submissions may be forwarded:

- by mail—Victorian Law Reform Commission, GPO Box 4637, Melbourne Vic 3001;
- email—law.reform@lawreform.vic.gov.au; or
- fax—(03) 8619 8600.

CONFIDENTIALITY

Submissions are public documents and may be accessed by any member of the public. If you wish to retain confidentiality you must clearly advise us whether:

- you wish your submission to be quoted or sourced but your name not to be disclosed (anonymous); or
- you do not wish your submission to be quoted or sourced to you in a commission publication (confidential).

DEADLINE FOR SUBMISSIONS

Wednesday 31 August 2005

Contents

TERMS OF REFERENCE	V
ABBREVIATIONS	VI
TERMINOLOGY	VII
CHAPTER 1	1
Introduction	1
What is Covered in this Position Paper	1
The Process	2
CHAPTER 2: LEGAL PARENTAGE	4
Background—Legal Parentage	4
Parental Obligations and Responsibility	5
Birth Registration	6
Who is a Parent?	6
Social Parents	9
Opposition to Transfer of Legal Parentage	10
Principles	12
CHAPTER 3: STATUS OF THE NON-BIRTH MOTHER	13
Present Law	13
Problems with the Present Law	14
Interim Recommendations	17
CHAPTER 4: STATUS OF DONORS	25
Introduction	25
Present Law	26
Problems with the Current Law	28
Interim Recommendations	28
CHAPTER 5: ACCESS TO INFORMATION	35
Introduction	35
Present Law	35
Interim Recommendations	38
CHAPTER 6: ADOPTION	46
Introduction	46
Present Law	47
Problems with the Present Law	49
Interim Recommendations	50
Intercountry Adoption	53

Terms of Reference

The Victorian Law Reform Commission has nine members: the Chairperson Professor Marcia Neave, the Honourable Justice Tim Smith, the Honourable Justice David Harper, the Honourable Vice-President Iain Ross, her Honour Judge Jennifer Coate, her Honour Judge Felicity Hampel, Professor Sam Ricketson, Ms Judith Peirce and Mr Paris Aristotle.

On 11 October 2002 the Attorney-General, the Honourable Rob Hulls MP, gave the commission a reference on the following terms:

1. The Victorian Law Reform Commission is to enquire into and report on the desirability and feasibility of changes to the *Infertility Treatment Act 1995* and the *Adoption Act 1984* to expand eligibility criteria in respect of all or any forms of assisted reproduction and adoption; and make recommendations for any consequential amendments which should be made to the:
 - *Status of Children Act 1974*;
 - *Births Deaths and Marriages Registration Act 1996*;
 - *Human Tissue Act 1982*;
 - *Equal Opportunity Act 1995*; and
 - any other relevant Victorian legislation.
2. In making its enquiry and report, the VLRC is to take into account, to the extent it decides is necessary or desirable:
 - (i) social, ethical and legal issues related to assisted reproduction and adoption, with particular regard to the rights and best interests of children;
 - (ii) the public interest and the interests of parents, single people and people in same-sex relationships, infertile people and donors of gametes;
 - (iii) the nature of, and issues raised by, arrangements and agreements relating to methods of conception other than sexual intercourse and other assisted reproduction in places licensed under the *Infertility Treatment Act 1995*;
 - (iv) the penalties applicable to persons, including medical and other personnel, involved in the provision of assisted reproduction (whether through a licensed clinic or otherwise); and
 - (v) the laws relating to eligibility criteria for assisted reproduction and adoption and other related matters which apply in other states or countries and any evidence on the impact of such laws on the rights and best interests of children and the interests of parents, single people, people in same-sex relationships, infertile people and donors of gametes.
3. In addition, the VLRC is to consider:
 - Whether changes should be made to the Act to reflect rapidly changing technology in the area of assisted reproduction.
 - The meaning and efficacy of sections 8, 20 and 59 in relation to altruistic surrogacy, and clarification of the legal status of any child born of such an arrangement.

On making its report the VLRC is to consider the relationship between changes to Victorian legislation and any relevant Commonwealth legislation, including the *Family Law Act 1975* and the *Sex Discrimination Act 1984*, as well as any international conventions and instruments to which Australia is a signatory.

Abbreviations

AC	Law Reports, House of Lords, Appeal Cases
ACT	Australian Capital Territory
art/s	article/s
ART	assisted reproductive technologies
Cth	Commonwealth
Del Code Ann	Delaware legislative code
div	division
ed	edition
(ed/s)	editor/s
eg	for example
Fam LR	Family Law Reports
FLC	Australian Family Law Cases
FLR	Federal Law Reports
ie	that is
ITA	Infertility Treatment Authority
IVF	in-vitro fertilisation
n	footnote
NH Rev Stat Ann	New Hampshire legislative code
NM Stat Ann	New Mexico legislative code
NSW	New South Wales
NT	Northern Territory
para	paragraph
pt	part (of a statute)
s	section (ss pl)
sch/s	schedule/s
UN	United Nations
UN GAOR	United Nations General Assembly
Vic	Victoria
WA	Western Australia

Terminology

Social parent

Not biologically related and not legally recognised. Includes step-parents, foster parents and same-sex partners of a biological parent.

Legal parent

A person who is recognised under law as having parental responsibility for a child.

Birth parent

The person who conceived a child and saw the pregnancy through to birth.

Partner

A person who is married or in a de facto relationship with another person, regardless of gender.

Birth mother

The woman who carried and gave birth to the child.

Non-birth mother

The female partner of a woman who has a child and who is that child's social parent.

Donor

The person who provides sperm or eggs to assist another person to conceive a child.

Chapter 1

INTRODUCTION

1.1 This is the second in a series of position papers published by the Victorian Law Reform Commission in its reference on assisted reproductive technologies (ART) and adoption. The first Position Paper¹ contained the commission's interim recommendations on access to infertility treatment. These recommendations proposed the expansion of eligibility criteria for ART to allow women without male partners to access all forms of treatment. This paper addresses the question of who should be recognised as the legal parents of children born as a result of the use of donated gametes (in particular, of children born to women without male partners), the rights of donor-conceived children to information about their genetic origins, and who should be eligible to adopt children. The third position paper will discuss the law governing surrogacy.

Gametes are sperm or ova (a woman's eggs).

1.2 This paper makes interim recommendations which indicate the direction of the commission's thinking. It is not intended to be a comprehensive report on the findings of our review of the law in this area. The interim recommendations are based on careful consideration of the issues raised in the *Assisted Reproductive Technology & Adoption: Consultation Paper*, published in December 2003;² extensive research by the commission's research and policy staff; and consideration of issues raised in (and responses to) three occasional papers published by the commission.³ Most importantly, the recommendations have been informed by extensive public consultation, roundtables and the 252 submissions received in response to the Consultation Paper. The commission has weighed all of this information in reaching its interim recommendations.

1.3 The commission will take account of responses to its interim recommendations in preparing the Final Report. The Final Report will contain full details of our consultation process and research findings, a complete list of submissions received and a comprehensive discussion of the broad range of arguments and beliefs about the regulation of assisted reproduction.

WHAT IS COVERED IN THIS POSITION PAPER

1.4 This Position Paper includes:

- a brief explanation of our consultation process;
- a discussion of the issues relevant to legal parentage, access to donor information and eligibility to adopt children; and
- a summary of the findings and arguments that have led the commission to its interim recommendations.

1.5 The paper also seeks:

1 Position Paper One is available at <www.lawreform.vic.gov.au> or by calling (03) 8619 8619.

2 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Consultation Paper* (2003).

3 Dr Ruth McNair, *Outcomes for Children Born of A.R.T. in a Diverse Range of Families* (2004); John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (2004); Adjunct Professor John Seymour and Sonia Magri, *A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review* (2004).

- your comments on the interim recommendations; and
- responses to questions about the practical operation of the system suggested.

THE PROCESS

CONSULTATION PAPER

1.6 In December 2003, the commission published *Assisted Reproductive Technology & Adoption: Consultation Paper*.⁴ The Consultation Paper was published to inform people of the scope and nature of our inquiry, invite public comment, and provide people with the necessary background to make informed submissions. It also raised questions which the commission identified as being important to the inquiry. It sought information about the effects of current laws and practices governing assisted reproduction and people's opinions on the range of issues we have been asked to consider.

SUBMISSIONS

1.7 Public interest in this project has been intense and has involved people from all sectors of society. The commission received 252 submissions in response to its Consultation Paper. All of the issues raised in these submissions were carefully considered and weighed and taken into account in decisions about the interim recommendations contained in this Position Paper.

1.8 All submissions, including those in response to these interim recommendations, will be considered in making the final recommendations to government, which will be published in our Final Report.

OCCASIONAL PAPERS

1.9 The interim recommendations take account of the information presented in three occasional papers published by the commission. These papers considered outcomes for children born of ART in a diverse range of families,⁵ the implication of the *Convention on the Rights of the Child* for children conceived through ART,⁶ and regulatory models in Australia, Canada, the United Kingdom, and the United States.⁷ These papers were launched on 8 September 2004 at a public forum. The forum was advertised widely and was attended by over 150 people who made many valuable comments.

1.10 More information about these papers, and/or copies of them, may be obtained from the commission's website, or by contacting us on (03) 8619 8619. The papers are also freely available at all university and legal libraries.

FINAL REPORT

1.11 The recommendations made in the Final Report will be made by the commissioners, who take account of the information received and views expressed in our public consultations. The complexity of the issues considered in this paper and the wide variety of views which people hold about them has made it particularly important to give people opportunities to have their

4 Victorian Law Reform Commission (2003), above n 1.

5 McNair (2004), above n 3.

6 Tobin (2004), above n 3.

7 Seymour and Magri (2004), above n 3.

say. The commission will consider your responses and comments on the position papers when deciding what should be included in the Final Report to the government.

1.12 We are planning to complete the Final Report in early 2006. It will then be tabled in parliament by the Attorney-General.

Chapter 2

Legal Parentage

INTRODUCTION

2.1 The use of donated sperm and eggs in the conception of children has created challenges for the law governing who is recognised as the legal parent of a child. Legislation introduced in Victoria in 1984⁸ and federally in 1987⁹ clarified the situation for children born to married or heterosexual de facto couples. However, the law that relates to children born to women without male partners remains deficient, unclear and confusing.

2.2 In Position Paper One the commission discussed the use of ART by women without male partners who wish to have children. We recommended the removal of restrictions on access to clinic-based ART services for these women to enable more women and children to benefit from the safeguards which apply when treatment is provided in a licensed clinic. We also discussed the fact that clinic-based ART is currently available to clinically infertile women, and that children have been and are likely to continue to be born as a result of self-insemination carried out by single women and women in same-sex relationships outside the clinic system. Even if the law is not changed to enable more women to undergo ART in clinics, it is necessary to clarify the parental status of the people involved in the conception of these children.

2.3 Our terms of reference ask us to make recommendations for any consequential amendments to Victorian legislation if eligibility criteria for ART are expanded. In doing so, we are to have particular regard for the rights and best interests of children. In this paper, we examine the law that governs the legal parentage of donor-conceived children born to women without male partners. Before turning to this issue, we explain what legal parentage is and why it is important.

BACKGROUND—LEGAL PARENTAGE

2.4 The parent–child relationship gives rise to a range of important legal obligations and entitlements for parents, children and third parties. Legal parentage status is principally intended to protect children; the law confers powers on parents to enable them to fulfil their duties to care for their children.¹⁰

2.5 It is important to remember that legal parent status does not itself determine whether someone will have a relationship or contact with a child. The Family Court is able to make residence and contact orders in favour of a person who is not the legal parent of a child, including a person who has no biological connection to the child, if that person is concerned with the care, welfare or development of the child.¹¹ Similarly, legal parents may have no contact with their child, although their legal obligations will persist.

8 *Status of Children (Amendment) Act 1984* (Vic).

9 *Family Law Amendment Act 1987* (Cth) s 24 (inserted s 60B, which was subsequently replaced by the current s 60H).

10 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

11 *Family Law Act 1975* (Cth) s 65C(c).

PARENTAL OBLIGATIONS AND RESPONSIBILITY

2.6 Parental obligations are derived from federal and state legislation as well as the common law. Today, the most significant sources of parental responsibility are the *Family Law Act 1975* (Cth) and *Child Support (Assessment) Act 1989* (Cth). Under the Family Law Act, each of the parents of a child has parental responsibility.¹² Parental responsibility means ‘all the duties, powers, responsibilities and authority which, by law, parents have in relation to children’.¹³ These duties and powers include the duty to provide for the day-to-day and long-term care of the child, the power to make decisions on behalf of the child (eg decisions about the child’s education, care and medical treatment), and the power to control the child’s property.¹⁴

2.7 The parents have the primary duty to maintain the child financially.¹⁵ If the parents separate, the parent who has ongoing day-to-day care of the child can apply for child support to be paid by the other parent. Only a parent (which means a parent as defined in the Family Law Act) can be ordered to pay child support for a child aged under 18.

2.8 Whether parental responsibility under these federal Acts applies to a particular person depends on whether he or she is considered to be a parent under the definitions and presumptions contained in the legislation. In some circumstances, these definitions and presumptions rely on and recognise state law and in other circumstances state law has no effect.

2.9 A broad range of obligations and entitlements that arise out of the parent–child relationship are also created under Victorian law.¹⁶ Such obligations and entitlements include:

- entitlement to compensation under statutory schemes such as workplace or transport accident and victims of crime compensation;¹⁷
- entitlement to a share of a person’s estate if he/she die without making a will;¹⁸
- entitlement to distribution of a person’s superannuation after his/her death;¹⁹
- responsibility of a parent for the supervision of a child (eg to be present with the child at certain times, to consent to the child’s involvement in a dangerous activity, not to permit a child under 15 to engage in employment);²⁰
- obligation to cause the child to attend school;²¹

12 *Family Law Act 1975* (Cth) s 61C(1).

13 *Family Law Act 1975* (Cth) s 61C(2).

14 See HA Finlay, Rebecca Bailey-Harris and Margaret FA Otlowski, *Family Law in Australia* (5th ed, 1997) [7.53–7.70]; LexisNexis, *Halsbury’s Laws of Australia* <www.lexisnexis.com.au> at 19 May 2005, Title 205, Family Law, ch III, Children [205–1670].

15 *Family Law Act 1975* (Cth) s 66C; *Child Support (Assessment) Act 1989* (Cth) s 3.

16 In some instances these obligations and entitlements are also conferred on people other than parents and children: see para 2.23.

17 *Accident Compensation Act 1985* (Vic) ss 5, 82, 92A; *Transport Accident Act 1986* (Vic) ss 3, 59; *Victims of Crime Assistance Act 1996* (Vic) s 3, div 3.

18 *Administration and Probate Act 1958* (Vic) s 52(1)(f).

19 If the person is a state public servant: *Police Regulation Act 1958* (Vic) s 23(2), 24, 28, 45; *Country Fire Authority Act 1958* (Vic) s 110(1)(e), s 110(1)(gb); *Emergency Services Superannuation Act 1986* (Vic) s 20E(1), 20E(2); *Parliamentary Salaries and Superannuation Act 1968* (Vic) s 18(6); *State Superannuation Act 1988* (Vic) s 36, 37, 48, 72.

20 *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) s 10; *Firearms Act 1996* (Vic) s 20(c), 58A(c); *Liquor Control Reform Act 1998* (Vic) s 119(5)(a), 123(2)(a), 123(2)(f)(ii); *Child Employment Act 2003* (Vic) s 9, 11. A parent is also deemed to be the owner of a pet owned by a child for the purposes of the *Domestic (Feral and Nuisance) Animals Act 1994* (Vic) s 4.

21 *Education Act 1958* (Vic) s 53; *Community Services Act 1970* (Vic) s 74C.

