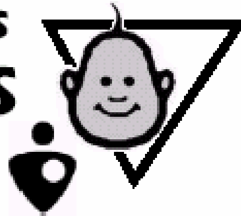
Fertility Access
R·I·G·H·T·S
A working group of the Victorian
Gay and Lesbian Rights Lobby



VICTORIAN GAY AND
LESBIAN RIGHTS LOBBY

JOINT RESPONSE
TO POSITION PAPER 2:
PARENTAGE

of the Victorian Law Reform Commission's Enquiry

"Assisted reproductive technology and adoption – should the current eligibility criteria in Victoria be changed?"

31 August 2005

INTRODUCTION

THE FERTILITY ACCESS RIGHTS LOBBY

The Fertility Access Rights Lobby (FAR) was established in November 1999 to raise awareness of the discrimination and health risks inherent in the restriction of access to assisted reproductive technology specified by the Victorian Infertility Treatment Act (1995). Voluntary membership up until December 2004 has included over 100 people from diverse areas including lesbian and gay parents, prospective parents, single heterosexual parents, health care providers, counsellors, family therapists, lawyers and human rights advocates. FAR and the VGLRL joined the Victorian Gay and Lesbian Rights Lobby to become a working group of that broader organisation in December 2002.

FAR's aims include:

- advocacy for law reform to open access to donor insemination and adoption for lesbian, gay and single people; through representation on the Attorney General's Advisory Committee on Gay and Lesbian issues, development of fact sheets, written articles and meetings
- community building to create connection between people creating diverse families
- community education about lesbian and gay family formation and support

FAR has been supported by a range of organisations including VicHealth, the ALSO Foundation, Reichstein Foundation, Victorian Gay and Lesbian Rights Lobby, Gay and Lesbian Health Victoria, Women's Electoral Lobby, National Women's Justice Coalition, Women's Health Victoria, Women's Health West, Victorian AIDS Council, the Australian Council of Single Women and their Children, the Bouverie Centre (Family Therapy), the Australian Lesbian Medical Association, Port Phillip and Darebin Councils. Various community education events have been sponsored by Absolutely Women's Health, the health promotion unit the Royal Women's Hospital, and law firms including Slater and Gordon, Blackburn, and Kelly and Counsel.

In August 2003, FAR organised the first Rainbow Families Conference, a community event that was attended by 150 people. In February 2005 a second Rainbow Families conference was held involving more than 250 people, including a large children's program. An active Rainbow Families email group established at the first conference has maintained connections between a diverse and active population of people interested in lesbian and gay families.

THE LOVE MAKES A FAMILY CAMPAIGN

The Fertility Access Rights Lobby established the Love Makes a Family community education and lobbying campaign in December 2004, with support from the Victorian Gay and Lesbian Rights Lobby, and auspicing from the ALSO Foundation which enabled FAR to successfully apply for limited funding to the Reichstein Foundation.

Since then, the campaign has been very active in the GLBTI (gay, lesbian, bisexual, transgender and intersex) community, as well as in the broader community, supporting and encouraging people involved in or supportive of GBLTI and other diverse families to get active in changing both the law (through participation in the VLRC's Enquiry) and social attitudes.

The Love Makes a Family Campaign currently has a coordinating group, along with a number of working groups and an actively-involved email list of approximately 100 members (additional to the Rainbow Families list, with a membership of approximately 80). Activities to date have included media work, public forums, stalls at a variety of community events, public speaking and liaison with GLBTI and mainstream organizations and publication of resources including a website at www.lovemakesafamilyaustralia.org.

THE VICTORIAN GAY AND LESBIAN RIGHTS LOBBY

The Victorian Gay and Lesbian Rights Lobby (VGLRL) aims to achieve equality and social justice for lesbians and gay men. We do this by working with the media, undertaking and supporting research, conducting community education and directly lobbying politicians across all levels of government. We have a financial membership of over 350 people, and are an incorporated association in Victoria. The VGLRL committee of management is designed to ensure representation of both gay men and lesbians, while still allowing space for members who do not identify as either gay or lesbian. The VGLRL focuses on key issues of relevance to the lesbian and gay communities by continually canvassing community needs and assessing the political landscape.

