

# Options for prospective sperm donors, egg donors and surrogates

Helping somebody else have a child is a profound and generous act. It is critical to understand the issues involved, both legal and emotional, and discuss them in depth with the prospective parents before making any decisions. Will you have an ongoing relationship with the family and children? What might that look like? Will it change over time? If you have a partner and/or your own children, it is also important to think about how your choices will affect them.

## About this information sheet

This information sheet explores options and issues for prospective sperm donors, egg donors and surrogates to same-sex couples and single people. The issues overlap to some extent, although in other ways they are very different. In this information sheet we outline relevant Victorian and federal laws for prospective sperm and egg donors and surrogates, and the processes (medical and other) involved.

We also go into some depth about the choices and emotional journeys men often make around being a sperm donor. We can do this because men have

been helping lesbian couples and single women create families in Victoria for decades. In contrast, altruistic surrogacy was only effectively legalized in this state with the passing of the *Assisted Reproductive Treatment Act* (ART Act) in 2008. We do not yet know the extent to which gay men will take this option up as a way to create their families, or what kind of relationships they will form with their egg donors and surrogates. If you are considering being an egg donor or surrogate, it is worth reading the material for prospective sperm donors, to decide how relevant some of the issues explored there may be to you.

This kit makes many references to what might happen if things go wrong, whether between couples, between parents and their donors or surrogates, 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 happens 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 and others involved 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. Nevertheless, it is critical to understand and talk through the implications of the relevant laws, not least because it might influence the decisions you make.

All that being said, helping to bring a child into the world – and perhaps in your own life – is a wonderful, heart-expanding experience. We wish you the very best with your journey!

## Prospective sperm donors

### Donor or parent/father?

One of the most critical issues for prospective sperm donors to consider is whether being a donor is what you want, or whether you would really prefer to become a parent/father yourself.



## The differences between donors and parents

Gay, bisexual and heterosexual men have been helping lesbian couples and single women create families for decades in Australia and elsewhere. The role of donor can be very rewarding – many men say it is one of the best things they have ever done in their lives.

Donor's roles and relationships with the families they help to create vary enormously, from virtual anonymity (although Victorian law emphasises children's right to identifying information about their donor) to exchanges of emails or Skype chats (for donors who live in another state or country), occasional visits, to being a regular part of family life – sharing time with the family, perhaps holidaying together, and sometimes becoming regular babysitters and spending time alone with kids. For many men, it is not only about helping someone else in an extraordinary way, but also having the joy of children in their own lives, without any of the hard work!

Sometimes the relationship between a known donor and family is more akin to co-parenting, or grows into this over time (see our sheet on 'Options for prospective gay male parents' for more on co-parenting). But legally – and in everyday life – the role of donor is very different from that of a parent. Donors do not live with children, or provide for them, or make decisions about children's lives such as where they live, how they are raised, where they go to school and so on. Depending on the relationship with the family, a donor's input on issues like these might be welcome, but ultimately – and legally – these are parental responsibilities. Both federal and Victorian law now recognise lesbian couples as their children's legal parents, and clearly state that a donor is not a parent, as we explain below.

### What are your options?

Sometimes men become donors when what they really want is to be a parent or father themselves. You can potentially be very involved in a child's life as a donor, but it is a different role. Some donors call themselves fathers, and are called 'Dad' or equivalent by the children for whom they donated. But however much contact they have with a child, both federal and Victorian law is clear that they do not have parental responsibility, and are not the legal father or parent.

Some gay couples and single men might feel that being a donor is the closest they can come to being a father. Many gay men feel, when they come out, that they must quash any desire to be a parent. Historically – and even today – some men have denied their sexuality and married women (although many come out later in life), largely because they felt this was the only way they could become fathers.

Many LGBTI (lesbian, gay, bisexual, transsexual and intersex) people have internalised homophobic messages that they cannot, or should not, have children

because of their sexuality or gender identity. It can be hard to challenge those feelings within yourself. But remember, there are more and more gay and same-sex couple dads in Australia and around the world, and both social attitudes and relevant laws are changing.

Try not to let fear – for example of what other people might think – dictate this critical life decision.

In particular, try to challenge the idea (even within yourself) that 'all children need a mother and a father'. Three decades of rigorous Australian and international research show that children of same-sex parents are not disadvantaged, and are in some ways – such as in their capacity for empathy – better off!

Even if a good friend asks you if you would be willing to donate to them, it is critical that you think carefully about what this would mean for you, and whether it is what you really want for yourself, whether you are in a couple or single. If what you truly want is to be a parent/father, explore ways that you can make this happen.

The options currently available for gay men to become parents are not easy, but the number of gay dads is increasing, and there are support and discussion groups available. If you compromise on this issue, but do not 'make peace' with your decision, the evidence is that it can too often result in heartache for everyone concerned: you, the mother/s, and most importantly the child/ren. See our information sheet 'Options for prospective gay male parents' for further information, including about altruistic surrogacy in Victoria, overseas commercial surrogacy, co-parenting with single women and lesbians couples, and foster and permanent care.

It might be that the woman or couple who asked you if you would be willing to donate is open to co-parenting with you, if this feels like something you might want. Co-parenting means sharing all the aspects of bringing up children, from day to day life to the big decisions. It is important to realize, however, that co-parenting is a social term, not a legal one. The law does not recognise more than two legal parents, and since the recent reforms, a child's legal parents can only be the birth mother and her partner if she has one, although other co-parents can have their role legally recognised by court order. Co-parenting is a less common choice for both gay men and lesbians, and while there are many successful co-parent families, it can be challenging to negotiate. See our information sheet 'Options for prospective gay male parents' for more about co-parenting and other options for becoming a parent.

### Thinking it through

There are many men whose first preference is the role of donor. And there are many others who feel some desire to become parents, but decide to become known donors instead, and make their peace with that decision. If you feel that this might apply to you, take whatever time you need to be very sure. Think about what you might feel once conception has been

successful, when a baby comes along, or as a child grows. Talk to your partner (if you have one), to other men who are donors, and to parents (same-sex parents and others). Talk to your own family of origin, if this feels appropriate. Explore these issues many times, over a considerable period of time, with the couple or woman you are considering donating to. We outline some of the issues your discussions might include (in relation to your possible role as a known donor) in much more detail below, under 'Talking and making agreements'.