- obligation to provide an immunisation status certificate to the child's primary school;²²
- power to consent to the removal of tissue from a child's body (while living or upon death) or to a blood transfusion;²³
- power to appoint a person to be the guardian of one's child after one's death;²⁴
- power to take action on behalf of the child (eg to make a complaint or application about family violence or discrimination, or to consent to an award of damages in favour of a child);²⁵
- power to consent to the adoption, permanent care or short-term care of the child;²⁶
- entitlement to be consulted and heard on proceedings concerning the care and welfare of the child;²⁷
- entitlement to be present when a child is being questioned by the police, or is being drug tested;²⁸ and
- obligation to disclose existence of a parent-child relationship for the purpose of certain business activities and prohibition or permission of carrying on business activities with prescribed family members.²⁹

Whether these obligations or entitlements apply to a particular person depends on whether he or she falls within the scope of the definitions contained in the relevant Victorian legislation.

BIRTH REGISTRATION

2.10 The legal parents of a child are entitled and required to be registered on the Registry of Births, Deaths and Marriages. If a person is named as the parent of a child on the births register and the child's birth certificate, then he or she is presumed to be the parent of the child. The birth certificate can be produced as evidence of the relationship between the parent and the child, and can be used to establish a range of legal obligations and entitlements. The register can be corrected if a person who is not in fact the legal parent of the child has been named as a parent on the register. Being named on the register is not of itself the source of legal parentage, it is merely a formal recording of the existence of a legal relationship between a parent and child.

WHO IS A PARENT?

2.11 In the absence of any statutory provisions to the contrary, a child's legal parents are his or her biological parents.³⁰ Some children have legal parents who are not biologically related to them

22 *Health Act 1958* (Vic) s 144(1).

23 *Human Tissue Act 1982* (Vic) s 15(1).

24 *Marriage Act 1958* (Vic) s 135(3), 135(4), 135(5).

25 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(c)(ii); *Equal Opportunity Act 1995* (Vic) s 104(1)(c)(ii); *County Court Act 1958* (Vic) s 39A(1).

26 *Adoption Act 1984* (Vic) s 33; *Community Services Act 1970* (Vic) s 13A; *Children and Young Persons Act 1989* (Vic) s 23, 76.

27 *Children and Young Persons Act 1989* (Vic) s 18(1)(a)(ii), 18(1)(c)(ii), 23(1); *Human Services (Complex Needs) Act 2003* (Vic) s 24(2), 26, 28.

28 *Crimes Act 1958* (Vic) s 464E(1)(a); *Major Crime (Investigative Powers) Act 2004* (Vic) s 34(4), 83(5), 113(5); *Sports Drug Testing Act 1995* (Vic) s 11.

29 *Sale of Land Act 1962* (Vic) s 33(6), 33(7); *Estate Agents Act 1980* (Vic) s 55(8); *Legal Practice Act 1996* (Vic) s 295, 317; *Meat Industry Act 1993* (Vic) s 16; *Gambling Regulation Act 2003* (Vic) s 1.4, 7.7.4.

30 Finlay, Bailey-Harris and Otlowski (1997), above n 14, [7.7]; *B v J* (1996) 21 Fam LR 186; *Tobin v Tobin* (1999) FLC 92-848; *ND v BM* (Unreported, Family Court of Australia, Kay J, 23 May 2003); *Re Mark* (2003) 179 FLR 248.

(eg adoptive parents), and other children are cared for by people who are neither biologically related to them nor regarded as their legal parents (eg step-parents or foster carers).

2.12 The law has evolved over the years to reflect the changing nature of families and relationships. Lawmakers have recognised the importance of responding to social change to ensure the needs of children are met and people do not avoid the responsibilities the community has decided to impose on parents. The law has been expanded to recognise a broader range of legal parents through adoption legislation and statutory presumptions.

CHILDREN BORN OUTSIDE MARRIAGE

2.13 Historically, children born outside marriage were regarded as illegitimate and were unable to inherit from their parents. The status of illegitimacy was abolished, in 1974, removing the legal disadvantages suffered by children born outside marriage. These reforms were based on the view that children should not be stigmatised by the law because their parents were unmarried. Children born outside marriage now have the same legal entitlements and protections in respect of their parents as children born to married couples.³¹

ADOPTED CHILDREN

2.14 The legal concept of adoption was introduced in Victoria in 1928,³² at a time when society was intolerant of exnuptial births and neither contraception nor abortions were widely available. It was expected that unmarried mothers would relinquish their children to be cared for by others, often by childless married couples. Informal adoption arrangements existed prior to the *Adoption Act 1928* (Vic) but parliament believed it was necessary to formalise the process to protect all parties involved.³³ Adoption was the legal and formal means of transferring parental status from the child's birth parents to the people who would care for the child.

2.15 An adoption order extinguishes the legal parentage of the child's birth parents and confers parental status on the adoptive parents.³⁴ This obliges and enables adoptive parents to assume all of the obligations and responsibilities of caring for a child, and provides the child with the full range of legal rights and entitlements in respect of their parents.

2.16 An adoption order made under the *Adoption Act 1984* (Vic) is recognised for the purposes of the *Family Law Act*³⁵ and the *Child Support (Assessment) Act*.³⁶ It also entitles the adoptive parents to be registered as the parents on the child's birth certificate.

DONOR-CONCEIVED CHILDREN—MARRIED COUPLES

2.17 With the advent of IVF and the increased use of donated gametes to conceive children, the *Status of Children Act 1974* (Vic) was amended to clarify the legal status of donor-conceived children. A married or heterosexual de facto couple who have a child through ART are legally the

31 *Status of Children Act 1974* (Vic) s 3.

32 *Adoption of Children Act 1928* (Vic).

33 See Department of Human Services, *Adoption and Permanent Care Information Kit* <www.dhs.gov.vic.au> at 22 November 2004.

34 *Adoption Act 1984* (Vic) s 53.

35 *Family Law Act 1975* (Cth) s 60D.

36 *Child Support (Assessment) Act 1989* (Cth) s 5(a).

parents of the child, even if the child was conceived with the use of donor sperm or eggs.³⁷ The person who donated the sperm or eggs is presumed not to be the parent of the child.³⁸

2.18 The reallocation of parental status from the donor to the child's social parent is achieved through a statutory presumption or deeming provision. Presumptions and deeming provisions in legislation alter a person's legal status without the need to undergo any formal legal process. The Status of Children Act states that where a married woman becomes pregnant as a result of artificial insemination, her 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'.³⁹ The sperm donor 'shall, for all purposes, be presumed not to have caused the pregnancy and not to be the father of any child born as a result of the pregnancy'.⁴⁰ Similar provisions apply where the pregnancy is achieved as a result of the implantation of an embryo formed with donated sperm or eggs.

2.19 These presumptions are recognised for the purposes of the Family Law Act⁴¹ and Child Support (Assessment) Act⁴² and entitle the non-biological parent to be registered as a parent on the child's birth certificate.⁴³ This means that the non-biological parent is subject to all of the usual legal obligations to care for the child, and having consented to the treatment as a result of which the child was conceived, he or she cannot avoid caring or providing for the child because of the absence of any biological relationship.

DONOR-CONCEIVED CHILDREN—WOMEN WITHOUT MALE PARTNERS

2.20 The position of a child born as a result of a sperm donation to a woman without a male partner is different to that of a child born to a heterosexual couple in a number of respects. First, whereas both state and federal law recognise the male partner of the child's mother as a parent of the child, even if he is not genetically related to the child, the law does not recognise the female partner of the birth mother as a parent of the child. She is therefore unable to be registered as a parent on the child's birth certificate and will not be liable to pay child support if she and the birth mother separate and she no longer has day-to-day care of the child.

2.21 Secondly, whereas the parental status of the donor is fully extinguished for a donor-conceived child born to a heterosexual couple, the status of the donor whose sperm is used by a woman without a male partner is less clear. The Status of Children Act provides that the man who donates sperm to artificially inseminate a woman without a male partner 'has no rights and incurs no liabilities in respect of a child born as a result of a pregnancy occurring by reason of the use of that semen'.⁴⁴ The Act does not declare that the donor is not the parent of the child. The rationale behind the difference in approach stemmed from opposition to the use of ART by women without male partners⁴⁵ and concern that a child should have a legal father. The statement that the donor has no rights and incurs no liabilities applies for the purposes of Victorian law. There is divided judicial opinion on whether the donor is a parent or has rights and liabilities for the purposes of the

37 *Status of Children Act 1974* (Vic) s 10C(2)(a), 10D(2)(a),(c), 10E(2)(a),(c),(e).

38 *Status of Children Act 1974* (Vic) s 10C(2)(b), 10D(2)(b),(d), 10E(2)(b),(d),(f).

39 *Status of Children Act 1974* (Vic) s 10C(2)(a).

40 *Status of Children Act 1974* (Vic) s 10C(2)(b).

41 *Family Law Act 1975* (Cth) s 60H(1).

42 *Child Support (Assessment) Act 1989* (Cth) s 5(b).

43 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 16(1)(f).

44 *Status of Children Act 1974* (Vic) s 10F(1). The Act is silent on the status of a donor whose sperm is used to create an embryo which is then implanted into the body of a woman who does not have a male partner.

45 Victoria, Parliamentary Debates, Legislative Assembly, 18 April 1984, (Mr T Roper, Minister for Health).

Family Law Act, a question that turns on the interpretation of section 60H of that Act. This will be further discussed in Chapter 4.

SOCIAL PARENTS

2.22 Those children who are cared for by people who are not their legal parents are not entirely without legal protection. In some cases, social parents (such as step-parents, foster carers or a parent's same-sex partner) obtain some legal recognition of their relationship with the child by applying for a parenting order from the Family Court, or in the case of foster carers, obtaining a short-term or permanent care order from the Children's Court.⁴⁶ Such orders are generally for specific purposes and expire when the child is 18 years old. Parenting and permanent care orders do not carry all of the powers and responsibilities imposed on legal parents by the common law and federal and state legislation.

2.23 However, some of the specific statutory obligations and powers that are conferred on legal parents are extended to social parents. This may be because the definition of parent or relative in a particular Act is broad, or because it stipulates a series of other people to whom the particular provision applies. For example, responsibility may also fall on a 'guardian', a 'person acting as the child's parent', a 'nominated person', 'a foster parent', an 'independent person', or 'a person who has day-to-day care and control of a child and with whom the child ordinarily resides'.⁴⁷

2.24 In 2001, the Victorian Government introduced legislation to recognise the rights and obligations of partners in same-sex relationships.⁴⁸ The legislation amended provisions in statutes regulating property-related benefits, compensation schemes, superannuation schemes, health law, criminal law, consumer and business activities, guardianship and child protection. As a result of these amendments, several Acts now include the 'domestic partner' of the parent of a child in the definition of 'parent'. A domestic partner is a person who lives with another person as a couple on a genuine domestic basis, irrespective of gender.

2.25 As a result of these amendments, in some instances the obligations and powers of legal parents have been extended to the same-sex partner of the parent of the child. For example, in the *Children and Young Persons Act 1989* (Vic) the definition of a parent includes the domestic partner of the child's mother or father.⁴⁹ Under that Act, a protection order may be made in favour of a child if his or her parents have failed to, or are unlikely to, protect the child from physical, sexual or psychological harm.⁵⁰ The amendments to the *Witness Protection Act 1991* (Vic) extended the protections offered by that legislation to the children of a person's same-sex partner. The Witness Protection Act, which facilitates the security of witnesses in criminal proceedings also contains provisions to protect the safety of a member of the family of a witness.⁵¹ For the purposes of this Act, 'member of the family' of a witness includes 'a child of the witness or of the witness's spouse or domestic partner'.⁵²

46 Permanent care orders are discussed in further detail in Chapter 6. See paras 6.5 and 6.17.

47 The definition of parent in the *Health Act 1958* (Vic) includes a step-parent, an adoptive parent, a foster parent, a guardian and a person who has day to day care and control of a child and with whom the child ordinarily resides: s 3. The *Victims of Crime Assistance Act 1996* (Vic) defines parent as '(a) a biological parent of the child; (b) a step-parent of the child; (c) an adoptive parent of the child; (d) a foster parent of the child; (e) a guardian of the child; (f) a person who has responsibility for the care, welfare and development of the child': s 3.

48 *Statute Law Amendment (Relationships) Act 2001* (Vic); *Statute Law Further Amendment (Relationships) Act 2001* (Vic).

49 *Children and Young Persons Act 1989* (Vic) s 3.

50 *Children and Young Persons Act 1989* (Vic) s 63A.

51 *Witness Protection Act 1991* (Vic) ss 3A, 3C, 5.

52 *Witness Protection Act 1991* (Vic) s 3.

2.26 In some cases, these provisions are not directed to the protection of children but rather have other public policy objectives. For example, the *Gambling Regulation Act 2003* (Vic) regulates gambling in Victoria and aims to ensure it is conducted honestly and the management of licensed venues is free from criminal influence. To this end, people wishing to operate gambling venues must apply for a licence. If they or any relative of theirs is found not to be of good repute, the application will be rejected.⁵³ The Act defines ‘relative’ of a person as:

- (a) the spouse or domestic partner of the person;
- (b) a parent, son, daughter, brother or sister of the person; or
- (c) a parent, son, daughter, brother or sister of the spouse or domestic partner of the person.⁵⁴

2.27 These enactments suggest that the legislature has already perceived the need to recognise and respond to the diversity of parenting arrangements in the community for a range of specific purposes. The law does not, however, go so far as to ascribe full legal parental status to social parents such as the female partner of a child’s birth mother. This may expose a child to significant gaps in his or her legal entitlements.

OPPOSITION TO TRANSFER OF LEGAL PARENTAGE

2.28 The commission received a number of submissions from people who object to the transfer of parental status from the genetic or biological parent of a child to a person who is not biologically related to the child. The beliefs expressed in these submissions included:

- a child’s genetic parents should be recognised as legal parents;
- to declare that people with no genetic connection are the child’s parents is to perpetuate a legal fiction or lie;
- perpetuating a legal fiction is likely to cause the child grief and confusion associated with the loss of a relationship with his/her genetic parents, particularly if the social/legal parents conceal the truth about the child’s genetic origins; and
- children have the right to grow up knowing both their genetic parents.

2.29 Many of the submissions that put these arguments were made by people, both parents and children, who have had negative experiences of donor conception and adoption.

2.30 We acknowledge that past policies and practices in adoption, donor conception and child welfare have led to significant distress for many of the people involved. We received some very moving submissions from mothers who gave up their babies for adoption in the 1950s and 1960s under duress and without proper consent.⁵⁵ These women, who were victims of society’s disapproval of unwed mothers, continue to grieve deeply about being separated from their children, even if they have subsequently been able to establish a relationship with them. The community is now much more aware of the effects that past adoption practices have had on children who were not told they were adopted and who experienced grief, anger, confusion and feelings of betrayal when they discovered the truth of their origins.

2.31 Adoption law and practice was modified substantially during the 1970s and 1980s. The community no longer expects single mothers to relinquish their babies and very few babies are now given up for adoption. A child cannot be adopted unless rigorous provisions for obtaining the

53 *Gambling Regulation Act 2003* (Vic) s 3.4.11.

54 *Gambling Regulation Act 2003* (Vic) s 1.4(3).

55 Most of these women are members of the support group Adoption Origins Victoria Inc.

consent of the child's parents have been followed.⁵⁶ People are encouraged to explore a range of options for the care of the child.⁵⁷ If adoption is chosen, open adoption arrangements are encouraged so the child and birth parents may have an ongoing relationship where appropriate⁵⁸ and all parties involved are able to access information about each other.⁵⁹ The principal feature of adoption law that remains is the transfer of legal parentage from the birth parents to the adoptive parents.

2.32 While some people conceived from donated gametes are not troubled by the fact, our research and consultation have also revealed that some people who were conceived with donated gametes have experienced similar reactions to those of adopted people upon learning of the method by which they were conceived. These people are often angry and hurt that they were not told the truth about their origins until later in life, and experience grief about the absence of a relationship with or information about their donor.⁶⁰ People conceived using gametes donated before 1998 have no way of identifying their donor (or their genetic siblings), unless the donor has provided information to the Infertility Treatment Authority's (ITA) voluntary register or has consented to the release of his identity, and feel extremely frustrated as a result.

