

Recognising pre-existing families

People were creating rainbow families long before the Victorian *Assisted Reproductive Treatment Act 2008* (the ART Act, in place since 1 January 2010) and a raft of federal law reforms (which came into effect in 2008 and 2009) allowed them to do so without legal discrimination. These new laws mean that most same-sex parented families can now be legally recognised.

About this kit

This kit makes many references to what might happen if relationships break down, whether between couples, between parents and donors, or between co-parents. This is not because conflict is necessarily more likely to happen in rainbow families than in any other. It is because this is what much of family law, in particular, is about: what should happen if things go wrong.

However, it is also important to acknowledge that while same-sex parents have been successfully raising children for decades, our diverse family formations are in many ways still relatively new, and the law is still coming to terms with them. As a result, parents, co-parents and donors can be vulnerable to confusion and differing expectations, which can sometimes contribute to conflict. Every family has issues to talk through from time to time, but only a tiny proportion need to attend mediation or family court. Yet it is important to understand the relevant laws, not least because they might influence how people go about creating and recognising their families.

Lesbian couples with children conceived before the reforms

Victorian law

Lesbian couples are now assumed to be their children's legal parents, provided they were in a 'domestic partnership' (the Victorian legal equivalent of what federal law calls a 'de facto' relationship – see below) and the non-birth mother consented to the 'treatment procedure' (including home insemination) that resulted in conception. This includes couples who separate prior to the birth. This recognition extends to grandparents and other relatives of the non-birth mother. The Victorian *Status of Children Act 1974* states that a child's donor, known or clinic-recruited, is not a parent (see below).



Lesbian couples with children conceived before the reforms came into effect can now amend their children's birth certificates to recognise both mothers. The birth mother is listed as 'mother' and the non-birth mother as 'parent'. Birth certificates provide important documentation to assist with, for example, giving consent for medical treatment or school excursions. Children of the same parents can also have older siblings recognised on their birth certificates.

If you previously listed your donor under 'father'

Prior to the ART Act coming into effect, people made all sorts of choices around birth certificates. Some chose to list only the birth mother. If that applies to you, you simply need to fill in a form at the Victorian Registry of Births, Deaths and Marriages (BDM) and sign a statutory declaration that the non-birth mother consented to the 'treatment' that resulted in conception.

Some people chose to list their known donor on their child/ren's birth certificate under 'father'. For children conceived and born after the reforms, this is no longer a legal option. The only people that can be listed on a child's certificate are their legal parents; the birth mother and her partner, if she has one. To list anyone else, under the current law, is to make a 'false declaration'.

If you listed your child's donor on their birth certificate prior to the reforms, he is assumed to be the legal parent, not the non-birth mother. However, the ART Act allows you to correct the certificate by removing his name and listing the non-birth mother (she will be listed as 'Parent') – you cannot list all three as a child cannot have three legal parents. Legally, the birth certificate should represent the actual situation, which is that the mothers are the parents (in that you have the parenting responsibilities), and your child/ren's donor (whatever level of contact he might have with your family) is a donor. You need a County Court order to change the certificate, and your donor's consent is not required. We strongly advise that you speak to BDM before taking any action toward seeking an order.

Your donor will be listed as the child's donor in their birth record at the Registry of Births, Deaths and Marriages (BDM), but not on their birth certificate. Contact BDM to find out about the process.

It is important to seek legal advice if it comes to a dispute. Although Victorian law states clearly that a donor is not a parent, the federal *Family Law Act* also presumes a person listed as a parent on a child's birth certificate is their legal parent. This can be 'rebutted' (argued against) in court, based on the non-rebuttable presumption (also in the *Family Law Act*) that a non-birth mother who fits the criteria (see below under federal law) is a legal parent, but this contradiction in the legislation is yet to be tested in court. Also, courts take legal parentage as only one factor in deciding on things like who should live with, make decisions for, and have contact with a child. See the information sheet on 'Options for prospective lesbian parents' for more on what happens if relationships break down.

Even if he is not listed on the birth certificate, your donor might well have a role in your child/ren's life. If desired, you might explore the idea of recognising this role through court parenting orders by consent.

Federal law

The federal reforms included amendments to a number of laws, including those covering maintenance, child support, parental rights and responsibilities, social security, tax, Medicare and superannuation.

Since November 2008, federal law has automatically recognised lesbian couples as their children's legal parents, provided that the couple were in a 'de facto' relationship at the time, and that the non-birth mother consented to an 'artificial conception procedure' (including home insemination) that resulted in conception. The donor (known or otherwise) is assumed not to be a parent, where the intention was for the non-birth mother to be a parent. See above for possible complications, if the donor was listed as a 'father' on the birth certificate. The federal changes are retrospective; that is, they apply regardless of whether your child was conceived before or after they came into effect.

This means, for example, that if your relationship breaks down, both mothers remain equal legal parents, with responsibilities including maintenance and child support. Many more rights and responsibilities arise from these reforms – see below for where to find out more about the federal reforms. See the information sheet on 'Options for prospective lesbian parents' for more on what happens if relationships break down.