The emotional challenges you face now, deciding whether to be a donor and what this might look like, are very different from the emotional reality of there being a child in the world you helped create. Try to imagine what it will be like. Will you be happy and comfortable with the role you have committed to, and with the agreements you have made with the couple or woman you donated to? Will you feel any sense of loss at not being a parent yourself? Of course, people's emotions often change over time, but it is very important that you do not go ahead until all such issues are resolved.

Whether you decide to be a known donor, or to pursue becoming a parent yourself (or both!), remember that both roles are absolutely legitimate. The most important thing is that you base your choices on your own values and desires. Gay, bisexual and straight men have been involved in both making their own families, and in helping lesbian couples and single women make families in a rich variety of ways for many years, and will continue to do so. Laws and social attitudes have improved a lot, and this is increasing as our numbers and diversity grow.

## Your emotional journey

### Working out whether to say yes

We have talked about making sure the role of known donor is what you want. But how do you decide if the woman or couple who has asked you is who you really want to donate to? Do you like them? Can you envisage working through difficult issues with them? Even the most smooth-sailing donor/family relationships involve some challenging conversations; indeed, good communication on difficult issues is an important foundation for a good relationship.

It might be very difficult to decide, even if you are close to the person asking you. Even if you are very supportive of their desire to parent, you might not feel this is something you can do for them. Helping someone to create a child by donating is a profound act, and there might be many reasons that you (and/or your partner, if you have one) do not feel that this is a role you want, many of which are likely to be separate from your relationship with the mother/s.

Is it important to you, in making your decision, that you share some key values around how children are raised? You might not have (or want) any input into these kinds of choices once a child is born; many donors do not. But you need to decide whether this matters to you, and what values you want to discuss in this context.

Some men might feel that they may not have another chance to help create a child. But remember that there are other options. You could explore being a parent yourself, if you are not already. You could find another woman or couple to be a known donor for. Or you could become a clinic donor. There is a shortage of clinic donors throughout Australia, and in Victoria, children have the right to contact their clinic donor, should they wish at age 18. In practice, it is not uncommon for parents to ask for contact with clinic donors before the child is 18 (they need to donor's permission for this). Clinics are often happy to include in their records whether a particular donor is open to being contacted before children are 18. See below for more on storage, management and release of donor information.

If you are interested in donating to the woman or couple who has approached you, you will need to work out if the role they envisage for their known donor is something you can see working for you. You also need to be clear about what you want out of the role, and talk many times about this, over a significant period of time, with the prospective mother/s. Think of it as a negotiation, with both of you clearly articulating what you want, and then working out whether you can come to a solid agreement. Do your visions coincide? What points of difference do you have? Are they negotiable? We list some of the key issues to consider below, under 'Talking and making agreements'. It might be worth getting assistance from a counsellor to work through some issues. Some fertility clinics, for example, offer the paid service of a counselling 'information session', prior to committing to any treatment.

### When you are already friends

Some prospective mothers and donors who have an existing friendship might be less likely to really thrash through the more difficult issues, because they feel that 'they can always work it out'. However, this is not always the case, and sometimes the most intimate, longstanding friendships can end, or even turn into bitter disputes in this context. You might all feel impatient to make a baby, but remember that this decision is critical and irreversible. If you conceive a child with someone, you are connected to them for life. Most importantly, the decision you make affects not only you, but also the child/ren whom you help to create.

So take your time – perhaps as long as a year – to get to know each other in this new context, reflect on your own needs and feelings, and talk about the issues many times before you begin. It might be useful, when you begin talking seriously, to think about 'putting on a

different hat' during those discussions. It is very different to talk as prospective parents and donors than as friends. The issues for parents and donors are different, and it is important to acknowledge and talk through those differences without feeling that they reflect negatively on your friendship or care for one another.

### Working out what your role is (and is not)

As we have said, men have been helping lesbian couples and single women make families for decades, through a constellation of types of arrangements and level of involvement. But on a personal level, it is likely that you will not have thought in very great depth about what being a donor might mean for you, before being approached by a friend or acquaintance about it. It is very important that you do so, however, before agreeing to donate, and certainly before attempting conception.

So how can you make sense of the role of donor, and what you might want out of it? As we have said, the role varies enormously, from very minimal contact to a high degree of involvement. You will not be a legal parent or father, even though some known donors call themselves fathers (with the agreement of the mother/s) and are perhaps called 'Dad' (or equivalent) by the children. Parents have particular roles and responsibilities, including legal responsibilities. If you want to be a parent/father, then explore ways to make this happen, and do not agree to be a donor unless you have resolved your feelings about this.

Sorting out the difference between being a known donor and a parent can be confusing and difficult, especially if you plan to be quite involved and/or use language like or 'Dad'. But it is important to be clear about this difference, and to revisit the issue as often as needed throughout your journey of being a known donor, with support from your partner (if you have one), friends or a counsellor. If you are not clear in your own mind, this can lead to conflict, and cause real heartache for you, the mother/s, and most importantly the child or children.

Some men think of being a donor as a sort of in-between space, between being a father (but not a legal parent), a family friend, and part of the children's extended family. You are not just a friend, because you helped create the child/ren; they are genetically connected to you, and probably look a bit like you, which many donors find an amazing experience. Whether you all think of yourselves as extended family depends on your relationship, and how you all think about family. There's a big range of possibilities in that in-between space, and you need to be clear about where you see yourself, and where the prospective mother/s see you. One idea is to map out all the family relationships, and where you see yourself in relation to them. Try doing this separately from the prospective mother/s, then comparing your two diagrams to work out where you can find common ground.

### Your partner and (perhaps future) children

If you have a partner, what role might he or she have? Do both of you want to be involved, or only you? If you both do, it will be particularly important that you are both part of the conversations with the prospective mother/s. It can be easy for the donor's partner to feel marginalised at this point, and throughout the process.