2.33 Our analysis of the available research and the information we have gathered through our consultations suggests that these negative experiences were not necessarily the result of the transfer of legal parentage, but were largely a product of flawed policy and a culture of secrecy. We do not accept that non-biological parenting is in itself harmful to a child's development or wellbeing, although we do acknowledge that it may sometimes affect a child's sense of identity. The commission has reviewed the available literature on outcomes for children born through the use of donated gametes and into diverse family types. The literature provides evidence that children born through ART into families with non-biological parents do just as well as other children, although there are some negative outcomes that can be attributed to the non-disclosure of donor status and the effects of social stigmatisation.⁶¹ In Chapter 5 we discuss the importance of openness in donor-conceived families and of giving children access to information about their genetic origins.

2.34 The commission also received submissions from people who strongly believe that children should be born into families where they have a mother and a father to whom they are genetically related. Some of these submissions argued that a same-sex partner should not be recognised as a legal parent of a child because to do so 'normalises homosexuality and is a step closer to legalising marriage of same-sex couples'.⁶²

2.35 The commission does not share these views. Our review of the law that applies to children born to same-sex couples has first and foremost been informed and directed by a consideration of the best interests of these children. The commission also believes the law can play a significant role in promoting tolerance and respect by recognising the diversity of family relationships and structures in the community.

56 *Adoption Act 1984* (Vic) pt 2, div 3.

57 Department of Human Services, *Legal options for permanent care* (2003) <www.dhs.vic.gov.au/commcare> at 22 November 2004.

58 Department of Human Services (August 2004) *Adoption and Permanent Care Procedures Manual*, 80–84.

59 *Adoption Act 1984* (Vic) pt 6.

60 These experiences were described in submissions from members of the group TangledWebs.

61 McNair (2004), above n 3.

62 Submission 120 (Dorothy Brown).

PRINCIPLES

2.36 The question for the commission is whether the law that governs the legal parentage of children born to single women or women in same-sex relationships is in need of reform, particularly if eligibility criteria for access to ART are expanded. The commission was guided in its consideration of this question by the following principles.

- In considering the law that determines who is to be recognised as a legal parent of a child, the best interests of the child should be the paramount consideration. This is consistent with the *Convention on the Rights of the Child*.⁶³
- The best interests of children require certainty about the status of their parents. Certainty about parental status at the earliest possible time minimises the potential for disputes and litigation about a person's obligations and status in respect of the child, and promotes stability in the child's life.
- It is in the best interests of children for their parents to be subject to all of the usual parental obligations and responsibilities.
- It is in the public interest for people who become parents to be subject to all of the laws that flow from the parent-child relationship.
- It is important for people to appreciate the responsibilities that accompany parenthood, in particular the needs of donor-conceived children, and to plan their arrangements before the child is born.
- The law should aim to eliminate discrimination against children and parents based on their family type and relationship status. Legal recognition of diverse family types is an important way of countering discrimination.

63 *Convention on the Rights of the Child*, UN GAOR, 44th sess, UN Doc A/44/736 (1990) art 3(1).

Chapter 3

Status of the Non-birth Mother

INTRODUCTION

3.1 Many women in same-sex relationships have children. Statistics derived from the 2001 Census indicate that almost 20% of lesbian couples have a child living with them.⁶⁴ 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.⁶⁵ Although it is impossible to quantify the number of same-sex couples with children in Victoria, it appears that this family type is on the increase. 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.⁶⁶ Data provided to the commission by the Registry of Births, Deaths and Marriages indicate that between 2001 and 2004 the registry recorded the births of 168 children conceived with donor sperm by women without male partners. This figure is considered to be an under-representation because not all women disclose their relationship status or the method or circumstances of the child's birth to the registry. In addition, some children of same-sex partners will have been born outside Victoria.

3.2 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 about the couple's decision to have a child, the planning that follows, and the arrangements made to care for the child. A key point made in most of these submissions was that the women consider themselves to be equal parents and share the financial and other responsibilities of caring for the child. This is supported by research about parenting in lesbian-parented families.⁶⁷ It is often the non-birth mother who becomes the primary carer of the child when the birth mother returns to work.

3.3 The woman who gives birth to the child (the birth mother) is automatically recognised as the child's legal parent.⁶⁸ Her partner (the non-birth mother) 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, what would be the best mechanism for achieving this.

PRESENT LAW

3.4 As explained in Chapter 2, where a child is born to a woman who is in a de facto relationship with another woman, the relationship between the child and the birth mother's female

64 David de Vaus, *Diversity and change in Australian families: Statistical Profiles* (2004) 84.

65 McNair, R et al 'Lesbian Parenting: Issues, strengths and challenges' (Spring/Summer 2002) 63 *Family Matters* 40.

66 Victorian Gay and Lesbian Rights Lobby, *Everyday Experiments: Report of a Survey into Same-Sex Domestic Partnerships in Victoria* (2001) 14.

67 McNair, above n 3, 59; Submission 198 (Dr Elizabeth Short).

68 Although in *Re Mark* (2003) 179 FLR 248, 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: 254.

partner is not recognised by the law. By contrast, where a child is conceived through the use of donor sperm by a woman who is married or in a heterosexual de facto relationship, the woman's husband or partner is presumed to be the father of the child for the purposes of Victorian law⁶⁹ and federal law,⁷⁰ and he is entitled to be registered as the father of the child in the births register.⁷¹

3.5 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 in favour of the non-birth mother to recognise her parental role in the child's life. 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 2, 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 PRESENT LAW

3.6 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 partner. It also has implications for parents and the community generally.

LEGAL IMPLICATIONS

3.7 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. This may seriously disadvantage the child.⁷²

3.8 If a parent dies without leaving a will, his or her child is, under certain circumstances, entitled to a share of the estate.⁷³ However, because the non-birth mother is not recognised as a parent for the purposes of the *Administration and Probate Act 1958* (Vic), if she dies without making a will the child will not automatically be entitled to a share of her estate.⁷⁴ If the non-birth mother's parents wish to leave part of their estate to the child and make a will to benefit their 'grandchildren' the bequest will not be effective because the relationship between the child and the non-birth mother's parents is not legally recognised. A bequest which names the child would, however, be effective.

3.9 The *Marriage Act 1958* (Vic) makes provision for the guardianship of children if one or both of their parents die.⁷⁵ 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 by deed or will appoint a person to be the guardian of the child if they die. 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.

69 *Status of Children Act 1974* (Vic) ss 10C(2)(a), 10D(2)(a).

70 *Family Law Act 1975* (Cth) s 60H(1); *Child Support (Assessment Act) 1989* (Cth) s 5(b).

71 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 16(1)(f).

72 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.

73 *Administration and Probate Act 1958* (Vic) s 52(f).

74 The child may, however, have a claim for family provision under the *Administration and Probate Act 1958* (Vic) pt IV.

75 *Marriage Act 1958* (Vic) pt VII.

3.10 The various statutory compensation schemes that operate in Victoria make provision for benefits to be paid to a child if his or her 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.

3.11 As discussed in Chapter 2, there is a detailed set of legal obligations and entitlements that arise out of the parent–child relationship. Most of those 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 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 the non-birth mother and the child is often not recognised under this legislation, the policy objectives underpinning these laws may be compromised. For example, the *Estate Agents Act 1980* (Vic) restricts real estate agents from purchasing properties which they have been commissioned to sell.⁷⁶ This restriction also extends to purchases by the following family members of the estate agent: spouse, domestic partner, parent, brother, sister or child.⁷⁷ Neither 'parent' nor 'child' is defined in the Act. For this reason, the restriction would not apply to a purchase of property by the estate agent's non-birth mother.

3.12 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.

PRACTICAL IMPLICATIONS

3.13 We received many submissions from women who described the practical consequences for them and their children of the absence of legal recognition of the non-birth mother. These submissions reported that the non-birth mother often encounters obstacles and ignorance, and at times hostility, in her dealings with government agencies and service providers where legal status is a relevant factor. Because the 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.

3.14 If she has not obtained any formal authority in respect of the child, the non-birth mother has no status to consent to medical treatment for the child and some women report having experienced problems with hospital staff and doctors not disclosing medical information to her.⁷⁸ Some couples choose to give the child the non-birth mother's surname to avoid some of the difficulties that can arise in these situations.⁷⁹

SOCIAL IMPLICATIONS

3.15 Although the commission received numerous submissions that described strong and happy families that are generally respected and supported within their communities and by health professionals, teachers and child carers, 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.

76 *Estate Agents Act 1980* (Vic) s 55(1).

77 *Estate Agents Act 1980* (Vic) s 55(8)(a)(i).

78 Submission 179 (Lesbian Parents Project Group).

79 Submission 198 (Dr Elizabeth Short).

3.16 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 that 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 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.⁸⁰

3.17 Same-sex parents feel very strongly about their inability to obtain a birth certificate for the child which names 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 and their children's family.

3.18 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. 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.⁸¹ The centre also reported situations of non-birth mothers severing all contact with the child after separating from the birth mother, which may have caused significant distress to the child. In other cases encountered by the centre, non-birth mothers have been denied contact with the child after separation, and have declined to proceed with Family Court proceedings, believing they have no legal standing to maintain contact with the child. 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.⁸²

3.19 It is clearly not in the best interests of a child to be affected by instability in his or her parents' relationship, or to be separated from a parent with whom he or she has established a significant bond.

3.20 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:

80 Submission 179 (Lesbian Parents Project Group).

81 Submission 143 (Bouverie Centre)

82 Submission 101 (Anonymous)

...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.⁸³

INTERIM RECOMMENDATIONS

3.21 The commission believes that the fundamental principle that should apply to the consideration of legal parentage is the protection of the rights and best interests of the child. It is evident that children born to same-sex couples lack the full range of rights and protections that are afforded to children born to heterosexual couples. This is unacceptable and is inconsistent with the *Convention on the Rights of the Child*.⁸⁴ 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 the non-birth mother does not prevent lesbian women from having children, but it does have detrimental effects for those children in several respects. We also acknowledge that legal recognition serves a very important symbolic purpose.

3.22 The commission therefore recommends that the status of children born to a lesbian couple be brought into line with children born to heterosexual couples by giving legal recognition to the non-birth mother.

! INTERIM RECOMMENDATION(S)

1. The law should recognise the birth mother's female partner as a parent of the child.

3.23 In addition to members of the gay and lesbian community, the following organisations expressed support for the recognition of the non-birth mother as a parent of the child in their submissions: the Victorian Biotechnology Ethics Advisory Committee, ACCESS, the Law Institute of Victoria, the Equal Opportunity Commission of Victoria and Victoria Legal Aid.

ADOPTION OR STATUTORY PRESUMPTION

3.24 The commission gave detailed consideration to the most effective means to achieve legal parental status of the non-birth mother. As discussed in Chapter 2, the two principal ways in which legal parentage is conferred on a non-biological parent are the making of an adoption order and the application of a statutory presumption.

3.25 Some jurisdictions outside Victoria have legislated to recognise the parental status of the non-birth mother. 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.⁸⁵ In the ACT, a woman who is in a domestic relationship with a woman who gives birth to a child is

83 Submission 179 (Lesbian Parents Project Group).

84 Article 2 requires parties to respect and ensure that the rights set out in the convention without discrimination on the basis of the status of the child's parents: see further Tobin, above n 2, 28–34.

85 *Artificial Conception Act 1985* (WA) s 6A; *Status of Children Act* (NT) s 5DA.

presumed to be a parent of the child.⁸⁶ Western Australia, Tasmania and the ACT have all legislated to allow the same-sex partner of the parent of a child to apply to adopt the child.

3.26 In assessing these options, the commission was conscious of the following considerations:

- the importance of ensuring that legal recognition is enduring, comprehensive and operative under federal legislation;
- the need to provide children with legal protection as early in life as possible;
- the importance of ensuring that non-biological parents understand and reflect on the responsibilities of legal parenthood;
- the desirability of having a simple process for attributing legal status; and
- the need to avoid imposing legal obligations on people who have not consented to the procedure which resulted in the birth of the child, or have never wished to be regarded as the legal parent of the child. Because the obligations of parenthood are substantial, it is important that the mechanism for legal recognition gives the birth mother's female partner the opportunity to decide whether she will take on those obligations. Her position differs from that of a heterosexual partner because she cannot participate biologically in the conception of the child.

3.27 Of these considerations, the commission was particularly concerned to ensure that its proposed mechanism for achieving legal recognition would have effect under federal law. As discussed in Chapter 2, the federal Family Law Act and the Child Support (Assessment) Act impose the most substantial and important obligations on the parents of a child. Recognition under these Acts would ensure that a child born to a same-sex couple would have the same legal protections in respect of his or her parents as a child born to a heterosexual couple. It would also ensure that those people who take on the role of caring for a child at the outset are subject to all of the responsibilities and entitlements that accompany parenthood.

3.28 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.⁸⁷ The Victorian provisions that relate to the parentage of a child born to a woman without a male partner are not recognised for the purposes of federal legislation,⁸⁸ and the commission is unable to make recommendations for reforms to federal law. For this reason, creating a deeming provision that mirrors the provision for recognition of a male partner as the parent of the child would not result in federal recognition of a female partner. Such a provision would only be operative for the purposes of those Victorian Acts that do not already recognise the legal obligations of the non-birth mother. It would not make the non-birth mother liable for other responsibilities such as child support.⁸⁹

3.29 Adoption is the only available legal mechanism that would ensure the birth mother's female partner will be recognised as the legal parent of the child under federal legislation and will have equal legal status with all other parents. This is because federal law recognises parental relationships

86 *Parentage Act 2004* (ACT) s 8.

87 *Family Law Act 1975* (Cth) s 60H(1); *Family Law Regulations 1984* (Cth) r 12C, sch 6.

88 This is because the federal government has not prescribed any relevant Victorian laws pursuant to s 60H(2) or (3) of the *Family Law Act 1975* (Cth).

89 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.

created by adoption.⁹⁰ The commission has therefore decided that adoption should be the mechanism by which the non-birth mother becomes a legal parent of the child, albeit with important modifications.

3.30 Most of the submissions received from and on behalf of lesbian parents argued that the mechanism for legal recognition should be equivalent to that applied to heterosexual couples and therefore favoured a deeming provision that would apply automatically. Adoption was considered to be an option of last resort because it requires people to undergo a lengthy assessment process that is not imposed on heterosexual couples who have children through the use of donated gametes. This was also the position reached at the roundtable discussion held by the commission on this issue.⁹¹

3.31 We also received submissions from people involved in adoption who argued that adoption has such complex social and psychological implications that it should not be used as the mechanism to recognise the non-birth mother as a parent of the child, and Family Court parenting orders should be preferred.⁹² These arguments were based on concerns about severing an existing relationship between the child and an absent parent, and concealing the truth about the child's genetic origins.

ADOPTION CRITERIA

3.32 After considering these positions, the commission concluded that equality of outcome for children was the most important factor. This can only be achieved through a mechanism that is different to that which applies to heterosexual couples. The commission did, however, accept that it would be inappropriate to impose all of the standard adoption requirements on the non-birth mother of a child born through ART.⁹³ It should not be necessary for the non-birth mother of a child born through ART to have her fitness to parent assessed before the deemed adoption takes effect, in the same way it is unnecessary for the non-biological parent in a heterosexual relationship to be assessed in order to become the legal parent of a child born through the use of donated gametes.

3.33 The commission's view is that the eligibility criteria for access to clinic-based ART advocated in Position Paper One, together with counselling, provide a sufficient and appropriate process for ensuring that the health and wellbeing of children will not be compromised and that prospective parents receive important advice about the legal and social consequences of becoming parents of a donor-conceived child. If the eligibility criteria are expanded in accordance with the recommendations made in Position Paper One, the commission envisages that a significant majority of women in same-sex relationships who choose to have children will avail themselves of services offered by licensed clinics.

3.34 Another aspect of standard adoption procedure that should not apply in these cases is the presumption against step-parent and relative adoption. Whereas once step-parent adoption was quite common, it now only occurs where there are exceptional circumstances. This is based on the policy that the legal relationship between the child and his or her biological parent should not be

90 *Family Law Act 1975* (Cth) s 60D; *Child Support (Assessment) Act 1989* (Cth) s 5(a).