Families with more than two parents (co-parent families)

Some rainbow families include three or more parents who share significant parenting responsibilities. At present, neither Victorian nor federal laws allow for equal recognition of more than two legal parents.

Since the reforms, a child's legal parents are their birth mother and her partner (if she has/had one at the time of conception – see above). The exception is where a child is conceived through sex between the biological mother and father, in which case they are the legal parents and the non-birth mother (if there is one) is not. Thus, for children born after the reforms, only the birth mother and her partner (if she has one) can be listed on the certificate, as the legal parents. To list anyone else is to make a false declaration.

Historically, co-parent families might have chosen to list the birth mother only, or the birth mother and biological father on the birth certificate. If the latter applies to you, the biological father is presumed to be the legal parent, not the non-birth mother, unless the certificate is changed by County Court order. If you wish to change the certificate, refer to the above procedures for families who listed their donor under 'father'.

Many co-parent families have historically chosen to list the birth mother only on the birth certificate, and sought parenting orders for other co-parents. One reason for this is because listing the biological father on the birth certificate would have created implications for social security, tax and other matters that may not have fitted the family's needs. It is important to note that if a conflict arises, legal parentage (reflected on the birth certificate) is only one factor in determining the outcome. A court can award full residence and parenting responsibilities to parties other than the legal parents. For more discussion, look under 'If relationships break down' in the sheets for prospective lesbian and prospective gay male parents, and seek legal advice.

You should also seek legal advice as to which adults in your family situation (even if there is no dispute) require court parenting orders to legally recognise their parenting role/s. All parties who have parenting responsibilities under court order are, along with a child's legal parent/s, required to give their consent for a child to obtain a passport. Parenting orders can include most of the rights and responsibilities of legal parentage, but end at age 18, and don't include things like inheritance and superannuation in most situations. So it is important for those who require parenting orders to, for example, ensure they specifically recognise children in their wills and seek legal advice about choices in relation to making financial provision for children (including a choice not to make provision, which may be subject to legal challenge in very limited circumstances, even if you are not a legal parent).

Gay male couples with children conceived via overseas surrogacy

The ART Act opened up 'altruistic' (unpaid) surrogacy in Victoria as an option for gay men to become parents, and allowed for recognition of parents (including both partners in a gay male couple) of children conceived this way. See the information sheet on 'Options for gay male prospective parents' for details.

Commercial surrogacy is illegal within Australia. However, some gay couples and single men create families through overseas commercial surrogacy services. Some countries where this is available can provide birth certificates listing both fathers, while others do not. Even where this is possible, this does not at present translate into legal parentage in Australia. Fathers whose children were conceived via overseas surrogacy – whatever their birth certificates state about parentage – currently require court parenting orders (see above) to recognise the parenting role of both the biological and non-biological father in Australia. These orders would continue (although they may need some amendment) if a couple separates. Refer to the information sheet on ‘Options for prospective gay male parents’ and Gay Dads Australia’s website for details (see the sheet ‘Resources and links’).

Sole parents

If you are a single woman who conceived a child with a donor – clinic-recruited or otherwise – then you might well be raising them on your own, without your donor’s involvement. Since the recent reforms, Victorian law, in the *Status of Children Act*, is very clear that a donor is not a father or parent, whether he is involved in your child’s life or not. However both Victorian and federal law come into play, should there be a dispute between you and your known donor. The federal *Family Law Act* is ‘silent’ on the question of donors to single women, only severing the parental status of donors where there is an ‘other intended parent’.

It is possible, if a dispute reached court, that your donor might seek to be recognised as a legal parent. It is yet to be tested what a court would decide if this was the case. This does not mean that a court would grant your donor parental responsibilities, especially if he has never had them. Legal parentage is only one factor in a court’s decision about issues like who should have contact with, live with and make decisions for a child. However, it is possible that even if a court did not grant parental status, they might grant your donor some contact with your child should he seek it. We highly recommend you seek legal advice on this issue.

If you are a sole parent, male or female, and you enter a same-sex relationship after your child’s conception, your partner is not considered your children’s legal parent. He or she can be recognised as a step-parent (see below under step-parents) and their role can be recognised through a court parenting order. Should there be a dispute, he or she can apply for such an order, as a ‘significant person’ in the child’s life.

If you conceived your child/ren in a lesbian relationship where the non-birth parent consented to the treatment resulting in the conception of a child, but are now separated, you are both recognised as the child’s legal parents. Seek advice from Births, Deaths and Marriages to find out more.

Families that include step-children

If you began your same-sex relationship after your children were conceived (whether in a previous relationship or as a sole parent), then the non-biological parent can be recognised as a step-mother or step-father, just like step-parents in heterosexual relationships. Step-parents’ rights and responsibilities are covered by federal law, and are not equal to those of legal parents – see below for where to find out more. The best option for legally recognising a step-parent’s role is a court parenting order (see above under co-parent families for more about orders by consent).