If you have some contact with the family, this is likely to impact on your partner to some extent. If the mother/s need to use a clinic to conceive, they may require your partner to attend counseling with you, and with the prospective mother/s, and give his or her consent to the donation. Might the prospective mother/s be open to your partner's contact with the family increasing over time, if desired? If you are single now and later partner (or if you separate and re-partner), would they be open to your new partner having contact with the family?

If you have children yourself, or plan to later, how will you talk to them about your role? At what age would you tell them? There is strong evidence that children fare best when adults are open about issues around donation. If they are older, would you talk with them about it before making your decision to go ahead? If you plan to have regular contact with the family, in particular, it will be important to be open with your children. You might wish the children to have a relationship with the family. There are resources available on the VARTA website (see below) to help you think about talking to your children about donating, including interviews with donors and their older children.

### The F-word

The language question is a very personal one, and the answer might change for you and the mother/s over time. It is important to agree on what language you will all use, in what context, and exactly what you all mean by it. Language is extremely powerful, in terms of the feelings and expectations of everyone involved (not least the children), and also in the wider community.

Some known donors feel strongly that they want to call themselves a father, and would like the children to call them 'Dad' (or equivalent), even though they are not a parent. Some men feel strongly that they do not want this, prefer to call themselves a donor, or a compromise such as 'donor dad', and want the children to use their first name, or 'Uncle John' or equivalent. There is also the question of what your partner might be called.

Some men start out being open to being called 'Dad', but feel after a child is born that this term is really only for men who are actually in a day-to-day parenting role. Others don't really want the name, but are happy for the children to call them 'Dad' if they choose to, as they grow older. Children will usually follow what the adults around them model when they are young.

It is worth revisiting this issue when you conceive, when a child is born, and in the year or two after. It might also be helpful to explore whether you are all comfortable to leave the question open or flexible until then.

### Your family of origin and other people

Other people's issues and expectations can have a big influence. It is important to acknowledge this and be clear about which are your feelings, and which are other people's. On a broad social level – in your own friendship circle, family or community – the role of known donor might not be well understood. People can put their own expectations of what it means to be a 'father' on you (even if you do not call yourself one) without understanding your feelings about it, or your agreement with the mother/s. People might find it tricky to understand if you call yourself a father, but do not have parenting responsibilities. Remember that the children's parent/s made a positive choice of you as a known donor, and your role is not less in value to that of a parent, but simply different.

Confusingly, many men find that being a known donor brings up a lot of issues for them around fatherhood, and what that means to them, even when they are very clear that their role is not that of a parent and/or father in this family. In particular, it can bring up a lot of feelings about how you were parented (or not) by your own father. This can be the case whether or not you have an ongoing relationship with your family of origin.

For many men, the response of their family of origin to them being a donor can be a major issue. A lot of gay men have had to deal with their parents' feelings (on coming out) that they are unlikely to be grandparents through their gay son. You being a donor might be an exciting possibility (or a challenge) for them to deal with. Think about what contact you might wish your family of origin to have with the child/ren, and talk about this in detail with the prospective mother/s. They might or might not be open to contact with your family, and the possibility of them being grandparents, aunts and uncles to their children. It can be an added complication for you all to negotiate, and might be something that you or the prospective mother/s don't want, especially your family is still dealing (or not) with their own homophobia. But remember that people can change (especially when it comes to children), and it is potentially wonderful for children to have more loving extended family if this is what everyone wants.

If you or the prospective mother/s do not want your parents or others involved, it will be very important that you be clear with your family of origin about this. They might well have understandably strong feelings about it, but you will need to help them understand that you are a donor, not a parent in this family, and that the arrangement is between you and the mother/s only.

### It's all about the kids

Some men have extensive experience of being around children before they are approached about being a donor, perhaps because they are fathers themselves, or uncles, or have many friends with children. Other men have much less experience, and don't know what to expect from being in contact with children. It will be helpful to talk with other donors, and parents (particularly those whose families involve donors) about what kind of contact can work for children at different ages. Whatever level of contact you negotiate with the mother/s, from very occasional visits to regular time spent together, and even time alone with children as they grow, the key to building a relationship with the child/ren themselves over time will be the quality of attention you give to them when you are with them, and the consistency of your involvement (at whatever level that might be) in their lives.

### Ensuring that you have support too

It is important for you to have the support you need throughout the emotional journey of becoming and being a known donor. This starts when you are making the decision about whether to donate. It continues during your negotiations with the prospective mother/s, and throughout the processes of trying to conceive, during the pregnancy, birth, early infancy and as the child or children grow.

Sometimes the focus can be very much on the mother/s, particularly the birth mother, when they are trying to conceive, and particularly if they have a miscarriage – remember that around one in six pregnancies ends in miscarriage. It is often the case during pregnancy, birth and early infancy. The mother/s will certainly need lots of support during all of those processes, and you might well be involved in giving that support, especially if you are good friends.

However, it is important to recognise that you also need support for your own journey, particularly if it proves difficult to conceive, or if there is a miscarriage or some other problem. It is possible that this support might not be able to come, to any great extent, from the mother/s because they are dealing with their own feelings. But if you are a couple, you can support each other, and whether you are coupled or single you can ask for support from your friends, family members (if appropriate), a counsellor, and support groups, including online groups.

Even if there is no such problem, helping to create new life is a momentous experience, and can be an unexpected emotional rollercoaster. If you are in a couple, for example, being a donor can bring up issues in your relationship, perhaps related to your feelings about family and future, including whether you might have your own children. And if you already have your

own children, you will need to think about how to talk with them about it all – see below for more on this. Whatever your own situation, it is important that you work out what being a donor might mean for you before you decide to take on this role, and help a couple or single woman to create a child.

## The process of donating

There are three options for attempting conception: home insemination using fresh semen; home insemination using screened, stored sperm; and clinic-based insemination using screened, stored sperm. We explore each in some detail below. It is important to remember that although some people conceive the first time they try (be warned, it certainly does happen!), for others the process might be much longer and more complex than they first envisaged.

### Checking and supporting your fertility

Consider having a sperm test early in the process, as problems are not uncommon. If you are a gay couple, and the intending donor has fertility issues, then the other man may consider taking this role. If this is not possible, you might still be able to donate, although probably not through home insemination; if they are open to it, the prospective mother/s can find out about other options from a fertility specialist. There are also diet and other lifestyle changes that both you and the prospective birth mother can make support your chances of conception.