91 Consultation, 4 October 2004.

92 Submission 77 (Victorian Standing Committee on Adoption and Alternative Families), Submission 95 (Adoption Information Forum), Submission 117 (VANISH), Submission 122 (Connections Adoption and Permanent Care).

93 The Adoption Act requires applicants to be approved as fit and proper persons to adopt a child: s 13. Regulations 35, 35A and schedules 4 and 5 of the *Adoption Regulations 1998* (Vic) list the requirements to be satisfied by applicants for adoption of a child.

severed or distorted by a step-parent becoming the child's legal parent. Alternatives such as Family Court parenting orders are preferred.

3.35 The commission's view is that the reluctance to allow a biological parent's partner to adopt the child should not apply to the non-birth mother of a child conceived with the use of donated sperm. This is because in such cases the child has no other legal parent (assuming the donor has no legal status in respect of the child (see Chapter 4)) with whom it is important to maintain a legal relationship.

3.36 Having regard to the above considerations, the commission recommends that a new form of adoption be introduced to recognise the legal parentage of the non-birth mother. We call this form of adoption 'deemed adoption'.

DEEMED ADOPTION

3.37 The concept of deemed adoption mirrors, as closely as possible, the process by which the male partner of a woman who gives birth to a child born through the use of donated gametes becomes the legal parent of the child. The non-birth mother must be living with the birth mother in a genuine domestic relationship and must have consented to the procedure by which the birth mother became pregnant.

3.38 The commission also wants to ensure that where people are planning to have a child with the use of donated gametes, each of the parties involved gives adequate thought to the needs of the child, the relationship they will have with the donor, if any, and the responsibilities of parenthood. For this reason, the commission's recommendations are designed to encourage people to make use of the licensed clinic system that requires the prospective parents and donors to undergo counselling and register each birth with the ITA to preserve the child's right to access information about his or her genetic parents. Deemed adoption would therefore only be available to a couple who conceive as the result of a treatment procedure carried out in a licensed clinic, where all of the safeguards of the system have been complied with. Its automatic operation is designed to be an incentive for women to utilise the services of a clinic.

3.39 Once the non-birth mother has gone through the treatment process and has been recognised as the legal parent of the child, she will not be able to avoid the legal responsibilities and duties of parenthood. If the birth mother's partner does not want to take on the legal responsibilities of parenthood, the birth mother will still be able to proceed with treatment.

! INTERIM RECOMMENDATION(S)

2. The *Adoption Act 1984* should be amended to provide that the female partner of a woman who gives birth to a child conceived as the result of a treatment procedure carried out in a clinic licensed pursuant to the *Infertility Treatment Act 1995* should be deemed to have adopted the child (without extinguishing the birth mother's status) and to be the adoptive parent of the child if:
 - she consents to the birth mother undergoing the procedure leading to the child's conception;
 - she receives appropriate counselling, including information as to the legal parentage of the child; and
 - she is living with the birth mother on a genuine domestic basis at the time of the treatment procedure.

! INTERIM RECOMMENDATION(S)

3. Deemed adoption should take effect at the time the child is born.

BIRTH REGISTRATION

3.40 A woman who is deemed to be the adoptive parent of a child should be recorded as the parent of the child on the births register and named on the child's birth certificate. Registration as a parent on the births register and birth certificate provides evidence of the person's parental status for a range of legal and practical purposes. It will be necessary for the adoptive parent to provide some form of evidence to the registry to distinguish her position from someone who has not gone through the clinic system and is therefore not able to benefit from the deemed adoption provisions. A letter from the clinic confirming that the non-birth mother complied with the requirements of the Infertility Treatment Act should be sufficient evidence to enable the registry to register her as a parent of the child.

! INTERIM RECOMMENDATION(S)

4. A woman who is deemed to be the adoptive parent of the child should be entitled to be registered as a parent of the child on the Registry of Births, Deaths and Marriages. A letter from the clinic should be sufficient to satisfy the registrar that the partner is the adoptive parent of the child.
5. The *Births, Deaths and Marriages Registration Act 1996* and Regulations should be amended to replace references to 'mother' and 'father' with 'parent(s)'. The registry should also be required to produce revised birth registration forms and birth certificates.
6. Section 8 of the *Status of Children Act 1974* should be amended to provide that 'Where the name of the father parent of a child is entered in the register of births in the Register maintained under the *Births, Deaths and Marriages Registration Act 1996* in relation to the child a certified copy of the entry purporting to be made or given under section 46 of that Act shall be prima facie evidence that the person named as the father parent is the father parent of the child'.

DECLARATIONS OF PARENTAGE

3.41 For the purposes of federal law, an adopted child is regarded as the child of its adoptive parents. Our recommendation is intended to ensure that the child will be recognised as the child of the non-birth mother under both federal and state law. It remains a possibility that a federal court might not recognise deemed adoption as being the type of adoption envisaged by federal legislation (in particular the Family Law Act and Child Support (Assessment) Act). We therefore propose a process to enable a person to apply for a court order confirming the partner's status as the adoptive parent of the child. Such an order could be made to be equivalent to a standard adoption order. It

would also confirm that the person declared to be the parent is the parent of the child for the purposes of the Family Law Act.⁹⁴

! RECOMMENDATION(S)

7. The operation of section 10 of the *Status of Children Act 1974* should be expanded to enable the Supreme Court to make declarations of parentage in relation to children to whom Interim Recommendation 2 applies.

→ We seek your views and comments, particularly from family law and adoption experts, about whether the concept of deemed adoption would be effective for the purposes of federal law.

WHERE DEEMED ADOPTION DOES NOT APPLY

3.42 There are a number of situations in which the same-sex partner of the birth mother will not be able to become a parent through deemed adoption:

- if the child was born before the introduction of the proposed amendments;
- if the child was conceived in Victoria as a result of self-insemination outside the clinic system; or
- if the child was conceived in another state, territory or country but is resident in Victoria.

3.43 These are also situations in which the commission believes the non-birth mother should, for the sake of the child, be recognised as the legal parent of the child. Recognition in these cases should not be automatic because there is no guarantee the partner has consented to becoming the legal parent of the child. It is therefore necessary for there to be a process that requires the partner to ‘opt in’ and involves appropriate counselling and provision of information. Adoption is therefore the appropriate means of conferring legal parental status on the non-biological parent in these cases. Obtaining an adoption order would entitle the non-birth mother to be named as a parent on the child’s birth certificate.

3.44 Again, the commission concluded that the standard adoption process would be unnecessarily onerous in these circumstances. However, it is important to prevent a person who is manifestly unfit to be a parent from adopting the child. For this reason, we recommend that the Department of Human Services should be able to intervene in the adoption application. The details of this process require further consideration and the commission would be grateful for suggestions about how such a process could operate in practice.

! INTERIM RECOMMENDATION(S)

8. Where a woman without a male partner becomes pregnant as the result of a donor treatment procedure carried out:
 - outside the licensed clinic system; or
 - in another state, territory or country; or
 - before the legislation was amended;
 it should be possible for the partner of the birth mother to adopt the child (without extinguishing the birth mother's status).

9. In these circumstances it should be presumed that:
 - exceptional circumstances exist which warrant the making of an adoption order; and
 - the making of a parenting order under the *Family Law Act 1975* in relation to the child would not make adequate provision to serve the welfare and interests of the child.

10. The Department of Human Services should be able to intervene in the adoption application if the applicant is manifestly not a fit and proper person to adopt the child.

→ We seek your views and comments about how an abridged form of adoption could operate in practice.

3.45 Some women may consider this process to be too onerous, particularly if they already have a child who was conceived as a result of a treatment procedure carried out in a Victorian clinic. It is arguable that if a non-birth mother has met the existing requirements of consent and counselling, this should entitle her to take advantage of the proposed deemed adoption provisions. We would be interested in hearing from women in this situation about this issue.

→ If a same-sex couple has had a child as a result of treatment provided in a Victorian clinic prior to the introduction of the proposed amendments and can provide evidence that they complied with the consent and counselling requirements of the Infertility Treatment Act, should the non-birth mother be deemed to have adopted the child?

3.46 Another situation in which deemed adoption would not apply is where the birth mother was single when the child was conceived, and subsequently commences a relationship with a person who agrees to take on a parenting role.

3.47 We propose that where a single woman conceives a child as a result of donor insemination and subsequently enters into a genuine domestic relationship with a woman or a man, her partner should be able to apply to adopt the child. This situation can be distinguished from the usual step-parent adoption because there is no other parent with whom it is necessary for the child to maintain a relationship (see Chapter 4 in relation to the status of a sperm donor).

! RECOMMENDATION(S)

11. Where a single woman conceives a child as a result of donor insemination and subsequently enters into a genuine domestic relationship with a woman or a man, her partner should be able to apply to adopt the child.

3.48 There may be situations in which the same-sex parents of the child have both been recognised as the legal parents of the child but they separate after the child's birth. In such a situation, the non-birth mother's legal status and obligations in respect of the child will persist. If the woman who retains day-to-day care of the child enters a new relationship and her new partner wishes to be recognised as the parent of the child, the same provisions that apply to step-parent adoption of a child with heterosexual parents should apply. That is, it should be necessary to show that exceptional circumstances exist which warrant making the adoption order and a Family Court parenting order would not be adequate to serve the interests of the child. This should be required because the adoption will extinguish the relationship between the child and the person previously recognised as his or her parent. We make further recommendations in relation to adoption in Chapter 6.

CONSEQUENTIAL AMENDMENTS

3.49 If the commission's recommendations are implemented, it will be necessary for all Victorian legislation to be reviewed to recognise 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.

! INTERIM RECOMMENDATION(S)

12. Consequential amendments should be made to the *Births, Deaths and Marriages Registration Act 1996* and, where appropriate, to all other Victorian legislation that contains provisions relating to parent-child relationships, to recognise that a child may have two parents of the same sex.

Chapter 4

Status of Donors

INTRODUCTION

4.1 There are a variety of different arrangements and relationships between gamete donors and the women or couples who use those gametes to conceive a child.⁹⁵ Some donors donate to clinics and are unknown to the recipients (donors recruited through clinics). Other donors agree to donate to a particular person or couple (privately recruited donors).

4.2 Donors may be recruited through clinics in the following situations.

- Some donors are unknown to the recipients and they never meet. These arrangements are typically organised by clinics that recruit donors who agree to donate on the basis that the child is entitled to information about the donor's identity when the child is 18 years old.
- Some donors are unknown to the recipients but meet before the treatment procedure is carried out. These arrangements are typically egg or embryo donations organised by clinics.
- Some donors are unknown to the recipients but meet after the birth of the child. Such meetings are facilitated by the information release provisions of the Infertility Treatment Act.

4.3 Donors may be privately recruited in the following situations.

- Some donors meet the recipient solely for the purpose of the donation and have little or no further contact with the recipient after that time. These arrangements are typically made by women who self-inseminate outside the clinic system.
- Some donors are friends, relatives or acquaintances of the recipients and maintain those relationships with the recipients after the birth of the child. These arrangements are made by people undergoing clinic-based treatment and by women self-inseminating outside the clinic system.

4.4 Similarly, there are a diversity of arrangements and relationships between donor-conceived children and their donors:

- Some children do not know they are donor conceived and never meet their donors.
- Some children know they are donor conceived and have never met their donors either because they and/or their donor have no desire to meet each other, or they have no way of identifying who the donor is.
- Some children know they are donor conceived and the donor has no role in their family but is identified and introduced as the child's biological father when the child asks.

95 The diversity of arrangements was discussed in many submissions, including: 88 (Deborah Dempsey), 89 (Ministerial Advisory Committee on Gay and Lesbian Health), 143 (Bouverie Centre), 149 (Prospective Lesbian Parents), 179 (Lesbian Parents Project Group).

- Some children know their donors because the donor is part of their parents' family or circle of friends and the donor is acknowledged as the biological father of the child.
- Some children have donors who are regarded as their parents and play a parenting role in their lives. In some instances, the child also regards the donor's partner as a parent as well.

4.5 In this chapter we examine the legal status of the donor, particularly where the recipient of his or her gametes is a woman without a male partner.

PRESENT LAW

4.6 In all cases where recipients of the donor's gametes are a heterosexual couple the donor is presumed not to be the legal parent of the child under Victorian law. The donor's parental status is extinguished regardless of the relationship he or she has with the recipient parents or the child.

4.7 The legal status of the person who donates gametes for use by a woman who does not have a male partner is less clear.

VICTORIAN LAW

4.8 In the case of donation to a single woman or a woman with a male partner, the Status of Children Act states that the donor has no rights and incurs no liabilities in respect of the child, but is silent as to whether he is the child's father. The Status of Children Act operates for the purposes of Victorian law. Therefore, the donor cannot insist on exercising any of the powers conferred on parents under Victorian law, such as the right to be consulted in any proceedings concerning the child. Similarly, the child could not benefit from the donor's estate if he dies without making a will (unless the child was financially dependent on the donor during his lifetime).

4.9 There are certain provisions under Victorian legislation that are relevant to the parent-child relationship which cannot be described as 'rights' or 'liabilities' of the donor in respect of the child. For example, the Registry of Births, Deaths and Marriages regards the donor as the parent of the child because his parental status has not been fully extinguished and therefore insists his name be recorded on the births register.⁹⁶

FEDERAL LAW

4.10 Whether the donor has rights and liabilities in respect of the child or is the legal parent of the child under federal law has been the subject of several court cases. These decisions focus on the meaning and effect of section 60H of the Family Law Act.

4.11 Section 60H of the Family Law Act contains provisions that define who is to be regarded as the legal parent of a child born as a result of an artificial conception procedure. Section 60H confers parental status on certain people for the purposes of the Act, even if they are not biologically related to the child. These provisions ensure that a non-biological parent has full parental responsibility for the child.

4.12 Section 60H(1) deals with children born to heterosexual couples and confirms that, for the purposes of the Family Law Act, if the procedure was carried out with the consent of the couple the

96 The registry has developed a protocol for the recording of the donor's name in these cases. If the donor, the birth mother and the birth mother's partner (if she has one) all agree, the donor's name will not be recorded in the births register as the father of the child and will not appear on the birth certificate. Instead, the donor's name is recorded in the notes section of the register.

child is legally theirs, whether or not the child is biologically theirs. The Act refers to and recognises the transfer of legal parentage that is achieved under the Status of Children Act.

4.13 The Family Law Act does not recognise any of the provisions in the Status of Children Act that deal with the status of a person whose gametes are used by a woman without a male partner.⁹⁷ There has been some recent judicial consideration of whether someone who is biologically related to a child born as a result of an artificial conception procedure is a parent of the child, even if he or she does not fall within the scope of section 60H. The question to be determined by the court is whether section 60H is an exhaustive source of parental status for the purposes of the Family Law Act, or whether its function is to enlarge the classes of people who may be regarded as the parents of a child.

4.14 In *Re Patrick*⁹⁸ Justice Guest held that the donor was not a legal parent of the child because he did not fall within the scope of section 60H of that Act. In that case, the donor was seeking orders from the Family Court for contact with the child who was born to a lesbian couple through the use of his donated sperm. Even though the court found that the donor was not the legal parent of the child, it did make orders allowing him to have contact with the child on the grounds that he was a person who was significant to the care, welfare and development of the child and had previously had some contact with the child.

4.15 In *Re Mark*⁹⁹ Justice Brown found that section 60H was not an exhaustive provision and did not preclude the sperm donor from being recognised as the child's parent because he was the child's biological parent. In that case, the donor (and his partner) had commissioned a married woman to bear a child conceived with his sperm and a donated egg under a surrogacy arrangement. Justice Brown was satisfied that the donor and his partner were people concerned with the care, welfare and development of the child and it was in the child's best interests for orders to be made for them to have parental responsibility for the child.

