

# Introduction and definitions

In January 2010, legal changes came into effect in Victoria, recognising same-sex couples as legal parents of children they conceive through assisted reproductive treatment (including donor insemination, home insemination, IVF and altruistic surrogacy).

## What's in this information kit

This kit provides an overview of Victorian laws (and some federal laws) that affect same-sex parented – or 'rainbow' – families. This includes prospective parents and single people.

The six information sheets describe:

- how existing families can be recognised
- options for prospective lesbian and gay parents (including prospective sole parents)
- options for potential sperm and egg donors and surrogates
- how donor information is stored and managed, and
- additional resources, including organisations. Websites, books and support groups.

The kit can be read as a whole, but each information sheet is also designed to stand alone.

The kit makes a number of 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.

The Victorian *Assisted Reproductive Treatment Act 2008* (ART Act), removed discrimination in fertility treatment for lesbian couples and single women,



Hundreds of parents, children and their supporters march each year at Pride March in St Kilda.

recognised non-birth mothers as legal parents, and effectively legalised 'altruistic' surrogacy, providing a new option for gay men and others to become legal parents through Victorian fertility services.

In addition, many federal reforms came into effect in 2008 and 2009, recognising rainbow families in relation to issues like maintenance, child support, parental responsibility, social security, taxation, Medicare and superannuation. Federal law now recognises most same-sex parents as their children's legal parents, provided they were in a legally recognised 'de facto' relationship at the time, and the non-biological parent consented to the 'treatment' that resulted in the child's conception. The main exception at present is gay dads of children conceived via overseas surrogacy, who still need court parenting orders to recognise their family relationships. See the 'Resources and links' information sheet for where to find out more about how the federal reforms affect couples and families.

This information kit has been produced by Rainbow Families Council – a voluntary community organisation – for use by families, prospective parents, and prospective donors and surrogates. We hope it is also useful for service providers and others who support and are involved with 'rainbow' families.

## Acknowledgements

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## 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.

## The kids come first

Research shows that donor-conceived people want and need information about their donor origins. Well before many other states and countries, Victoria legislated that people have the right to identifying information about their donor. The ART Act strengthens the rights of donor-conceived people. Its key principles are that:

- the interests of donor-conceived children are paramount, and children have a right to information about their biological origins
- fertility treatment must not exploit anyone – men, women or children
- the health and wellbeing of people undergoing fertility treatment must be protected, and
- people seeking fertility treatment must not be discriminated against on the basis of sexual orientation, marital status, race or religion.

## How the laws fit diverse rainbow families

This kit describes the current laws most relevant to rainbow families, prospective parents, donors and surrogates. It outlines how these laws might impact on the choices that people make about creating families, and provides additional information with regard to the emotional issues and medical procedures involved.

Rainbow families have always been very diverse. The structure of some rainbow families – such as those with three or more co-parents, or two dads who create their family through overseas surrogacy – are not reflected in the current laws, as we describe in the relevant information sheets. However, there are legal mechanisms, such as court parenting orders by consent, that can legally recognise and protect the relationships between children and adults other than their legal parents. If your situation (whether you have an existing family or are planning to create one) is complex in this sense, we advise that you speak with Births, Deaths and Marriages and/or seek legal advice.

## Definitions of terms used

Rainbow families use a wide range of terms to describe themselves and their relationships. Language is powerful, in terms of people's understanding of their own role, and the expectations of others in their community and society. It is critical to be precise about

language in relation to people in and connected with rainbow families. In this kit we use terms that fit most meaningfully with how most rainbow families describe themselves, but which are also *legally clear*. However, our language is not necessarily the same as that used in the relevant Victorian and federal legislation. Below we define the key terms, as we use them in this kit:

**Parent:** an adult who *in fact* bears parental responsibility for a child. This includes the birth mother and non-birth mother (for lesbian couples who are parents) and the biological and/or non-biological father (for gay male couples who are parents), even when they are not currently recognised as legal parents, for example if their child/ren were conceived via overseas surrogacy. We generally refer to parents in co-parent families as 'co-parents', regardless of who is recognised as the legal parents (see the information sheets). We do not use this term for a donor, although we acknowledge that some donors call themselves a 'father' and are called 'Dad' or equivalent for children for whom they donate.

**Co-parent/s:** two or more adults, not in a couple, who share significant parenting responsibilities. However, children cannot have more than two legal parents, and who those are depends on whether the child was born prior to the recent reforms and who is listed on the birth certificate (see the information sheets).

**Birth mother:** a woman who gave birth to a child, intending to parent them, who is their legal parent.

**Non-birth mother:** a woman who is a parent, who did not give birth to her child/ren; the domestic/de facto (see below) partner of the birth mother, who consented to the procedure that led to the child's conception, with the intention of being the child's parent; their legal parent, except for children born before the reforms who are not listed on the child's birth certificate, although certificates can now be corrected (see information sheet 'Recognition of pre-existing families'). We use the phrase 'the mothers' or 'both mothers' to mean the birth mother and the non-birth mother.