### Health screening and safer sex

However you plan to attempt conception, you will need to be screened for a number of sexually transmissible infections. Donor insemination carries many of the same risks of infection as unprotected sex. If you are planning to home inseminate using fresh semen, you will need to ask your GP to arrange these tests, which should include gonorrhoea, chlamydia, HIV, syphilis, Hepatitis B and Hepatitis C and CMV (cytomegalovirus), plus blood group and antibody tests.

If you or your partner are subsequently exposed to any risk of infection, you will need to test again, to ensure you do not put the prospective birth mother, her partner or the baby at risk. It is more important than ever that you have safer sex throughout the period you are attempting conception. Talk openly with your partner/s about your sexual practices, together and (if relevant) with other people, and minimize your risk of infection through safer sex and avoiding other risks (such as through injecting drug use).

Another option is to make a 'directed donation' to the mother/s through a fertility clinic. The clinic will arrange all the screening tests, and after a quarantine period

(to allow for the HIV testing window), will provide the mother/s with your frozen, screened sperm for home insemination, clinic-based insemination or IVF. You will not need to re-test unless more sperm is required.

### Options for attempting conception

#### *Home insemination with fresh semen*

One advantage of home insemination with fresh semen is that it is free, apart from the costs of health screening (see above). The prospective birth mother should also have the recommended pre-pregnancy checks, including a pap test and HIV, rubella, blood group and antibody tests. She should talk to her GP for more information about preparing for pregnancy, including understanding her cycle and the timing of ovulation.

Some people choose home insemination because it is less medical and more private. Other advantages are that fresh semen has a much higher sperm count than frozen. You can also increase the chance of conception by making more attempts each cycle, because women are fertile for a number of days, and fresh sperm is viable for longer (inside a woman's body) than frozen. However, the logistics can be challenging, as semen should be used within an hour of (but not straight after) ejaculation. You will also need to ensure that you get the entire ejaculate into the clean, dry glass container you are using to transport it, as there is more sperm in the first part of the ejaculate. Find out more about maximizing the chance of conception through home insemination in resources listed in the information sheet 'Options for prospective lesbian parents'.

#### *Home insemination with screened, stored sperm*

Melbourne IVF Clinic also offers a service, mentioned above, where you can give a 'directed donation' to the mother/s through the clinic. After a 'quarantine period' (to cover the window period for HIV testing), the clinic provides the mother/s with your screened, stored sperm for home insemination. This means that the mother/s will need to become clients of the clinic, which involves a number of complex procedures and legal checks (see the information sheet 'Options for prospective lesbian parents'). It also costs (approximately \$1000 per cycle at the time of writing), especially as Medicare does not cover fertility services not medically required.

If the mother/s need to become clients of a clinic, as their donor you will undergo clinic counseling both with, and separate from them. Many clinics also require your partner to attend counselling and give his or her consent to the donation. The mother/s will also have to undergo police and child protection checks. You will fill out questionnaires about your medical background, see a medical specialist, and give consent to the procedures involved. Some counsellors will also take you through issues around your (and your partner's) potential role in the family's life. See 'Thinking about it and making agreements', below, for an outline of such issues.

### *Clinic-based insemination with screened, stored sperm*

The third option is clinic-based insemination using your sperm. The advantage of this method is that the clinic will conduct some basic fertility tests, and help track the prospective birth mother's cycle, maximizing her chances of conception. A fertility clinic can also do 'intra-uterine' insemination, inserting the sperm directly into her uterus, which increases her chance of conception (but is not safe to do at home). However, Medicare will not cover clinic-based insemination unless there is a medical reason (such as trouble with ovulation).

Note that Victorian clinics can screen and store your sperm even if you live interstate or overseas. The prospective mother/s may be able to get permission from VARTA (the Victorian Assisted Reproductive Treatment Authority) to 'import' your sperm into Victoria, if you cannot come here to donate. You will be required to undergo counseling and give consents through the Victorian clinic, but some are willing to do this over the phone and by mail.

### **What about the 'natural way'?**

Some prospective sperm donors (and/or sometimes the prospective mother/s) might be interested in the idea of conception through sex between the donor and prospective birth mother. This is not advisable, partly because of the potential emotional complications for everyone involved, but also because of the legal ramifications. The law says that if you are the sperm donor for a child conceived through a 'treatment procedure', including home insemination, you are not their legal parent. That is, you are not responsible for them, financially or otherwise. Your role in their lives can be legally recognised and protected, as we explain below. But you cannot be pursued for child maintenance, and they have no claim on your estate, insurance or superannuation (except in very limited circumstances). But if you 'donate' by having sex to conceive, this makes you the child's legal parent. In one such case, a donor was successfully pursued for maintenance, against the wishes of both the mothers and donor.

### **When insemination isn't working**

If the mother/s have had around six unsuccessful. Well-timed attempts at conception, she/they will need to talk to their GP (if home inseminating) or a clinic about investigating their fertility. Depending on the prospective birth mother's age, how long they have been trying, and medical issues identified, further treatment may be recommended, such as drugs to support ovulation, intra-uterine insemination (if they are not already using it) or in-vitro fertilisation (IVF). The out-of-pocket costs of IVF are considerably higher than clinic insemination (between \$1,000 and \$3,000 per cycle at the time of writing) but they are eligible for Medicare rebate (50% up to the Medicare threshold and 80% thereafter).

If there are ongoing problems with conception, or with miscarriage, it is possible that you and the prospective birth mother would be required to undergo genetic testing. The fertility clinic will provide information and counselling support to assist you if this is needed.

It is important that you discuss the possibility of fertility treatment such as IVF in your initial discussions with the prospective mother/s. It is not uncommon, even for women under 35, to require assistance to conceive. You might well have no issues with IVF, but it is important to think it over before you decide to donate. See 'Thinking about it and making agreements', below, for more.

## **Your legal status**

If you are a donor, even if you plan to have a high level of contact with the family and child/ren, you are not a legal parent or father. Victorian law, through the *Status of Children Act*, defines a child's legal parent as the birth mother and her partner (if she has one). They are the only people who can be listed on the child's birth certificate. To list anyone else is to make a 'false declaration'. The exception is if the child was conceived via sex between you and the birth mother, in which case you are both legal parents, and the non-birth mother (if there is one) is not. Children cannot have more than two legal parents.