4.16 Several Family Court cases have considered whether a sperm donor is liable to pay child support under the Child Support (Assessment) Act. Section 5 of that Act states that:

'Parent' means (a) when used in relation to a child who has been adopted—an adoptive parent of the child; and (b) when used in relation to a child born because of the carrying out of an artificial conception procedure—a person who is a parent of the child under section 60H of the *Family Law Act 1975*.

4.17 In *B v J*¹⁰⁰ Justice Fogarty decided that, for the purposes of the Child Support (Assessment) Act, a donor of sperm to a woman without a male partner was not a parent of the child born as a result. His Honour came to this conclusion on the ground that section 5 of that Act is an exhaustive definition. Therefore, if the donor did not fall within the scope of section 60H of the Family Law Act, he did not fall within the definition of parent under the Child Support (Assessment) Act. The Child Support (Assessment) Act therefore restricts the categories of people who are regarded as a child's parent for the purpose of that Act.

4.18 Whatever the legal parental status of the donor, the Family Court retains the power to make residence and contact orders in favour of any person concerned with the care, welfare and development of the child if the court considers that to be in the best interests of the child. In this way, the presence or absence of legal parental status is not the factor that determines whether a

97 No Victorian laws have been prescribed for the purposes of s 60H(2) or 60H(3), the sections which determine whether someone may be recognised as the legal parent of a child born as the result of an artificial conception procedure.

98 *Re Patrick* (2002) 28 Fam LR 579.

99 *Re Mark* (2003) 179 FLR 248.

100 *B v J* (1996) 21 Fam LR 186.

child has a relationship with a particular person. Even if a donor is not considered to be the legal parent of the child, he or she may still take on a parenting role in the child's life or may be granted contact with the child (as was the case in *Re Patrick*).

PROBLEMS WITH THE CURRENT LAW

4.19 The uncertainty about the status of the donor is detrimental to children and has implications for parents, donors and the community.

4.20 Uncertainty about the legal parental status of the donor may lead to:

- stress and anxiety and make it difficult for people to plan their arrangements successfully—many women who make arrangements with known donors feel uneasy that these arrangements have no legal force;
- disputes about the status of the donor and the role of the donor in the family;
- disputes about the rights and liabilities of third parties (such as the State or grandparents) under Victorian law; and
- confusion about whether the name of the donor should be registered as a parent of the child on the births register.

4.21 Children born to single women in Victoria have a different status to children born in the same circumstances interstate. In NSW, Western Australia, South Australia, Tasmania and the ACT, the donor is presumed not to be the father of the child, regardless of the marital or relationship status of the child's mother.

4.22 The law does not accommodate the diversity of arrangements made in a broad range of family types. Even if the birth mother, her partner (if she has one) and the donor agree that the donor will be regarded as the child's father, he will not have the full range of parental obligations and powers that are conferred on legal parents.

INTERIM RECOMMENDATIONS

4.23 The commission believes strongly that it is in the best interests of the child for the status of his or her parents and donors to be as clear and certain as possible. Certainty in the law minimises the likelihood of litigation. It also assists people to understand their rights and responsibilities and to make decisions and arrangements with the benefit of that knowledge. However, it is also important for there to be some degree of flexibility in the law to recognise the variety of family structures that exist in the community.

STATUS OF THE DONOR

4.24 We recommend that the donor should be presumed at law not to be the father of the child. This is consistent with the status of donors whose gametes are used by a heterosexual couple. In a system where heterosexual couples, same-sex couples and single women can access donor sperm, and where donors are precluded from directing their donations, it does not make sense for the donor to have a different legal status in relation to the child according to the relationship status of the woman who receives his sperm, particularly if the donor never knows who the recipient of his sperm was.

4.25 Almost all of the submissions received from and on behalf of single women and women in same-sex relationships supported the extinguishment of the legal parental status of the donor, on

the grounds that this generally reflects the reality of their families and would provide certainty and consistency for those families.¹⁰¹ These submissions drew a distinction between a donor and a father and argued that the legislation should recognise the different roles played by each. ACCESS also supported the clarification of the donor's status in this way.¹⁰²

4.26 Extinguishing the legal status of the donor will mean that a child born to a woman without a male partner will not have a legal father, but it does not mean that the donor will necessarily be precluded from having any contact or relationship with the child. The parties are still able to negotiate the role of the donor in the child's life and approach the Family Court to obtain parenting orders conferring some parenting obligations on the donor. Our recommended approach to the status of the donor cannot affect or limit the jurisdiction of the Family Court to make orders enabling a donor to have contact with the child if the court concludes it would be in the best interests of the child to make such an order.

4.27 The commission received some submissions that argued that the donor to a woman without a male partner should be declared to be the father of the child but without any rights or responsibilities in respect of the child. The Victorian Biotechnology Ethics Advisory Committee,¹⁰³ for example, argued that maintaining the parental status of the donor would emphasise the child's right to information about his or her genetic origins and biological history. This approach would emphasise the importance of the biological connection between the child and the donor.

4.28 As mentioned in Chapter 2, some people in the community object to the extinguishment of the donor's legal relationship with the child because they believe to do so perpetuates a lie or fiction about the child's identity. The commission received submissions from people who believe that the law should 'affirm the genetic reality that the gamete donor is the actual father/mother of the child/adult conceived via an ART procedure utilising donor gametes'¹⁰⁴ and that 'the legal definition of the term 'parent' should be based on genetic truth as much as on upbringing responsibilities'.¹⁰⁵ These arguments suggest that the removal of the donor's legal status is instrumental in obscuring the truth of the child's genetic origins. The commission, however, believes that issues of legal status can and should be distinguished from children's right to information about their origins and parents' duty to be open and honest with their children. We examine this question in Chapter 5.

4.29 Our recommendation that the donor should not be presumed to be the parent of the child does not completely resolve the problems that arise under federal law, as described above. Until this uncertainty is addressed by the Family Court and/or the Commonwealth Government, the commission believes the most effective ways to reduce the impact of the uncertainty of the donor's status are to encourage informed decision making by providing appropriate information, advice and counselling to the parties, and to give women the choice to use sperm from clinic-recruited donors.

4.30 Our expectation is that if eligibility for ART is expanded as recommended in Position Paper One, more women and known donors will attend counselling before treatment commences. As a result, they will be better equipped to plan their arrangements and roles in respect of the child. The provision of information and legal advice to each party will assist in minimising the possibility

101 Submissions 82 (Anonymous), 83 (Sexuality Law Reform Committee, Melbourne University Law Students Society), 149 (Prospective Lesbian Parents), 156 (Law Institute of Victoria), 167 (Victorian Gay & Lesbian Rights Lobby), 179 (Lesbian Parents Project Group), 198 (Dr Elizabeth Short).

102 Submission 192 (ACCESS).

103 Submission 224 (Victorian Biotechnology Ethics Advisory Committee).

104 Submission 154 (Michael Linden).

105 Submission 60 (Myfanwy Walker).

of future conflict. Where a woman is not in a position to negotiate an arrangement with a known donor, she will have the option of using sperm donated by an unknown donor. Where there is a shared intention that the donor will take on a parenting role, the commission believes there should be a process for formalising that decision.

DONOR AS PARENT

4.31 The commission acknowledges that some donors take on parental responsibilities in respect of the child. We received several submissions which described arrangements where the birth mother, her partner, the donor, and occasionally his partner, all consider each other to be equal parents of the child and intend the donor to be recognised as the father of the child. In such cases, the commission believes it is in the best interests of the child for the donor to be conferred with all of the standard legal responsibilities and powers of parenthood.

4.32 We therefore recommend that, subject to certain conditions being met, the donor be able to opt in as the legal parent of the child.¹⁰⁶ The New Zealand Law Commission recently recommended that known donors be able to become a legal parent of the child, noting that there 'are no apparent policy reasons why a child and family should lose the advantage of having a legal father, where the genetic father wishes and intends to act as a father from birth, simply because of the method of conception'.¹⁰⁷ A small number of states in the United States of America (for example, Delaware,¹⁰⁸ New Mexico¹⁰⁹ and New Hampshire)¹¹⁰ enable the donor to be recognised as a parent of the child in certain circumstances.¹¹¹

4.33 For the reasons articulated in Chapter 3, namely in order to achieve recognition under federal law, we believe that adoption is the most appropriate method for conferring parental status on the donor. Opting in as a parent should only be possible with the consent of the birth mother and her partner (if she has one) and the application should be made as early as possible in the child's life. We recommend that the application should be made before the child turns one.

4.34 The commission anticipates that only a small number of families would wish the donor to become a legal parent of the child and they are more likely to be those families where the child is born to a single woman or a woman in a same-sex relationship. However, our recommendations would also make the process available to families where the child is born to a heterosexual couple.

4.35 If the child is born to a couple and the donor opts in as a parent of the child pursuant to our recommendations, the child will have three legal parents. During our consultation process some people expressed concern that this may have the potential to lead to more Family Court disputes about arrangements for the care of the child.¹¹² The commission considered these concerns, but concluded that conferring legal status on the donor had the potential to reduce the potential for conflict because the opt-in process would assist the parties to reflect on and clarify their roles and expectations in respect of the child from the outset. As we have noted above, Family Court disputes can and do arise between a range of parties, some of whom are not legally recognised as legal parents of the child, such as step-parents and grandparents.

106 Currently under the *Status of Children Act 1974* (Vic) if the donor subsequently becomes the husband or de facto partner of the birth mother all of his parental rights and liabilities in respect of the child are restored: s 10F.

107 Law Commission [New Zealand], *New Issues in Legal Parenthood* Report 88 (April 2005).

108 Del Code Ann § 8.703.

109 NM Stat Ann § 40.11.6 B.

110 NH Rev Stat Ann 168-B:3.

111 See further, Seymour and Magri (2004), above n 3, [2.21–2.24].

112 Roundtable discussion, 4 October 2004.

4.36 If the donor opts in to be the legal parent of the child through adoption, we anticipate that the Family Court would recognise his legal parental status for the purposes of the Family Law Act. It is unlikely that he would be liable to pay child support under the Child Support (Assessment) Act because this Act is based on the assumption that a child only has two parents.

! INTERIM RECOMMENDATION(S)

13. Section 10F of the *Status of Children Act 1974* should be amended to provide that where a woman without a legally recognised male partner becomes pregnant as the result of a treatment procedure using donor sperm, the man who donated the sperm is presumed for all purposes not to be the father of any child born as a result of the pregnancy, unless he becomes a parent of the child under the *Adoption Act 1984*.
14. The *Adoption Act 1984* should be amended to permit more than two people to be recognised as the legal parents of a child.
15. Where a woman gives birth to a child conceived as the result of a donor treatment procedure, the man who donated the sperm should be able to become a legal parent of the child without extinguishing the legal parental status of the birth mother (and her partner if she has one).
16. In order for the donor to become the legal parent of the child:
 - the donor must apply to adopt the child;
 - the birth mother (and her partner if she has one) must consent to the donor's application to adopt the child;
 - the parties must receive appropriate counselling and legal advice;
 - the application must be made within one year of the child's birth.

→ Should egg donors also be able to opt in to become a legal parent of the child?

→ Should the donor's partner also be able to opt in to become a legal parent of the child?

BIRTH CERTIFICATES

4.37 The submissions received by the commission raised a number of problems and inconsistencies about the registration of the birth of a child born as a result of a donor treatment procedure to women without male partners.

4.38 When a heterosexual couple registers the birth of their donor-conceived child, the registry makes no enquiry about the circumstances of the child's birth and makes no attempt, other than requiring the parents to complete a Birth Registration Statement, to confirm whether they are in fact the child's parents or whether a donor was involved. The Births, Deaths and Marriages

Registration Act permits the registrar to rely on the presumptions made in the Status of Children Act when recording the identity of a child's parents, so no further enquiry is legally required.¹¹³

4.39 When a child's mother submits a Birth Registration Statement without naming the child's father, the registry tries to identify the father so his name can be recorded.¹¹⁴ There are many reasons why a woman may not include the name of the father on the registration form: she may not know who the father is, there may be a history of violence with the father and she fears that identifying him will expose her and her child to further violence, the birth may be the result of a sexual assault, or the child may have been born as the result of donor insemination.¹¹⁵

4.40 If the woman underwent a treatment procedure in a reproductive services clinic using sperm from an unknown donor, the registry will accept a letter from the clinic as evidence that the father cannot be named. In these instances, the field reserved for the name of the child's father remains blank and the registry makes a note that the birth was as the result of donor insemination carried out in a clinic.

4.41 If the woman informs the registry that she self-inseminated with sperm from a known donor, the registry regards the donor as the father of the child (because his parental status has not been fully extinguished) and will insist that the woman identify him. Some women are willing to have the name of the donor recorded on the child's birth certificate but many are not. Many women who self-inseminate with sperm from a known donor do not regard the donor as the child's parent and object to having his name recorded on the birth certificate because it does not reflect the reality of the child's family. Some women have also reported difficulties with government authorities and service providers who, having sighted the child's birth certificate naming the donor as the father of the child, require the donor's consent to the issue of a passport for the child or to medical treatment for the child.¹¹⁶ This can be problematic where the mother has no ongoing contact with the donor.

4.42 In response to these concerns, the registry has developed a protocol to deal with the registration of births of children born as the result of privately arranged donor insemination.¹¹⁷ If the mother and the donor agree, the donor's name will not be recorded in the field reserved for the father's name on the births register or birth certificate. Instead, the donor's name will be recorded in the notes section of the births register. The legal status of this information is not clear.¹¹⁸

FUNCTION OF BIRTH CERTIFICATES

4.43 The primary function of a birth certificate is to provide evidence of a person's identity, age, place of birth and parentage for a range of practical and legal purposes. A birth certificate has important legal effects.

4.44 If a man is named as the father of a child on the birth certificate, he is presumed for legal purposes to be the father and the certificate may be produced in court as evidence that he is the

113 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 16(1)(f).

114 The registrar is empowered to conduct an inquiry to ascertain the particulars of a birth: *Births, Deaths and Marriages Registration Act 1996* (Vic) s 42.

115 These and other reasons are listed in the registry's 'Registration of Parentage Details Procedures'.

116 Submission 179 (Lesbian Parents Project Group).

117 Meeting with Registry of Births, Deaths and Marriages, 18 February 2005.

118 The registry informed us that the notes can only be accessed by registry staff, and the information contained in the notes would be provided to the registered person upon request: meeting with Registry of Births, Deaths and Marriages, 18 February 2005.

parent of the child in order to establish a legal right or obligation.¹¹⁹ For example, if a donor is named as the father on the child's birth certificate, the child could produce the birth certificate in support of a claim to the man's deceased estate. This would clearly conflict with the provisions of the Status of Children Act that remove any legal responsibilities from the donor.¹²⁰ Although the presumption could be rebutted by reference to section 10F of the Status of Children Act, it is undesirable for this conflict to arise in the first place.

4.45 Several submissions called for flexibility and choice in who should be able to be named as the parents of a child on the birth certificate.¹²¹ Having regard to the legal consequences of being named on a birth certificate, the commission believes that only those people who are recognised as the full legal parents of the child should be named on the birth certificate. To do otherwise creates confusion about a person's legal status in respect of the child. This can lead to problems with organisations such as government agencies, schools and health providers. Flexibility and choice is relevant to whether a person becomes the legal parent of the child at the outset, and being named on the birth certificate should flow from that decision. Accordingly, the name of a sperm donor should only appear on the child's birth certificate if he has opted in to become the legal parent of the child in accordance with Interim Recommendation 15.

4.46 In all other cases, the donor should not be recorded on the births register. In Chapter 5 we discuss where information about a donor who is not the legal parent of the child should be recorded.

! INTERIM RECOMMENDATION(S)

17. Where the donor adopts the child, he should be registered as a parent of the child on the births register and birth certificate.

STATUS OF EGG DONORS

4.47 It is unclear whether a woman without a male partner who bears a child conceived as a result of ART using a donated egg is the child's legal mother. The Status of Children Act is silent as to the status of a woman in this position. Whether a woman in this position is considered to be the mother of the child at common law has not been tested. In the absence of any dispute, she is likely to be registered as the mother of the child on the births register, giving rise to a presumption that she is the child's mother. By contrast, where a woman with a legally recognised male partner bears a child conceived with a donated egg, the Status of Children Act states that she is presumed to be the mother of the child.