The ART Act came about through a five-year enquiry by the Victorian Law Reform Commission. The Commission made recommendations to reform adoption laws to allow same-sex couples to apply for adoption. The Victorian government referred the adoption recommendations of the Victorian Law Reform Commission to a federal committee in December 2007. At present, most forms of same-sex adoption – including step-parent adoption – are still not allowed in Victoria. If this changes, step-parent adoption may be an option for children who have one legal parent.

The Victorian Department of Human Services recommends against step-parent adoption for children who already have two legal parents (for example from the biological parent’s prior relationship). Research shows that for these children, parenting orders are often a better option for recognising their same-sex step-parent. This is because step-parent adoption severs children’s legal relationship with their former parent and extended family, removing their inheritance rights, and potentially leave them with an incomplete sense of their origins and history. See the end of this sheet for where to find out more about this issue.

Families that include children being fostered or on permanent care orders

Some foster care agencies have long recognised that gay, lesbian, bisexual, transsexual, intersex and queer (GLBTIQ) people, coupled or single, can provide loving, stable homes for children requiring short or long term care. Many same-sex couples and single people (including many who already have biological children) welcome children needing foster care into their families. But what if a child on a permanent care order becomes available for adoption?

At the time of writing, same-sex couples are not permitted to adopt in Victoria. The *Adoption Act* 1984 does, however, make provision for ‘individual’ people to adopt ‘only in special circumstances’. The definition of special circumstances has until recently only been granted to single people who wish to adopt a relative, and in one case a lesbian foster carer who sought to adopt a child with extreme ‘special needs’. In August 2010, a Victorian judge ruled in favor of one member of a gay male couple, who – with his partner – had been the long term foster carers of a child. In this case the

child's birth parents relinquished the child, and had no opposition to the carer adopting the child. Rainbow Families Council is hopeful that this case will help set a precedent for one half of a gay or lesbian partnership – or a single gay or lesbian person – to adopt a child who is in their care, although each case is decided on its particular circumstances.

Rainbow Families Council hopes that the Victorian government will act on the recommendations of the Victorian Law Reform Commission enquiry to extend the eligibility definition to include both members of a same sex couple and single people specifically. We also hope they will permit all GLBTI people or single applicants to apply for all forms of adoption – including inter-country, infant, familial – and the adoption of foster or permanent care children. We note that the Victorian Government has committed to continuing work on this issue through existing national processes and a review of the *Adoption Act* 1984.

Gay and lesbian foster carers, permanent carers and kinship carers in Victoria are eligible to join the Gay and Lesbian Carers Support Group, which provides information, telephone support and social opportunities for gay and lesbian carers and their children. See the end of this sheet for contact details.

Registering donor information: children's right to know their origins

A guiding principle of Victorian law is that children conceived through donation and surrogacy in Victoria have the right to know their donor origins. Historically, parents in rainbow families have tended to be much more open about their children's donor origins than heterosexual parents. After all, same-sex couples and sole parents clearly require some assistance to conceive their children!

The Victorian Registry of Births, Deaths and Marriages (BDM) is responsible for managing information about children's births and their donor information. For children conceived using Victorian fertility services, BDM receives their donor information from the treating doctor or clinic. Those who conceive via home insemination, for example, must give BDM this information themselves — the parents through the Birth Registration Statement and the donor through a letter. See the information sheet 'Donor information and registers' for more about what is required, and who can have access to donor information.

If your children were conceived outside a clinic before the ART Act came into effect on 1 January 2010, you are legally obliged to provide information about their donor origins to BDM. If you have not previously done so, you should do so now. Please refer to the information sheet on 'Donor information and registers', about how donor information is lodged, stored, managed and released.

Disclaimer

Rainbow Families Council produced this information kit in October 2010. We have made every effort to ensure the kit is correct, but accept no liability for information given. Information will be regularly updated on our website. We strongly advise that you seek medical and legal advice and specialist counselling relevant to your specific situation.

Find out more about:

- the federal reforms affecting same-sex couples and parents at www.wearitwithpride.com.au and at the www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_SameSexReform
- step-parents' legal rights and responsibilities from your local legal service or Step-parenting Australia at the Drummond Street Centre, www.dsrc.org.au.
- the potential impact of step-parent adoption, should it become legal: search on "stepchild adoption" on the Victorian Government's Children, Youth and Families website, www.cyf.vic.gov.au.
- registration and management of donor information under 'Donor registers and information' in this kit, or from Births, Death and Marriages. Phone 1300 369 367 or visit their website: Google 'Victoria births deaths and marriages', click on 'Births', and then 'Donor treatment registers'.
- joining the Gay and Lesbian Carers Support Group, for gay and lesbian foster carers, permanent carers and kinship carers in Victoria, by contacting Tracey on 0427 811 186.
- The Council for Single Mothers and their Children at www.csmc.org.au.
- Telling a child about their donor origins The Victorian Assisted Reproductive Treatment Authority, about telling, www.varta.org.au. VARTA's *Time to Apply?* brochure covers making an application to the donor registers including personal stories

What else is in the Rainbow Families and the Law Information Kit?

- Introduction and definitions
- Options for prospective lesbian parents
- Options for prospective gay male parents
- Options for prospective sperm donors, egg donors and surrogates
- Donor information and registers
- Resources and links