As a donor, you will not be held liable for child support or maintenance, and children have no rights to your estate, superannuation or insurance (except in very limited circumstances). Recognition of lesbian parents includes couples who were together when a child was conceived, but separate prior to or after the birth.

### **Legal recognition of your role in a child's life**

Your role in the child's conception must be recorded with the Victorian Registry of Births, Deaths and Marriages. For children conceived via a clinic, the clinic gives this information to BDM for storage in the Central Donor Register. For children conceived via home insemination, you and the mother/s inform BDM. The mother/s fill in the Birth Registration Statement, and you write a letter, providing your contact details and proof of identity (see the information sheet 'Donor information and registers'). You are responsible for keeping your contact information up to date with the Registry.

In addition, Australian family law recognises and protects the relationships a child has with people other than their legal parents. Your role (and that of your partner, if you have one) in the child/ren's life can be recognised and legally protected if you all wish. It is a good idea to make your own agreement about the role you (and your partner, if you have one) will have in the family's life, although such agreements cannot be legally binding. You also have the option of formalising your arrangements by seeking a court order by consent (without a dispute arising), to cover things like the

agreed level of contact. There are costs, and many donors and families are happy with their own informal agreement, including a process for negotiating changes if needed, and for resolving any conflicts that may arise. See below for issues your agreement might include.

## Thinking about it and making agreements

It is a good idea for you (and your partner, if you have one) to make a written agreement with the prospective mother/s, even though it is not legally binding. Australian law does not allow you to make a legally-enforceable contract or agreement about a child, written or verbal. Some people make their agreement, then put it in a drawer and never look at it again. Some revisit it when they conceive, when a child is born, when it comes to trying for any subsequent children, and when any major life changes happen that have possible implications for the relationship (such as someone moving interstate or overseas). Many people find their agreement a useful a tool, and a record of what they wanted and agreed to at the time. And in a conflict, a written agreement demonstrates your intentions, which might be one (but certainly not the only) factor a court would consider.

Most people make agreements that are legally clear in language, but also express their feelings. Think about how the children you help conceive might feel if they read your agreement, as they may do later in life. The most valuable thing an agreement can do is encourage you all to sit down and talk about the important issues. Your agreement should clearly state what each person's role will be (including your partner, if you have one), and who are the child's parents. It should clearly state what all of your intentions are in making the agreement.

The most important part of the agreement relates to how you will negotiate changes, and what you will do in case of conflict. The only certainty in life is change. Children change, people's circumstances change, and so do their feelings. The feelings of everyone involved – the parent/s, you, your partner, and the children as they grow – will inevitably change over time. This does not mean that your arrangements will also shift, although they often do. Some donors become much more involved in family life, for example, while others are less so than originally intended. The key is to agree on clear processes to negotiate change, and to deal with conflict (such as through a counselor or mediator), so that whatever happens you can stay out of court.

### Specific topics to discuss

People's agreements vary enormously, but there are some key issues to consider including:

- Will you be known to the child? Some donors are happy to be introduced when the child is old enough to show an interest, but have no other contact.

There is strong evidence that children fare best when their parents are open about their donor origins from early in life, whether or not they have an ongoing relationship or contact with their donor.

- Will you all be open about your role as donor with friends, family and acquaintances, including those you have in common? Bring this up early, before any of you mention the issue to others. Remember that when a child knows your identity and is old enough to talk, the adults involved will lose control of who has this information! There is strong evidence that any sense of secrecy about children's donor origins is not in children's best interests.
- Do you want to tell or involve your family of origin? This is a major issue for many donors, as previously discussed under 'Your emotional journey'.
- If you have a partner, what role might he or she play? We also discuss this above.
- What language will you all use around your role, and that of your partner if you have one? How will you speak with the children about this? How will you describe your role to other people? See above under 'The F-word'.
- What processes for donating are you open to? Make sure you understand what is involved with each option, described above, and the health screening required, including if you need to re-test. See above, under 'The process of donating'.
- What if the mother/s need to use IVF? Do you have any feelings about that, for example what choices the mother/s might make around unused embryos at the end of the process?
- Are you open to donating for more than one child? And for either mother to be the birth mother?
- How will you feel there is a likelihood of an unborn child having a profound disability or serious medical issue? People can have very strong, and different, feelings about issues like this.
- What contact might you have with the mother/s during the pregnancy? Would the mother/s want you to have any role (and would you want to) during the birth? How soon will you meet the child? What role or contact might you have during early infancy? Will you have any say in the naming of the child?
- What kind of time do you want to spend with the family? Do you want occasional or regular contact? Will it involve family celebrations and birthdays, school or social activities? Will the amount and nature of the contact you have with the family change over time?
- Will your contact always be with the whole family, or sometimes just with the children? If the latter, are you interested in – and would the mother/s ever be open to the possibility of – the children staying with you overnight? At what age? Talk to other parents about children's capacity to be away from

their home and parents at different ages, before exploring these issues.

- Who will be financially responsible for the child? If you want to make a financial contribution (and the mother/s are open to this), would this be regular or ad hoc? What about inheritance, superannuation, insurance and wills?
- What kind of support (other than financial) and involvement, if any, would you like to give to the family, and what might the mother/s want from you?
- Do you want – and are the mother/s open to you having – any say in the decisions about their children's lives? For example, will they ask for your input about things like education choices or religion? What about health care or other aspects of their children's upbringing?
- Make sure you understand the law in regards to who are the child's legal parents, who is listed on the birth certificate, and the legal requirements for listing donor information with the Registry of Births, Deaths and Marriages. Discuss whether you all want to seek court parenting orders by consent.

As we have said, the most important thing to agree on is how to negotiate change and any conflict. You might want to make some agreements on hypothetical scenarios, such as what you will do if someone wants to move interstate or overseas. It is worth all the 'parties' seeking separate legal advice before making decisions or attempting conception.