4.48 Uncertainty about the legal parental status of the egg donor to a woman without a legally recognised male partner may also cause stress and anxiety and lead to disputes about the rights and obligations of the birth mother, the egg donor and third parties. It may also discourage women who would otherwise wish to become egg donors.

119 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 46; *Status of Children Act 1974* (Vic) s 8; *Family Law Act 1975* (Cth) ss 69R, 102.

120 If it can be proved that the man is not the father of the child (either because he is not biologically the child's father, or because his legal parental status has been extinguished), the presumption can be rebutted and the births register and certificate rectified: *Births, Deaths and Marriages Registration Act 1996* (Vic) s 43.

121 For example, Submissions 149 (Prospective Lesbian Parents), 143 (Bouverie Centre).

4.49 The commission is of the view that Victorian law should expressly clarify that the birth mother is the mother of the child and the egg donor is not, regardless of the relationship status of the birth mother. This would bring Victorian law into line with that of Western Australia, South Australia, the ACT and the Northern Territory.

4.50 Amending the Status of Children Act will not necessarily clarify the status of birth mothers and egg donors in this situation for the purposes of federal law. It would be necessary for the amended provisions to be prescribed or recognised by the federal legislature. It should be noted that the *Family Law Regulations 1984* (Cth) do recognise provisions in the terms recommended by the commission that are contained in the relevant legislation from South Australia and the Northern Territory.¹²²

!

INTERIM RECOMMENDATION(S)

18. The *Status of Children Act 1974* should be amended to include the following provision:

(1) If a woman undergoes a procedure as a result of which she becomes pregnant, she is conclusively presumed to be the mother of any child born as a result of the pregnancy;

(2) If the ovum used in the procedure was produced by another woman, that other woman is conclusively presumed not to be the mother of any child born as a result of the pregnancy.

Chapter 5

Access to Information

INTRODUCTION

5.1 Victoria has recognised the right of donor-conceived people to obtain information about their genetic origins. The Infertility Treatment Act establishes a regime for the collection of and access to donor information. The capacity to access donor information is now considered to be of fundamental importance to people conceived using donated gametes, and the law in Victoria has been reformed to reflect this. Whereas once donors were guaranteed anonymity, their identity can now be released to the child once he or she is 18 years old.

5.2 Although Victoria's regime for the collection of and access to donor information is considered to be at the forefront of public policy in this area, some people believe the current system does not go far enough and others believe it goes too far in some areas. The following questions have been raised during our review.

- Should there be a legal obligation imposed on parents to inform children that they were conceived through use of donated gametes?
- Should the birth certificates of donor-conceived people include information about their donors, or indicate that they are donor conceived?
- Should donors be able to access information about children conceived through the use of their gametes?
- Should the donor registers be managed by the Registry of Births, Deaths and Marriages instead of the ITA?
- Should women who self-inseminate outside the clinic system be required to notify the name of the donor to be included on the central register?
- Should donor-conceived children be able to apply for access to information about their donors before they are 18 years old?
- Should people conceived through the use of gametes donated prior to 1 January 1998 be given access to information about their donors even where the donor was guaranteed anonymity?

5.3 In this chapter we address each of these questions and make recommendations for reform.

PRESENT LAW

5.4 The ITA maintains registers of information about births arising from the use of donor sperm, eggs or embryos. The ITA's central register contains the following information: the name and sex of each child born as a result of a donor treatment procedure carried out in a licensed clinic

or by a licensed doctor, the donor's code number, name and contact details, the names and contact details of the recipient parents, and details of any physical abnormalities of any of the parties.¹²³

5.5 The Infertility Treatment Act governs who may obtain access to the information contained in the registers, and under what conditions. Different provisions apply according to when the donor gave the gametes.

DONATIONS MADE ON OR AFTER 1 JANUARY 1998

5.6 The Infertility Treatment Act introduced new laws about applications for release of information in the 1990s. The new regime became effective on 1 January 1998 when the Act was fully proclaimed. The Act established the 1995 Central Register, which contains information about all births arising from donations made on or after 1 January 1998. As at 13 July 2005, this register contained entries for 664 births arising out of donations made by 403 donors.¹²⁴

5.7 People undergoing donor treatment procedures are counselled about advising children about their donor origins and right to information.¹²⁵

5.8 The Act provides for applications to be made for the release of identifying and non-identifying information about donors, children and recipient parents by each of the parties. Before releasing any information contained in the registers, the ITA must refer the applicant to counselling and must make reasonable efforts to find the person to whom the information relates to advise him/her the information is about to be released.

5.9 People conceived with gametes donated on or after 1 January 1998 will be able to obtain information identifying their donors when they are 18 years old, without the need to obtain the donor's consent.¹²⁶ If they wish to access this information before they are 18 years old, the application must be made by their parents and the release of the information is still subject to the donor's consent.¹²⁷ If the donor does not consent to the release of his or her identity, non-identifying information can still be provided to the child's parents.¹²⁸

5.10 Donors may also apply for information about people born through the use of their gametes or about the recipient parents.¹²⁹ The ITA can only release information that identifies the child if the recipient parents consent or, if the child has attained the age of 18 years, with that person's consent. If it receives such an application from the donor, the ITA must try to contact the recipient parents or donor-conceived person to advise them of the application, seek their consent and refer them to counselling.¹³⁰

DONATIONS MADE PRIOR TO 1 JANUARY 1998

5.11 Prior to the introduction of the 1995 Central Register, information about births arising from donor treatment procedures was recorded in the 1984 Central Register.¹³¹ The 1984 Central

123 *Infertility Treatment Act 1995* (Vic) pt 7, div 1.

124 Email from ITA, 13 July 2005.

125 *Infertility Treatment Regulations 1997* (Vic) s 6(f)(v).

126 *Infertility Treatment Act 1995* (Vic) s 79.

127 *Infertility Treatment Act 1995* (Vic) ss 74, 75(2).

128 *Infertility Treatment Act 1995* (Vic) s 75(1).

129 *Infertility Treatment Act 1995* (Vic) s 76.

130 *Infertility Treatment Act 1995* (Vic) s 77.

131 *Infertility (Medical Procedures) Act 1984* (Vic) s 22 (now repealed). The 1984 register now forms part of the 1995 Central Register: *Infertility Treatment Act 1995* (Vic) s 182(3).

Register contains information about births arising from donor treatment procedures carried out using gametes donated between 1 July 1988 and 31 December 1997. As at 13 July 2005, this register included entries for 2479 births arising out of donations from 578 donors.

5.12 Parents, donor-conceived people over 18 years of age and donors are able to access non-identifying information contained in the 1984 Central Register.¹³² Identifying information can only be released if the person to whom the information relates has consented. If the donor consented to the release of his or her identity at the time of the donation it will be recorded on the Central Register.

5.13 Gametes donated prior to 1 January 1998 have continued to be used since that date. This means that some children born after 1 January 1998 do not have an automatic right to access the identity of their donor when they are 18 years old, while children born through the use of gametes donated from 1998 do. The ITA has recently announced that it has advised clinics that from June 2006 they will no longer be permitted to use gametes donated prior to January 1998.¹³³

DONATIONS MADE PRIOR TO 1 JULY 1988

5.14 Prior to 1 July 1988, the only information identifying donors was kept in hospital or doctors' records. The only means for people to obtain information about births arising out of treatment procedures carried out before this date, is if that information has been voluntarily provided to the ITA.

VOLUNTARY REGISTERS

5.15 In 2001, the ITA established a voluntary register to record information about treatment procedures which occurred before 1 July 1988.¹³⁴ People born as a result of treatment procedures before that date, donors, parents and relatives can ask the ITA to enter their names and addresses and wishes about exchange of information. As at 13 July 2005, 18 children, 37 donors and 10 recipient parents had been entered on the register and five links had been made.¹³⁵

5.16 The ITA also maintains a register which contains information that has been voluntarily provided by donor-conceived people, recipient parents and donors associated with donor procedures since 1 July 1988 (the post-1988 Voluntary Register).¹³⁶ This register enables donors to indicate in advance that they agree to the release of their identity if the recipient parents or child apply for information. As at 13 July 2005, 31 donors and 41 recipient parents had been entered on the register and two links had been made.

5.17 The ITA may only release the information contained in the voluntary registers in accordance with the wishes of that person.¹³⁷ The information recorded on the voluntary registers may include a person's wishes about contact, photographs, letters and medical information.

132 Section 181 of the *Infertility Treatment Act 1995* (Vic) applies the relevant access to information provisions to applications for information kept in the 1984 Central Register, excluding the right of the child to information that identifies the donor: see s 184(3),(4).

133 Carol Nader, 'Fertility clinic rule ends confusion on contact with father' *The Age* (Melbourne) 7 July 2005. The only exception will be people who have already have children conceived through donor gametes and want to have more children using the same donor.

134 *Infertility Treatment Act 1995* (Vic) pt 7A (inserted by *Infertility Treatment Amendment Act 2001* (Vic)).

135 A link between parties on a voluntary register is usually considered to be made when the parties exchange information and/or communication: email from the ITA, 13 July 2005.

136 *Infertility Treatment Act 1995* (Vic) s 82.

137 *Infertility Treatment Act 1995* (Vic) s 92F, 82.

INTERIM RECOMMENDATIONS

5.18 During our consultation process, we heard a variety of views about the system for the provision of information about donor conception. We also examined research about the experiences of donor-conceived people.

DISCLOSURE OF DONOR STATUS

5.19 Many children born as a result of the use of ART are not informed they are donor conceived, despite the fact that parents have been counselled for many years that it is in the best interests of children to be told the truth about their origins. A study conducted in Victoria found that only 37% of families surveyed had told their children of their donor conception.¹³⁸

5.20 In her occasional paper written for the commission, Dr Ruth McNair reviewed some of the research conducted into outcomes for children conceived with donated gametes. This research indicates that some donor-conceived children have experienced negative outcomes associated with the method of their conception, some of which relate to the impact of delayed discovery of the truth of their origins and/or the inability to discover the identity of their donor.¹³⁹ The commission also received submissions from and consulted with a number of donor-conceived people who have experienced frustration, grief, anger and other negative reactions since discovering their donor status.¹⁴⁰

5.21 However, some recent international studies examining families with donor-conceived children suggest that children who have been informed of their origins from a young age feel comfortable about the fact, and their families are functioning positively.¹⁴¹

5.22 The commission is strongly in favour of parents informing their children of their origins from a very early age, as are doctors, counsellors, researchers and policymakers who work in this area. Early disclosure is clearly an important factor in avoiding some of the negative outcomes experienced by donor-conceived people.

5.23 In Position Paper One we recommended that a new guiding principle be introduced into the Infertility Treatment Act, namely that 'all children born as a result of the use of donated gametes have a right to information about their genetic parents'. This principle reflects the findings of studies which have highlighted the importance of children being told about their donor status and having access to the identity of their donor. It can also be argued that the *Convention on the Rights of the Child* creates such a right.¹⁴² Incorporating this principle in the legislation that regulates the provision of ART services in Victoria would reinforce the expectation that parents tell their children about their origins.

5.24 The commission does not believe, however, that a legal obligation should be imposed on parents to inform their children of their genetic origins. Such an obligation would be intrusive and

138 Jenny Blood, Penny Pitt and HWG Baker, *Parents Decision to Inform Children of their Donor (Sperm) Conception and the Impact of a Register which Legislates to Enable Identification of Donors*, Royal Women's Hospital Melbourne and the University of Melbourne, unpublished paper, copy provided to the VLRC by Jenny Blood.

139 McNair (2004), above n 3, 39–45.

140 Submission 60 (Myfanwy Walker), Submission 91 (Karen Clarke), Submission 234 (Christine Whipp); consultation with TangledWebs, 12 November 2004.

141 Scheib JE, Riordan M & Rubin S 'Adolescents with Open-Identity Sperm Donors: Reports from 12–17 Year Olds' (2005) 20(1) *Human Reproduction* 239; Lycett et al 'Offspring created as a result of donor insemination: a study of family relationships, child adjustment, and disclosure (2004) 82(1) *Fertility and Sterility* 172; Lycett et al, 'School-aged children of donor insemination: a study of parents' disclosure patterns' (2005) 20(3) *Human Reproduction* 810.

142 Tobin (2004), above n 3, 35–40.

unenforceable. Many people we consulted have also argued that if such an obligation were to be imposed on parents of donor-conceived children, it would also have to be imposed on all parents, which is not feasible.

5.25 Instead, the commission recommends that more supportive strategies be adopted to encourage parents to tell their children. Education and counselling should continue to remain central to donor treatment procedures, not only before the procedure, but also after the child is born. Parents need to be supported and provided with assistance to begin to tell their children about their origins early in life.

5.26 One of the principal reasons parents do not tell children they were donor-conceived is because of the stigma associated with infertility and ART. Several submissions argued that as society becomes more accepting of assisted reproduction and donor conception, parents will become more willing and able to tell their children about their origins. The Victorian Infertility Counsellors Group argued that society can ‘through community debate and education endeavour to establish a climate within our community where couples feel comfortable about telling’.¹⁴³ ACCESS drew a parallel between adoption and donor conception in its submission:

ACCESS considers that it would be desirable for all parents of donor-conceived children to inform their children of the circumstances of their conception. Children have a right to know their genetic heritage.

However, we do not believe that imposing a legal obligation on parents would achieve this purpose. As noted, it would be impossible to enforce such an obligation. Additionally, prescribing what should occur in the family home rarely facilitates co-operation. We believe that it would be more effective to actively encourage parents to disclose this information to their children, and to educate them about the pros and cons of the issue.

As an analogy, it was once rare for adoptive parents to tell their children about their adopted status.

However, over the last few decades, this notion of secrecy and shame has been debated, discussed and debunked and it has now become commonplace for adoptive parents to disclose the fact of their adoption to their children. It is, in fact, taken for granted. We would hope that there will come a time when such disclosures are just as common and relaxed for the parents of donor children.¹⁴⁴

5.27 Professor Ken Daniels, a social worker who has worked closely with parents of donor-conceived children and has been involved in numerous international studies of donor-conceived families, believes that the key to encouraging people to be honest with their children is to work with them to build confidence about how they have created their families.¹⁴⁵ Professor Daniels advocates the sharing of information with friends and family and other families who have used donated gametes, and preparing parents to talk to children about the story of their creation. Several children’s books about donor conception are now available.¹⁴⁶ Parents can use these books to help children understand how they were conceived.

143 Submission 155 (Victorian Infertility Counsellors Group).

144 Submission 192 (ACCESS).

145 Ken Daniels (2004) *Building a Family with the Assistance of Donor Insemination*.

146 The Donor Conception Support Group website lists a range of resources about donor conception for parents and children <www.dcs.org.au> at 13 July 1005.

! INTERIM RECOMMENDATION(S)

19. A guiding principle in the *Infertility Treatment Act 1995* that 'all children born as a result of the use of donated gametes have a right to information about their genetic parents' is sufficient, coupled with appropriate counselling, to underline the importance of informing children about their genetic origins.
20. Parents who have children born through the use of donated gametes should be provided with ongoing counselling and support and adequate resources sufficient to enable them to inform their children about their genetic origins. New and emerging ways of encouraging and equipping parents to tell their children should be investigated by counsellors and clinicians.

ACCESS TO INFORMATION BY DONORS

5.28 Donors are now able to request identifying information about people born as a result of donor treatment procedures using their gametes and/or the parents of those people. For such information to be released, the donor-conceived person must consent if he or she is aged over 18. Both of the child's parents or a guardian must consent if the child is aged under 18. If a donor approaches the ITA and requests information identifying a child born using his or her gametes, the ITA is required to contact the donor-conceived person to seek consent to the release of the information.