**Mother:** a woman who is a parent (a birth mother or non-birth mother), who is usually recognised as the legal parent. The exception is non-birth mothers of children born before the reforms who are not listed on their child/ren's birth certificate, although certificates can now be corrected (see information sheet 'Recognition of pre-existing families'). When we use the word 'mother' we do not mean a surrogate or egg donor, although the Victorian ART Act uses the term 'surrogate mother', and surrogate is the child's legal mother until the substitute parentage order is processed and the commissioning parent/s become the legal parent/s. Also, some rainbow families might choose to refer to their surrogate or egg donor as a 'mother', although neither is a legal parent (once the substitute parentage order is processed – see information sheets for prospective gay male parents and prospective egg surrogates).

**Domestic/de facto partner:** both Victorian and federal law recognise lesbian couples as parents if they were in a partnership at the time of conception and the non-birth

mother consented to the conception (see below). Victorian law uses 'domestic partner' for same-sex and unmarried heterosexual couples, which generally includes a requirement that the couple live together 'on a genuine domestic basis', although couples who do not live together can also be recognised as domestic partners if their relationship is registered, or they provide 'personal or financial commitment and support of a domestic nature for the material benefit of the other'. The federal *Family Law Act* uses 'de facto partner', which also generally includes the requirement of living together or having a registered relationship (in their state), but also considers how long you have been together or lived together, whether you are sexual partners, financial inter-dependence, responsibility for children and so on. See the Acts (online) for details.

**Biological father:** a man who is an actual parent (legally recognised or not, see above), who contributed his sperm for the child's conception. We generally refer to parents in co-parent families as 'co-parents', regardless of who are the legal parents (see the information sheets). We do not use the terms 'father' or 'biological father' for a donor, but acknowledge that some known donors call themselves a 'father', and are called 'Dad' or equivalent by the child/ren for whom they donated, although they are not their legal or actual parent/father in the sense these words are used here.

**Non-biological father:** a man who is a parent (legally recognised or not – see above under 'parent') who did not contribute his sperm to the child's conception. This includes both legal parents, such as a member of a gay couple whose child was conceived via altruistic surrogacy in Victoria. It also includes members of gay couples whose children were conceived via overseas surrogacy, although Australian law does not currently recognise them as their child's legal parent. We also use this term for men who have a parenting role in co-parent families with single women or lesbians, but specify in the relevant section that these men are not legal parents under current law. Not a known donor or the partner of a donor (see under 'father').

**Father:** a man who is an actual parent (legally recognised or not, see above), not a donor. We do not use the terms 'father' for a donor, but acknowledge that some known donors call themselves fathers, and are called 'Dad' or equivalent by the child/ren for whom they are a donor, although they are not their legal or actual parent/father in the sense these words are used here.

**The commissioning parent/s or couple;** a couple or single person who engages in an arrangement with a surrogate to bear a child for them to raise. In Victoria this must be altruistic (unpaid) and also involve a known egg donor. The legal parents, once the substitute parentage order is processed, for altruistic surrogacy in Victoria. Overseas surrogacy can be paid, and might involve an egg donor (known or anonymous) or not. Parents whose children are conceived via overseas surrogacy are not recognised as their children's legal

parents under current federal or Victorian law.

**Surrogate:** a woman who carries and gives birth to a child with the intention that another person or couple (the commissioning parent/s) will raise that child. The Victorian ART Act calls her the 'surrogate mother'. However, she is only a legal parent under the substitute parentage order is processed, transferring legal parentage from the surrogate (and her partner if she has one) to the commissioning parent/s.

**Egg donor:** a woman who donates her egg, in the context of this kit usually in the context of a surrogacy arrangement between a gay couple or single man and a surrogate. Egg donors are generally known to the person or couple.

**Clinic-recruited donor:** a man who is a sperm donor recruited by a fertility clinic, to donate to clients of the clinic. There are currently no clinic-recruited egg donors. Victorian law and federal law are clear that a donor is not a legal parent, and refer to him as 'a donor'.

**Known (sperm) donor:** a man who is a sperm donor, known to the lesbian couple or single woman (in most cases, in the context of this kit), who donates to them through a directed donation made at a clinic, or via home insemination with fresh sperm. Victorian law and federal law are clear that a known donor is not a parent, and refer to him as 'a donor'. We do not use the terms 'father' or 'biological father' for a donor, but note that some known donors call themselves a 'father', and might be called 'Dad' or equivalent by the child/ren for whom they donated, although they are not their legal or actual parent/father in the sense these words are used here. Some gay men who are partners might both be 'donors' to a woman or couple. This might reflect their social role, or conception might be actually attempted with both men's sperm (for example, on alternate cycles, or for subsequent children in a family)

**Home insemination:** also called 'self-insemination' – attempted conception outside a clinic through insemination using fresh semen or frozen, screened sperm.

**Treatment procedure/artificial conception procedure:** a procedure, carried out in a clinic or through home insemination – not sexual intercourse – with the aim of conceiving a child. The former term is used in the ART Act, and the latter in the *Family Law Act*. Clinic procedures include donor/intra-uterine insemination, in-vitro fertilisation (IVF) and surrogacy.

## What else is in this information kit?

- Recognising pre-existing families
- 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