Commit seriously to the agreements you make in good faith, but acknowledge the reality that people's needs, feelings and circumstances change. It is important to finalise your agreement before beginning to attempt conception; some people do not, then discover they still had very different expectations down the track. However, it is also a good idea to revisit the decisions you made after the child is born.

### Consider starting slow

For most people, this is all very new territory. If you do not have children yourself, you cannot know what it will be like when this child is born, and how you will feel. That goes for you and your partner if you have one, and the mother/s. Talk to parents of babies and young children. There is no greater change for many people than when children come into their lives.

When thinking about the kind of involvement you might have before and after birth, is important to consider the nature of pregnancy, birth and early infancy, and the mother/s choices around issues like birth, breastfeeding and sleeping.

The Australian National Health and Medical Research Council recommends that children are exclusively breastfed for the first six months, and continue to breastfeed until at least two years old. Of course, every

family makes their own choices around issues such as breastfeeding, for example, and not all birth mothers can breastfeed, or want to, short or long-term. Everyone involved in this process will have their own particular experiences of the exhausting, exhilarating, emotional and sometimes difficult processes of trying to conceive, pregnancy, birth, establishing breastfeeding and early infancy. Everyone will need different kinds of support at different times.

One option that works for many is to start with a lower level of contact (however you all define that – perhaps a short fortnightly visit) to begin with, but be open to that increasing over time as you all learn and explore your new roles. Your role can potentially be very different when a child is a toddler or preschooler to when they are newborn.

### If relationships break down

The escalation of conflict is not good for anyone. Most importantly, a breakdown in relationships between adults in a child's life always has a negative impact on the child. Every family has issues to deal with from time to time. Ideally, you will be able to talk them through. It can be useful to involve a third party, such as a counsellor or mediator, well before things get too difficult. Issues around family and children can get very emotional very quickly. Try hard to see each others' points of view, to maintain a sense of mutual goodwill and common purpose, and above all to keep the focus on the child/ren.

Australian family law, like the rest of our legal system, is based on an adversarial model that is particularly poorly suited to the complex and emotional nature of conflict over parenting and children. Going to court is extremely stressful and costly. Do everything you can to stay out of court if you can avoid it, including trying different counsellors or mediators if the first is not helpful.

Australian family law allows anyone with 'an interest' in a child's welfare to apply for a court order creating contact or other arrangements with regard to the child. The court will not change who is recognised as a child's legal parents in these circumstances, but it will decide on issues like who sees, lives with and makes decision for a child on the individual facts of the case, and what they see as the child's best interests.

A court might make an order for you (and your partner, if you have one) to have contact, and in some circumstances even some parenting responsibilities, if it considers this to be in the best interests of the child. Many factors will come into play, including your arrangements to date and perhaps your original intentions (for example, as documented in an agreement) or evidence shown by consent orders recognising your role. Previous cases also have an impact, although family law is less bound by legal precedent than other parts of Australian law, and this area of law is still emerging.

# Information for prospective egg donors and surrogates

## This information sheet

The information provided here is written on the assumption that the majority of egg donors and surrogates involved in creating rainbow families will be doing so with a gay couple or single man. It is also possible, of course, that a lesbian couple or single woman would need the assistance of an egg donor and/or surrogate.

As noted above, we have not explored the emotional and legal issues for prospective egg donors and surrogates in the depth we have for prospective sperm donors, as the option of surrogacy (with egg donation) has only recently been effectively legalised in Victoria, and we do not know yet what kind of ongoing relationships parents, surrogates and donors will form. We advise you to read the information provided above for prospective sperm donors to see whether you feel that any of the issues explored are relevant for you.

## A new option for gay men to become parents

The Victorian *Assisted Reproductive Treatment (ART) Act 2008* (in effect since 1 January 2010) effectively legalised the option of altruistic (unpaid) surrogacy in Victoria, opening this up as an option for gay men to become legal parents through Victorian fertility services. It removed the requirement that a woman be medically infertile to access the fertility services needed to be a surrogate, and allowed for recognition of the legal parentage of the 'commissioning' parent/s.

If you have been approached by a gay couple or single man to be their egg donor or surrogate, they might not have explained to you the limitations of their other options for becoming parents. At present, same-sex couples are not allowed to apply to adopt in Victoria, although a Victorian Court recently approved one member of a same-sex couple's application to adopt an older child for whom they had both been long-term foster carers. Nonetheless, even if same-sex adoption was legalised, there is a tiny number of 'stranger' adoptions across Australia, particularly of infants. Some men become parents through overseas commercial surrogacy services, but these are very expensive (\$40,000 to \$200,000 at the time of writing). Some men co-parent with a single woman or lesbian couple, but they cannot be the child's legal parents, and this option is not possible or desirable for everyone, for a variety of reasons.

Some foster care agencies have long recognised that gay men can provide loving, stable homes for children requiring short or long term foster care or those on permanent care orders. Fostering can be a very positive

experience for everyone concerned, but it has its own challenges, and is not the same as legal parentage of a child from birth, who might be biologically related to at least one of the parents.

## What is surrogacy?

The word surrogate means 'one that acts in place of another'. Surrogacy is when a woman agrees to conceive, carry and birth a baby for another person or couple to raise.

All surrogacy arrangements in Victoria must be altruistic. That is, if you are a surrogate, you cannot be paid to act as one. However, you can be reimbursed for costs you incur as a direct consequence of entering into the surrogacy arrangement. To be a surrogate, you must be at least 25, and have previously carried a pregnancy and given birth to a live child. You might be a friend, relative or acquaintance of the prospective commissioning parent/s, but they are not allowed to advertise for a surrogate, for example through television, radio, the internet or other public means.

Just as it is a difficult decision for men about whether to be a sperm donor, it might be very difficult for you to decide whether to be a surrogate, particularly if the person asking you is a very close friend or family member. There are certainly women who are willing to be altruistic surrogates, and who find it a very fulfilling role. In the case of altruistic surrogacy, they are usually a very close friend or relative of the commissioning parent/s. It is worth trying to find stories from women who have been surrogates, including in Australia and elsewhere, when thinking about whether or not you are willing to be a surrogate. However, although you might strongly support the prospective father/s desire to parent, you might feel that carrying a baby for them is something that you cannot do. Trying to conceive, pregnancy and birth are hard on most women, physically and emotionally, and even if the prospective father/s are willing for you to be very involved with their family, you might find it difficult to imagine not actually parenting a child to whom you have given birth.