5.29 On one hand, this provision serves an important purpose in supporting the child's right to know about his or her genetic origins. Because so many parents have not informed their children they are donor-conceived, being contacted by the ITA may be the only way the child will discover the truth of their origins. Although this may be traumatic at first, the child may come to be grateful for having received this information, as has been the case with many adopted people who have been sought out by their birth parents. The prospect of the child being contacted by the ITA may also act as an incentive for parents to inform their children of their origins from an early age. Some people consulted by the commission also suggested that the ITA should send letters to every donor-conceived person once they are 18 years old, as another means of ensuring that people will discover the truth of their origins.¹⁴⁷

5.30 On the other hand, some people have expressed concern about the capacity of the donor to apply for identifying information about the child. They fear that a person who was previously unaware of their origins will be traumatised by being contacted by the ITA to advise of the donor's application. Submissions received from doctors practising in this area also regard this as an invasion of the child's and recipient family's privacy, and an inappropriate role for the State to play. Professor Gordon Baker, for example, wrote:

I believe this is an unacceptable infringement of privacy and interference in the family. This part of the law should be removed and donors should not have the right to identifying information about the child. Because of this section, the Infertility Treatment Authority is intending to send patients a relatively open letter once they are informed of the birth of a child after a donor procedure, explaining that this contact with the child might occur. This letter might be seen as an attempt by the ITA to coerce the parents to tell the child of the involvement of the donors in their conception. I do not believe the parliamentarians understood that this would be the result of the provisions in the *Infertility Treatment Act 1995*. The sections about donor gametes and embryos should be revised to leave the decision about telling the children of the mode of conception to the parents.¹⁴⁸

5.31 Similar arguments were made by Professor Robert McLachlan:

To return to the current ITA legislation, one cannot begin to imagine the traumatic and devastating effect of the revelation, that they were...donor conceived. This could have a catastrophic effect on their relationship with their social parents and may have profound adverse effects on other aspects of their psychological health.

In summary, I believe that the ITA legislation must be changed such that the (sic) *only adult donor-conceived person* can initiate any correspondence after their 18th birthday. I reiterate that I personally believe that couples should be open, but I cannot see that it is ethically necessary or legally possible for them to be compelled to do so. Further the State would be committing a grave error by an unannounced re-entry into the lives of the child and the parents many years later. The revelation of their likely DI [donor insemination] origin could have devastating effects that, in essence, would be much more serious than the child having never been told.¹⁴⁹

5.32 The commission has weighed up these competing arguments. We have concluded that the donor should not have the right to apply for identifying information about the child. The commission's view is that the most appropriate way for children to discover they are donor-conceived is for them to be informed by their parents. The State should not do so, whether as the result of an application by the donor, by letter, or by some sort of annotation on the child's birth certificate. Parents should be encouraged to inform their children of their origins through education and the provision of support and assistance. Gradually, the community and parents will become more open and honest about donor conception, just as they did with adoption. Implementing provisions designed to coerce parents to inform their children is heavy-handed and may even encourage parents to undertake measures to avoid having their child's birth registered on the Central Register.

5.33 We do not believe the donor should be treated in the same way as the birth parents of an adopted child, as he or she has never been regarded as the parent of the child and has never had a relationship with the child that would justify enabling him to initiate an approach to be made to the child.

5.34 Removing the donor's capacity to apply for identifying information will not necessarily preclude the donor from ever having contact with the child. If the child is aged younger than 18, the donor can apply to contact the recipient parents and the parents may consent to contact while the child is a minor. When the child reaches 18 years of age, he or she may initiate contact with the donor. We recommend that the donor continue to be able to register his or her wishes about contact and that this information be provided if the child chooses to seek the donor out.

148 Submission 174 (Professor Gordon Baker).

149 Submission 237 (Professor Robert McLachlan).

! INTERIM RECOMMENDATION(S)

21. Donors should not be able to obtain identifying information about their donor-conceived offspring, but should be able to register their wishes with the ITA for identifying information about or contact with the child, for release to the child if the child initiates an inquiry about the donor.

5.35 The commission agreed this recommendation should apply to egg donors as well as sperm donors, but there was some hesitation about whether embryo donors should be treated in the same way. We would be interested in hearing whether people believe that embryo donors, who may be seen as having a different connection to the child than gamete donors, should be precluded from applying for information about the child. Our understanding is that many embryo donors meet the recipients of their embryos before the treatment procedure, which would suggest that they already know the identity of the recipients (and therefore the child) and will have no reason to apply to the ITA for that information.

→ Should embryo donors be able to apply for identifying information about the child?

5.36 If the donor's right to information about children born from his/her gametes is removed, the question arises of whether this should apply to donors who have already donated gametes on the basis that they can request information about the child, or only to donors who donate in the future. It is generally regarded as unfair for legislation to change the law retrospectively. However, changing the donor's opportunity to obtain information about the child prospectively would create distinctions between different categories of donors and children and might also be seen to be unfair.

→ Should the removal of the donor's right to apply for identifying information have retrospective effect?

DONOR REGISTERS

5.37 Currently, the ITA manages donor registers. During our consultation process, several submissions, including submissions from the ITA itself,¹⁵⁰ queried whether it would be more appropriate for the donor registers to be managed by the Registry of Births, Deaths and Marriages.

5.38 The commission recommends that the donor registers be managed by the registry, or an entity connected to the registry, in a similar way to the management of adoption information. The system would need to retain important features of the ITA registers, such as the high level of confidentiality and the referral of applicants to counselling.

5.39 The decision to locate the donor registers within a service attached to the Registry of Births, Deaths and Marriages is based on the concept that donor information is about the child. The parents' infertility should not define the child throughout his or her life. Centralising all information about a child's birth would also help to normalise donor conception, and would treat a donor-conceived person who has a desire for information about his or her parentage in the same way as other children in a similar position.

5.40 At the roundtable discussion convened by the commission to discuss these issues, representatives from the Registry of Births, Deaths and Marriages said the registry is already experienced in handling adoption records and requests for access to adoption information, so managing the donor registers would not pose any significant problems.

! INTERIM RECOMMENDATION(S)

22. A service connected to the Registry of Births, Deaths and Marriages, similar to the Adoption Information Service, should be established to manage the donor registers. The donor registers should be transferred from the Infertility Treatment Authority to this new service.

CHILDREN CONCEIVED OUTSIDE THE CLINIC SYSTEM

5.41 The ITA's donor registers only record information about children born through procedures carried out in licensed clinics or by licensed doctors. Women who self-inseminate with sperm from a known donor and do not use the services of a clinic are under no compulsion to register the name of the donor with the ITA. This may leave some donor-conceived children without the same right or capacity that others have to access information about their donors.

5.42 As discussed in Chapter 4, the commission believes the identity of a known donor should be recorded on the donor register, and not on the births register (unless the donor becomes the legal parent of the child). To this end, we recommend that when a woman who has self-inseminated with sperm from a known donor registers the birth of her child, she should be referred to the ITA (or the new service to be established in accordance with Interim Recommendation 20) to register the name of the donor.

5.43 This recommendation is consistent with the principle that children have a right to information about their genetic parents. It treats children born as the result of clinic treatment procedures in the same way as children born as the result of privately arranged self-insemination.

5.44 Many submissions from women who have had or are intending to have children using donated gametes, expressed a strong commitment to telling their children about their origins and enabling their children to make contact with the donor.¹⁵¹ The Victorian Gay and Lesbian Rights Lobby noted that 'within the gay and lesbian community, it is common, if not universal, for parents to tell their children about the circumstances of their conception'.¹⁵² The lobby supported the introduction of a requirement that a woman who self-inseminates with sperm from a known donor provide the donor's details to the ITA because it would provide 'equality and consistency for all children conceived in this way, whether via a clinic procedure or by self-insemination'. However, they said that such a provision 'should only be considered as part of legislative reform that explicitly recognises that the non-birth mother is a parent...and the known donor is not a parent'. Prospective Lesbian Parents and the Bouverie Centre both echoed these views.¹⁵³ The Bouverie Centre said that information about the donor should be recorded at the time of registering the child's birth.

151 Submissions 33 (Tracey Petersen), 36 (Mary and Rachael), 67 (Susan), 72 (Leonie Davey), 73 (Lauren Andrew), 104 (Anonymous), 108 (Anonymous), 110 (Lisa and Amanda), 62 (Bit Bent Buddies), 179 (Lesbian Parents Project Group). A submission received from a prospective known donor also stated an intention to inform the child about his/her origins: Submission 59 (Ian Seal).

152 Submission 167 (Victorian Gay and Lesbian Rights Lobby).

153 Submissions 149 (Prospective Lesbian Parents), 143 (Bouverie Centre).

! INTERIM RECOMMENDATION(S)

23. Women who self-inseminate with sperm from a known donor should be required to notify the name of the donor to the Infertility Treatment Authority (or the Registry of Births, Deaths and Marriages if the donor registers are transferred) to be recorded in the donor registers.

→ Should there be any penalty on a woman who refuses to provide the name of the donor to be recorded on the Central Register?

AGE OF ACCESS TO INFORMATION

5.45 Currently, donor-conceived children who are aged under 18 are not independently able to access information about their donors. Applications for identifying information about the donor can only be made by their parents. Accordingly, even though the right to access information about the donor is often expressed to be the child's right, the right does not come into effect until the child reaches adulthood. John Tobin argues that it is difficult to justify maintaining denial of access to identifying information about the donor until the child is 18 years old when the available research demonstrates that the capacity to obtain access to this information is of fundamental importance to the child.¹⁵⁴

5.46 The commission believes children who want to obtain information about their donor, whether identifying or non-identifying, should be able to access that information without the need for the consent or assistance of his or her parents. Many children become curious about their donor and other issues about their identity in their early teenage years.

5.47 We recommend that a child be able to apply for information about the donor at any age, but that the release of the information should remain subject to an assessment by a counsellor that the child has sufficient maturity to understand the nature of the information and the possible consequences of making contact with the donor. However, we do believe it would be appropriate for the views of the child's parents to be sought, and if the child would prefer that his or her parents not know about the application, that the application be able to be withdrawn at that point.

! INTERIM RECOMMENDATION(S)

24. Donor-conceived children under the age of 18 should be able to apply for information identifying donors, but access to the information should only be granted if a counsellor is of the opinion that the child has sufficient maturity to be able to understand the nature of the information.
25. If a donor-conceived child applies for information identifying the donor before he or she is 18 years old, that information should be able to be released to the child without the consent of the donor.

154 Tobin 2004, above n 3, 40–45.

→ Should the decision about whether a child aged under 18 may access information about the donor be reviewable by a body such as the Victorian Civil and Administrative Tribunal?

RETROSPECTIVE ACCESS TO INFORMATION ABOUT ANONYMOUS DONORS

5.48 Donor-conceived people born as a result of ART using gametes donated before 1 January 1998 are unable to access information about their donors unless the donors have consented to the release of information or have applied to the ITA to be entered onto the Voluntary Register. Some donor-conceived people we consulted are frustrated at their inability to find out about their genetic origins and their extended genetic families.¹⁵⁵ They are seeking retrospective access to information that would identify their donors, even where the donor was guaranteed anonymity, in the same way as adopted people were given the right to access records about their birth parents.

5.49 The commission has declined to make a recommendation for retrospective access to this information. We remain sympathetic to those people who have no way of ascertaining the identity of their genetic parents. However, we believe that it would be unfair to release identifying information about donors who were told at the time of their donation that this would not be made available. The voluntary registers were established as a means of facilitating exchange of this information. Our only recommendation in relation to this issue is that the ITA should conduct further campaigns to raise the profile of the voluntary registers and to encourage donors to come forward to consent to the release of their identity.

Chapter 6

Adoption

INTRODUCTION

6.1 Our terms of reference ask the commission to enquire into and report on the desirability and feasibility of changes to the Adoption Act to expand eligibility criteria for adoption.

6.2 In Chapter 2, we explained the legal effect of adoption and discussed the developments in adoption law and policy that have been implemented to avoid some of the negative consequences of adoption for parents and children. In Chapters 3 and 4 we recommended that the Adoption Act be amended to create new forms of adoption. These forms of adoption would allow a child who has been born as a result of sperm donation to be adopted by:

- the birth mother's female partner; and/or
- the donor, with the consent of the child's legal parents.

The circumstances in which these forms of adoption would apply, and the conditions that would need to be met for the adoption to take effect are discussed in Chapters 3 and 4.

6.3 In this chapter we identify the forms of adoption that exist and examine their eligibility criteria.

INFANT ADOPTION

6.4 Infant adoption is the adoption of a young child by a couple or person who has no relationship to the child or the child's birth parents. The primary purpose of infant adoption is to provide a stable family for a child in need, not to meet the need or desire of an adult for a child. The children are usually aged between two months and one year. Infant adoption is relatively rare today because birth parents are encouraged to explore alternatives to adoption such as permanent care arrangements, which preserve their legal relationship with the child. In 2003–04 there were only 10 infant adoptions in Victoria.¹⁵⁶

PERMANENT CARE ORDERS

6.5 If a child is unable to remain living with his or her birth parents, the Children's Court can make a permanent care order to grant custody and guardianship of the child to the caregivers to the exclusion of all others.¹⁵⁷ Permanent care orders last until the child turns 18 and do not transfer full legal parental status to the caregivers. They must include conditions that the court considers to be in the interests of the child concerning access by the child's parent.

156 Department of Human Services, 'Adoption and Permanent Care Statistics' <www.dhs.vic.gov.au> at 14 July 2005.

157 *Children and Young Persons Act 1989* (Vic) s 112.

SPECIAL NEEDS PLACEMENTS

6.6 Special needs adoption occurs where a child has a specific disability or health condition or there are concerns about his or her development. Most children with special needs who are referred to adoption agencies are placed in permanent care arrangements and only a very small number are adopted. In 2003–04 there were 64 adoptions and permanent care placements of children with special needs in Victoria.

RELATIVE AND STEP-PARENT ADOPTION

6.7 Relative adoption is the adoption of the child by a relative who is not the child's mother or father, for example an aunt or a sister. Relative adoption is discouraged because it distorts a child's family relationships.

6.8 Step-parent adoption is the adoption of the child by the heterosexual partner of the child's birth parent. Step-parent adoption extinguishes the legal relationship between the child and one of his or her birth parents, but not the other. Step-parent adoption is generally discouraged because it permanently severs the legal relationship between the child and an existing parent and other family members. To make an adoption order in favour of a step-parent, the court must be satisfied exceptional circumstances exist and that a parenting order from the Family Court would be inadequate for the care of the child.¹⁵⁸ Examples of exceptional circumstances are where the child's birth parent has died, there is a history of violence between the child's parents, or where the child was conceived by rape.¹⁵⁹

PRESENT LAW

ADOPTION

6.9 There are extensive laws, regulations, standards and procedures that govern adoption of children in Victoria. The United Nations, *Convention on the Rights of the Child* requires signatories to ensure that the best interests of the child are the paramount consideration in adoption.¹⁶⁰ This principle is enshrined in the Adoption Act.¹⁶¹

6.10 National standards and principles have been developed to guide the provision of adoption services. The *National Principles in Adoption 1997* incorporate obligations that arise under the *Convention on the Rights of the Child* and the Hague *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, to which Australia is a signatory. They contain policies which recognise the needs of children, parents and applicants involved in adoption. The *Standards in Adoption 1986* define and describe an accepted level of practice in the provision of adoption services.

6.11 The Adoption Act and *Adoption Regulations 1998* (Vic) set out the legislative requirements which must be met by people applying to adopt children and prescribe the procedures which must be followed for each adoption, from obtaining consent from the birth parents to obtaining an

158 *Adoption Act 1984* (Vic) ss 11(6), 12.

159 Department of Human Services (August 2004), above n 58.

160 *Convention on the Rights of the Child*, UN GAOR, 44th sess, UN Doc A/44/736 (1990) art 21.

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

adoption order from the court. The Act also establishes the Adoption Information Service and enables parents and children to obtain information about each other.¹⁶²

6.12 The Department of Human Services produces the *Adoption and Permanent Care Procedures Manual*, which provides extensive guidance to agencies handling referrals of children for adoption and/or permanent care and applications by prospective adoptive parents.¹⁶³ The Procedures Manual covers issues such as counselling of birth parents; the recruitment, preparation and education of applicants; linking of applicants and children; supervision of placements; access arrangements and post-placement support.