Read the material above for prospective sperm donors and consider which issues might be relevant to you in making your decision, or negotiating the arrangements under which you might agree to be a surrogate. You will need to sign consent forms at the clinic (see below) and undergo counseling, but we also recommend making your own agreement – even though it cannot be legally binding – especially if you are likely to have ongoing contact with the family. Agreements are a very useful tool for thinking through all the major issues. Clinic counselling can also help. Many clinics offer a paid service of a counselling 'information session' before committing to any treatment, which might be helpful.

All surrogacy arrangements must be approved by the Patient Review Panel. The Panel must be satisfied that all 'parties' have received counseling (from a fertility clinic, see below) and legal advice, and that they are

‘prepared for the consequences if the arrangement does not proceed in accordance with their intentions’ – for example if the commissioning parents decide not to accept the child, or the surrogate refuses to relinquish him or her. The experience in countries where surrogacy has long been an option is that such disputes might be the subject of midday movies, but they are extremely rare in reality.

## What is egg donation?

Only ‘gestational’ surrogacy is allowed in Victoria. This means that gay couples or single men also need to find an egg donor, as the surrogate’s own eggs are not allowed to be used to conceive. Many ask friends or relatives. Prospective parents are allowed to advertise that they are seeking an egg donor, but must have approval from the Minister of Health before doing so. Egg donation must also be altruistic (that is, unpaid) although egg donors can also be reimbursed for actual medical and associated travel costs incurred. Egg donation cannot be anonymous in Victoria. All egg donors meet the recipients of their donation, and are required to attend counseling separately and together, and sign consents to the processes involved before they go ahead.

Just as it is a difficult decision for men about whether to be a sperm donor, it might be hard for you to decide whether to be an egg donor, particularly if you are close to the person asking you. Even if you are very supportive of the father/s desire to parent, you might not feel that this is something you can do for them. Helping someone to create a child by donating is a profound act, and there might be many reasons that you (and/or your partner, if you have one) do not feel that this is a role you want to take on, many of which are likely to be very separate from your relationship with him/them.

Read the material above for prospective sperm donors and consider which issues might be relevant in making your decision, or negotiating the arrangements under which you will donate. You will need to sign consent forms at the clinic (see ‘Using a fertility service’, below) and undergo counseling, but we also recommend making your own agreement, even though it is not legally binding, especially if you are likely to have ongoing contact with the family.

Information about a child’s donor origins is lodged in the Central Donor Register at the Victorian Register of Births, Deaths and Marriages. Children conceived through donation have the right to access their donor information, and to contact their donor at age 18 if they wish, or earlier with parental consent or if a counsellor judges them to be sufficiently mature. See the information sheet on ‘Donor information and registers’ for more. Donors can also seek identifying information about children. Before children are 18, a donor will only receive this information with the parent/s’ permission. After the child is 18, they must consent for this informa-

tion to be released. In practice, the parents of many children conceived through sperm donation obtain such information when their children are much younger. If you are an egg donor, you will have had to have had some contact, at least, with the recipients of your donation before it goes ahead. It is possible that contact will be ongoing, even if it is only occasional.

## The egg donation and surrogacy process

A note on language: as stated, altruistic surrogacy and egg donation might be needed by a lesbian couple or single woman, as well as by a gay male couple or single man. The latter is much more likely, therefore our language reflects this scenario, but the process is similar regardless of who the commissioning parent/s may be. If they are a lesbian couple or single woman, however, or if the gay male couple or single man has compromised fertility themselves, they might also require a sperm donor. Fertility clinics have clinic-recruited sperm donors available, or the prospective parent/s might ask someone they know.

### Using a fertility service

Conceiving a child through altruistic surrogacy and egg donation requires the services of a fertility clinic. Victorian law requires everyone involved in the arrangement (including partners) to have sought legal advice, and to go through a number of procedures (the clinic will assist you with these):

- a police check, to ensure neither of you has ever been convicted of a violent offence or charges have been proven against either party in relation to a sexual offence
- a child protection order check, to ensure neither of you has had a child removed from your care, and
- clinic counselling, to ensure you both understand the implications of donor conception and consent to the procedures involved.

An overseas police check is required if either party has resided overseas for a consecutive 12 month period in the past 10 years. There is a presumption against treatment for anyone who does not pass the police and child protection checks and treatment must not be provided. If barred, you can appeal to the Patient Review Panel, and subsequently to the Victorian Civil and Administrative Tribunal (VCAT).

Egg donors must undergo a number of health screens, see a medical specialist and fill in a questionnaire about their medical and family history. If there is an indication of a family genetic condition, the clinic will discuss the implications of this with you and the prospective father/s for your role as a donor. The prospective surrogate and biological father will also undergo standard health checks, including for HIV.

## What is actually involved

The medical procedures for the egg donor are lengthy and invasive. They are essentially the first half of an IVF procedure, usually beginning with 'down-regulation' (taking the birth control pill for some weeks) and hormonal hyperstimulation of your ovaries to produce the maximum safe number of eggs. Blood tests and vaginal ultrasounds will determine when eggs should be collected from your ovaries. This involves a day hospital procedure, using a light sedation or general anaesthetic. The procedure takes 20 minutes, but you might need to rest for the following 24 to 48 hours.

While the eggs are developing in the donor's ovaries, the surrogate's menstrual cycle will usually be medically managed to synchronise with the egg collection process. If you are the surrogate, you will take oestrogen and progesterone to prepare the lining of your uterus for a possible embryo transfer.

When the donor's eggs are collected, they are fertilised with frozen, screened sperm from the prospective biological father. One or more eggs may be successfully fertilised, and go on to develop into an embryo that can be transferred into the surrogate's uterus. This is a short procedure, akin to a pap test, that does not usually require any anaesthetic. Any additional embryos can be frozen for subsequent transfers, if needed.

Awaiting the results of the pregnancy test two weeks later can be nerve-wracking for everyone, and if no eggs from the first donation lead to a successful pregnancy and birth, you might all go through this multiple times.

## If conception is successful

The processes of attempting conception, pregnancy and birth are amazing for everyone involved, but potentially exhausting and stressful. The relationships between the prospective father/s, the egg donor (and her partner if she has one) and surrogate (and her partner if she has one) will determine the extent to which you all have contact and give support to each other during these processes.

The prospective parent/s and surrogate (and the egg donor, if she is to have any ongoing contact with the family) will need to talk openly, perhaps many times, about their hopes for the birth and early infancy. What sort of birth does the surrogate want to have? What professional and other supports will she need at this time? Is she willing for you to play a role, and if so what? Would she be willing to breastfeed, at least during the period when her body is producing colostrum? Is this what the parent/s would want? When and how will the parent/s take home the baby, and what sort of contact might the surrogate or egg donor have with the new family in the early days?

## Transferring legal parentage

At the time of writing, the only way that both men in a same-sex couple can be recognised as their child's equal legal parents in Victoria is if the child is conceived and born through altruistic surrogacy here. This is done by transferring legal parentage from the surrogate (and her partner, if she has one) to the commissioning parent/s through a Supreme or County Court order.

When a baby is born in Victoria, the woman who gives birth (in this case, the surrogate) is deemed to be its legal mother, and is recorded as such on the birth certificate. Her partner, if she has one, is recorded as the father or parent. The commissioning parent/s must apply to the Supreme or County Court for a 'substitute parentage order', naming themselves as the child's legal parent/s. They must live in Victoria when they make the application, and make it no less than 28 days after a child's birth but before six months.

The Court will make the order once it is satisfied:

- that the order is in the child's best interests,
- that the surrogacy was commissioned through a fertility clinic and approved by the Patient Review Panel
- that the child is living with the commissioning parent/s when the application is made
- that the surrogate (and her partner if she has one) received no material benefits from the arrangements, and
- that the surrogate and her partner freely consent to the order.

## Options for ongoing contact

Historically, same-sex couples have tended to be more open with their children about the circumstances of their conception than heterosexual couples; after all, it is obvious that same-sex couples needed some help to create their families! If you had a prior relationship with the prospective father/s – or even if you did not – you might or might not want to have ongoing contact with the family. They will probably have their own ideas about whether they would like to have ongoing contact with you, as the egg donor or surrogate, after you have helped them create their family. This is something you should discuss in detail and agree on before you decide to go ahead. Read the information for prospective sperm donors to see what issues might apply to you.

As mentioned, altruistic surrogacy in Victoria is a new option for gay men. It remains to be seen what choices men who create their families in this way will make around ongoing contact with their donor and/or surrogate. Many couples who conceive through

overseas surrogacy choose to have ongoing relationships with their surrogates, at least, such as exchanges of emails and photographs, and perhaps the occasional visit. Some have contact with their egg donors, but this may not be an option if egg donation in that country is generally anonymous. The relationships between men and their Victorian egg donors and surrogates might well be different; because they live in the same country, because these roles are altruistic father than paid, because there is usually a pre-existing relationship, or at least some contact before, and because of the laws around release of donor information.

One possible parallel is the variety of relationships that lesbian couples and single women create with their donors. Some known sperm donors are just happy for the child/ren to know their name, see their photos, and perhaps meet up when the child/ren are old enough to show an interest. Some live in another state or country, and exchange cards, emails, Skype chats and perhaps the occasional visit. Some visit a few times a year, others more often. Some become part of family life, spending regular time, perhaps holidaying together and becoming regular baby-sitters. Some children call their known donor 'Dad', even though the man (and his partner, if he has one) does not share parenting responsibilities and is not a legal father or parent. Some do not. The diversity of people's choices is endless.

It is important to bear in mind how family law works in Australia. The commissioning parents of a child conceived via altruistic surrogacy in Victoria are their child's legal parent/s once the transfer of parentage is complete. However, anyone with 'an interest' in a child's welfare (such as a grandparent, step-parent, donor or surrogate) can apply for a court order creating contact or other arrangements with regard to the child. Whether you are the egg donor or surrogate, you can make an agreement with the parent/s about a whole range of issues, and we recommend that you do. See the discussion for sperm donors about making agreements above, for issues to consider. However, these agreements are not legally binding, should there be a dispute. You cannot make a legally-enforceable contract or agreement (written or verbal) about a child.

If a dispute arose, a court will not change who is recognised as a child's legal parents (once the parentage has been transferred – see above), but it will make its judgement – on things like who has contact with a child, who lives with them, and who makes decisions about their lives – on the facts of the case, and what they see as a child's best interests. Courts can award contact, and in some circumstances even some parenting responsibilities, to someone other than the legal parents, if they think this is in a child's best interests.

## 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:

- registration and management of donor information in the 'Donor information and registers' sheet 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', or 'Births' and then 'Self-insemination'.
- maximising the chance of conception through home insemination and lots of information about every aspect of the process in *The New Essential Guide to Lesbian Conception, Pregnancy and Birth* by Stephanie Brill
- a guide to all forms of fertility treatment in *IVF and Beyond for Dummies* by Karin Hammerberg, published in Australia in 2010
- fertility clinics in Victoria at [www.fertilitysociety.com.au/rtac/accredited-units/victoria/](http://www.fertilitysociety.com.au/rtac/accredited-units/victoria/)
- how to apply for a court parenting order in the *Family Court of Australia Consent Orders Kit* at [www.familylawcourts.gov.au/wps/wcm/connect/](http://www.familylawcourts.gov.au/wps/wcm/connect/)
- where to seek legal advice about agreements and other matters through the Law Institute of Victoria's Directories at [www.liv.asn.au/Specialists](http://www.liv.asn.au/Specialists)
- parenting orders and child maintenance, on Victoria Legal Aid's website under Children and Parenting, [www.legalaid.vic.gov.au/childrenparenting.htm](http://www.legalaid.vic.gov.au/childrenparenting.htm)
- The Victorian Assisted Reproductive Treatment Authority at [www.varta.org.au](http://www.varta.org.au).

## What else is in this information kit?

- Introduction and definitions
- Recognising pre-existing families
- Options for prospective lesbian parents
- Options for prospective gay male parents
- Donor information and registers
- Resources and links