6.13 The Adoption Act prescribes the categories of people in whose favour adoption orders may be made. The Act requires applicants to have been married or in a stable de facto relationship for at least two years.¹⁶⁴ A de facto relationship is defined as a 'relationship of a man and a woman who are living together as husband and wife on a genuine domestic basis, although not married to each other'.¹⁶⁵ An adoption order can therefore not be made in favour of a same-sex couple.

6.14 Single applicants can adopt if the court is satisfied that special circumstances exist which make adoption by that person desirable.¹⁶⁶ The *Infant Adoption* brochure produced by the Department of Human Services states that this generally applies to children with special needs.¹⁶⁷

6.15 Adoption applicants must be approved as fit and proper persons to adopt a child by the Department of Human Services or the principal officer of an approved adoption agency.¹⁶⁸ Applicants must meet the following criteria.

- (a) The personality, age, emotional, physical and mental health, maturity, financial circumstances, general stability of character and the stability and quality of the relationship between the applicants and between the applicants and other family members, are such that he or she has the capacity to provide a secure and beneficial emotional and physical environment during a child's upbringing until the child reaches social and emotional independence.
- (b) If an applicant has had the care of a child before applying for approval as a fit and proper person to adopt a child, he or she has shown an ability to provide such an environment for the child.¹⁶⁹

6.16 Adoption orders are made by the County Court.

PERMANENT CARE ORDERS

6.17 The above eligibility criteria only apply to adoptions. In the case of applications for permanent care orders, the Department of Human Services must have approved the applicant as suitable and the Children's Court must be satisfied the person or persons named in the application are suitable to have custody and guardianship of the child.¹⁷⁰ In making this decision, the court is required to have regard to the following matters:

162 *Adoption Act 1984* (Vic) pt 6.

163 Department of Human Services (August 2004), above n 58.

164 *Adoption Act 1984* (Vic) s 11(1).

165 *Adoption Act 1984* (Vic) s 4.

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

167 Department of Human Services, *Infant Adoption* (May 2005).

168 *Adoption Act 1984* (Vic) s 13(1).

169 *Adoption Regulations 1998* (Vic) s 35.

170 *Children and Young Persons Act 1989* (Vic) s 112.

- (a) the personality, age, health, marital and family relationships, emotional maturity, financial circumstances and general stability of character of each person named in the application as suitable to have custody and guardianship of the child; and
- (b) the capacity of each person so named in the application to provide a secure and beneficial, emotional and physical environment for the child's upbringing until the child reaches social and emotional independence; and
- (c) if a person so named in the application had the care of the child before applying to the Court, the ability of that person to provide such an environment for the child; and
- (d) the compatibility between the religion, race or ethnic background of each person so named in the application and the child; and
- (e) the understanding by each person so named in the application of the importance of access by the child's parents and exchange of information concerning the child.¹⁷¹

6.18 There is no prohibition on a person or persons in a same-sex relationship becoming the carer of a child under a permanent care order.

PROBLEMS WITH THE PRESENT LAW

6.19 Because the pool of eligible applicants is restricted to heterosexual couples, a child in need may potentially be deprived of the opportunity to be placed with the most suitable carers. This restriction is contrary to one of the assumptions articulated in the Standards in Adoption document, namely that 'It is in the best interests of children to have the maximum range of prospective adoptive parents available'.¹⁷² Although there are many more people who apply to adopt than children who are referred to adoption agencies, the process of linking children with applicants is complex and there is no guarantee that a suitable couple will be found for a particular child.

6.20 Some same-sex couples act as foster parents and permanent carers to children who are unable to live permanently with their birth parents. The commission received a submission from a gay man who has been a foster carer of two boys for over five years.¹⁷³ In his submission, the man describes how the boys chose to live with him and his partner:

The boys had a number of options about where they could live and were told that we were gay prior to meeting us. We wanted them to be told, so they could make the decision about whether they wanted to live with a gay couple. Before making their decision about living with us they met us and came and saw our house and our dogs and cats. We told them that if they had any questions about our being gay they could just ask, it wasn't something they should be fearful of or continue to wonder about if they had any questions. Our being gay was not a major concern for them, although they did have some questions that we were willing to answer from the outset. I suspect their decision in the end was based on the merits of us as a couple and what we could provide for them as a family unit.

Through fostering I have learnt a lot about the experiences of children being brought up by a gay couple. From talking to the boys I can tell that it has been a positive experience for them. The fact that the 19 year old has chosen to stay living with us even though he is no longer considered to be a foster child suggests that it's a positive experience for him.

171 *Children and Young Persons (General) Regulations 2001* (Vic) r 8.

172 Department of Human Services, *Standards in Adoption 1986* [4.1.1(v)].

173 Submission 59 (Ian Seal).

6.21 The man also provided the commission with an extract from the book *Boys' Stuff: Boys Talking about What Matters* in which the boys made some comments about what it was like living with a gay couple. One of the boys, then aged 14, said:

I was a bit homophobic in primary school. Then we met Brett and Ian and that helped a fair bit. Brett and Ian make me feel like I'm really special and it makes me feel good. They're kind of like role models. They tell me, 'Be yourself, believe in yourself and try not to pollute the earth'.¹⁷⁴

6.22 This submission describes a positive outcome for two children in need who found a stable family environment. Even if the children had wanted their relationship with their carers formalised through adoption, this would not have been possible under the current law.

6.23 It makes no sense that people in same-sex relationships are able to be approved as permanent and short-term carers of children in need, but cannot assume the full range of legal parental powers and responsibilities for those children.

INTERIM RECOMMENDATIONS

ADOPTION BY SAME-SEX COUPLES

6.24 In Position Paper One and in Chapter 2 of this paper, the commission has explained why it does not believe that parenting by same-sex couples or single people is in itself harmful to children, although we acknowledge that some people in the community are opposed to children being raised by same-sex couples. Based on the available research on outcomes for children in a range of diverse families, the commission is unable to conclude that prohibiting same-sex couples from adopting children is justified according to the principle of the best interests of the child.

6.25 The commission therefore recommends that the eligibility criteria in the Adoption Act be expanded to permit same-sex couples to adopt children in all circumstances in which heterosexual couples can.

6.26 Adoption by same-sex couples is already permitted in Western Australia, Tasmania, the ACT and several states of the United States.¹⁷⁵

6.27 In its submission, the Victorian Standing Committee on Adoption and Alternative Families emphasised the importance of placing the best interests of the child at the centre of any decision about adoption, in particular, whether adoption is an appropriate option for the child.¹⁷⁶ As to the eligibility of same-sex couples to adopt children, the committee stated 'Relationship issues of the parents should not be the object of any eligibility requirements, only the rights of the child'.

6.28 Expanding eligibility criteria for adoption would not mean that same-sex couples could automatically adopt children. They would be subject to the full range of assessment criteria applied to all people who apply to adopt children. The following provisions would remain:

- the applicants must apply to be approved as fit and proper persons to adopt a child;¹⁷⁷
- the applicants must attend information and education sessions;¹⁷⁸

174 Wayne Martino and Maria Pallotta-Chiarolli (eds) *Boys' Stuff: Boys Talking about What Matters* (2001) 154.

175 See Seymour and Magri (2004), above n3, 56–7.

176 Submission 77 (Victorian Standing Committee on Adoption and Alternative Families).

177 *Adoption Act 1984* (Vic) s 13(1).

178 Department of Human Services (August 2004), above n 58, 42–45.

- the applicants must undergo medical and police checks and provide personal references and histories;¹⁷⁹
- the applicants must provide information about their financial circumstances;¹⁸⁰
- the applicants must be assessed and approved as fit and proper persons to adopt;¹⁸¹
- the birth parents must consent to the adoption;¹⁸²
- the birth parents are given the opportunity to be involved in the placement of the child and to express preferences about approved applicants;¹⁸³
- if the child is old enough, his or her wishes must be taken into account;¹⁸⁴
- the court must be satisfied the applicants are fit and proper persons to adopt a child before making the adoption order;¹⁸⁵
- the court may make the adoption order subject to the condition that the child's birth parents have access to the child.¹⁸⁶

6.29 The commission acknowledges the presumption against step-parent and relative adoption and agrees that the current policy, which favours Family Court parenting orders over step-parent and relative adoptions, is appropriate where the child already has a second parent and extended family. Assuming our recommendations about the recognition of the non-birth mother as a legal parent of the child are implemented, situations will arise where a child born to a same-sex couple has two legal parents who later separate. If either parent enters a new relationship, the commission believes the presumption against step-parent adoption should apply. Such cases can be distinguished from the forms of adoption recommended by the commission in Chapter 3. In that chapter we recommended that the non-birth mother be able to become a legal parent of a child born to a woman without a male partner through adoption. In these cases the child would be born with only one legal parent because the donor will not be recognised as a parent of the child, so there would be no reason for the presumption against step-parent adoption to apply.

! INTERIM RECOMMENDATION(S)

26. The *Adoption Act 1984* should be amended to allow the court to make an adoption order in favour of a same-sex couple.

6.30 Connections Adoption & Permanent Care Program, one of the agencies in Victoria that provides services for people considering adoption or permanent care for their children, expressed in-principle support for permitting same-sex couples to adopt children.¹⁸⁷ However, their

179 Department of Human Services (August 2004), above n 58, 48–9.

180 *Adoption Regulations 1998* (Vic) sch 5.

181 *Adoption Act 1984* (Vic) s 13(3).

182 *Adoption Act 1984* (Vic) s 33 (1).

183 *Adoption Act 1984* (Vic) s 15(1)(b); *Adoption Regulations 1998* (Vic) s 18; Department of Human Services (August 2004), above n 58, 60.

184 *Adoption Act 1984* (Vic) s 14.

185 *Adoption Act 1984* (Vic) s 15(1).

186 *Adoption Act 1984* (Vic) s 59A.

187 Submission 122 (Connections).

submission commented that expanding the eligibility criteria would probably necessitate further training for staff and may raise new issues for the assessment process. For example, they suggested there may be a greater likelihood of relinquishing parents choosing a heterosexual couple over a same-sex couple for their child given current social and community attitudes and their commonly stated wish for the child to have what they are often unable to provide for them, namely a mother and a father in a stable relationship.¹⁸⁸ They also suggested it may become necessary to explore whether the child would be exposed to people of both sexes, but commented that the existing assessment process would be able to include such considerations:

It was felt that the current adoption processes allow for education and complex assessment around eligibility criteria with particular focus on applicants' views on parenting, strength of the couple's relationship, motivation, commitment, attitudes to access and information exchange with a child's birth family, level of understanding of identity issues for adoptees, and can be extended to incorporate the gender issues noted above allowing for the selection and approval process to continue to be child-focused as well as equitable for applicants.

6.31 These types of issues could be addressed in the *Adoption and Permanent Care Procedures Manual*. We recommend that the manual be reviewed and modified to recognise that applications from people in a same-sex relationship will be possible. We would be grateful for further input from adoption agencies and workers regarding modifications which might be required.

! INTERIM RECOMMENDATION(S)

27. The *Adoption and Permanent Care Procedures Manual* should be reviewed to accommodate applications by same-sex couples.

SINGLE APPLICANTS

6.32 In Position Paper One, the commission recommended that single women be permitted to access ART services. The commission believes that single people are able to provide a secure and loving environment for a child. Consistent with those recommendations, the commission believes it would be appropriate to remove the higher standard that is applied to single applicants applying to adopt. We believe that the adoption legislation provides an adequate process for assessing the suitability of a single person to adopt a child, without the need to prove to the court that 'special circumstances' exist. The assessment process already examines the financial circumstances of applicants, the current demands of the applicant's employment and the extent of family, friendship and community networks.¹⁸⁹ The commission therefore recommends that the Adoption Act be amended to make the criteria for making an adoption order in favour of a single person consistent with those that apply to the making of an order in favour of a couple.

188 Submission 122 (Connections).

189 Department of Human Services (August 2004), above n 58, 56.

! RECOMMENDATION(S)

28. The *Adoption Act 1984* should be amended to allow the court to make an adoption order in favour of one person in accordance with the same criteria that apply to couples.

INTERCOUNTRY ADOPTION

6.33 Intercountry adoption is the adoption of a child from another country. In Victoria, intercountry adoption is the responsibility of the Department of Human Services and is regulated by Part 4A of the *Adoption Act*. Part 4A implements the provisions of the 1993 Hague Convention, which was ratified by Australia on 25 August 1998.

6.34 Under Part 4A of the *Adoption Act*, in granting an adoption order the court must be satisfied that ‘the arrangements for the adoption of the child are in accordance with the requirements of the Hague Convention’.¹⁹⁰ The Hague Convention leaves eligibility criteria for selecting prospective parents to the contracting states.¹⁹¹ Victorian applicants must meet the eligibility criteria of both Victorian law and the law of the country of origin.

6.35 Victoria has intercountry adoption arrangements with nine countries: China, Ethiopia, Hong Kong, India, Lithuania, the Philippines, Korea, Sri Lanka and Thailand.¹⁹² These arrangements operate under bilateral government-to-government agreements or the Hague Convention. None of the countries with whom Victoria has an arrangement permits a same-sex couple to adopt a child. China, Ethiopia, Hong Kong and the Philippines permit single applicants to adopt.

6.36 In 2003–04 there were 100 intercountry adoption placements in Victoria.¹⁹³

6.37 In 2004, the federal government introduced a Bill to amend the *Family Law Act* to prevent same-sex couples from adopting children from overseas.¹⁹⁴ The Bill was referred to the Senate Legal and Constitutional Legislation Committee for review on 23 June 2004. One of matters the committee was directed to consider was whether the Commonwealth has the power to pass such legislation and whether it would interfere with state and territory responsibilities to legislate for and run adoption processes.¹⁹⁵ The review was discontinued following the dissolution of parliament prior to the 2004 federal election.¹⁹⁶ The Bill has not been reintroduced.

6.38 We do not make any recommendations about intercountry adoption because, as a state body, our recommendations cannot affect the law of the countries which Victoria has adoption arrangements with. However, if same-sex couples become eligible to adopt children in Victoria, in time, Victoria may enter into arrangements with countries that also permit adoption by same-sex couples.

190 *Adoption Act 1984* (Vic) s 69B(2)(c).

191 *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, concluded 29 May 1993, arts 5(a), 15(1) (entered into force 1 May 1995).

192 Department of Human Services, *Intercountry Adoption Service Information Kit* (June 2005) <www.dhs.vic.gov.au> as at 20 July 2005.

193 Department of Human Services, ‘Adoption and Permanent Care Statistics’ <www.dhs.vic.gov.au> at 14 July 2005.

194 The Marriage Legislation Amendment Bill 2004 (Cth).

195 Parliament of Australia, Senate Legal and Constitutional Committee, Inquiry into the Marriage Legislation Amendment Bill 2004.

196 Senator Marise Payne, Chair Senate Legal and Constitutional Committee, Letter to Senator Paul Calvert (6 September 2004) <www.aph.gov.au> at 16 November 2004.

Other VLRC Publications

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

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

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

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

Disputes Between Co-owners: Report (March 2002)

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

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

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

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

Defences to Homicide: Issues Paper (June 2002)

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

Workplace Privacy: Issues Paper (October 2002)

Defining Privacy: Occasional Paper (October 2002)

Sexual Offences: Interim Report (June 2003)

Defences to Homicide: Options Paper (September 2003)

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

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

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

Sexual Offences: Final Report (August 2004)

The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction: Occasional Paper by John Tobin (September 2004)

A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review: Occasional Paper by Adjunct Professor John Seymour and Ms Sonia Magri (September 2004)

Outcomes of Children Born of A.R.T. in a Diverse Range of Families by Dr Ruth McNair (September 2004)

Workplace Privacy: Options Paper (September 2004)

Defences to Homicide: Final Report (October 2004)

Review of Family Violence Laws: Consultation Paper (November 2004)

Review of the Laws of Evidence: Information Paper (February 2005)