The VGLRL was instrumental in the introduction of the 2001 relationship reform bills, which introduced legal recognition of same-sex partners into some fifty-seven statutes of the Victorian Parliament. These reforms removed legislative discrimination against people in same-sex relationships from all major areas of the law except those relating to assisted reproduction and adoption. The VGLRL therefore has a strong interest in the VLRC's reference into assisted reproductive technology and adoption, and is keen to ensure that legislative discrimination against same-sex partners and children of gay and lesbian families is removed from all remaining areas of Victorian law; and that full legal recognition of lesbian and gay families is introduced.

THIS SUBMISSION

This submission has been developed to be consistent with the FAR and VGLRL submissions made in the initial round of consultations in 2004 and our responses to the Commission's Position Paper 1, which were themselves developed by FAR and the VGLRL Lobby Members including a medical practitioner, lesbian parents, community activists, VGLRL committee members and lesbian families researchers.

Recommendations made in the Prospective Lesbian Parents 2004 submission have also been considered (developed through consultation with 25 prospective and current lesbian parents/couples), as have responses to the Love Makes A Family survey and the Victorian Gay and Lesbian Rights Lobby survey conducted in 2004 and 2005.

This submission addresses complex legal and social issues, about which there are diverse views within affected communities. It has been developed in consultation with a range of community members and experts, including parents, prospective parents, health workers, youth workers, lawyers and academics, as well as conversations with prospective and parental support groups including Prospective Lesbian Parents and MaybeBaby. A draft has been widely circulated for comment to the Love Makes a Family coordinating group, FAR and the VGLRL members, members of the Victorian Gay and Lesbian Rights Lobby, and the Rainbow Families and Love Makes a Family email lists.

The submission is structured according to the main areas of concern affecting communities that FAR and the VGLRL represents. To enable consultation and comment by affected community members and experts in the development and finalisation of the submission, it includes summaries of the main issues and Interim Recommendations from FAR and the VGLRL's perspective. For personal stories and quotes about how these issues impact on the lives of children and their families in the community, please refer to submissions by the Lesbian Parents Project Group (in response to all papers) and Prospective Lesbian Parents (in response the Commission's initial Consultation Paper in June 2004).

CONTACT DETAILS

For more information about any of the issues raised in this submission, please contact Felicity Martin, Chair of the Fertility Access Rights Lobby, Coordinator of the Love Makes a Family Campaign and a member of the Victorian Gay and Lesbian Rights Lobby. Her contact details are: phone [redacted] or email far_lobby@yahoo.com.au.

DEFINITIONS

Below is a list of definitions of terms as they are used within this submission.

Term	Definition
Parent	Any adult who effectively bears parental responsibility for a child. This includes both birth/biological parents and non-birth/non-biological parents (generally the birth/biological parent's partner), even where current law does not recognise their parental status. It does not include donors.
Mother	A woman who is a parent, regardless of biological relatedness.
Birth mother	The woman who gave birth to the child. This is the preferred term for women in same-sex partnerships parenting a child from birth.
Non-birth mother	The female parent of a child since that child's birth, who did not give birth to the child. This is the preferred term for women in same-sex partnerships parenting a child from birth.
Father	A man who is a parent, regardless of biological relatedness (i.e. includes biological fathers and non-biological fathers).
Biological parent	A parent (see above) who is biologically related to the child. Includes for example the birth mother and biological father (for example a man who has fathered a child through surrogacy).
Non-biological parent	A parent (see above) who is not biologically related to the child. Includes for example the non-birth mother and non-biological father (for example the male partner of a man who has fathered a child through surrogacy).
Known sperm donor	The man who is biologically related to the child and known to the family. He may or may not have contact with the child.
Unknown sperm donor	The man who is biologically related to the child and is not known to the family. He may be anonymous or his identity may be available.
Domestic partnership	Partnership as defined under Victorian law to include two adults of the same or different genders. For most aspects of Victorian law this includes a requirement that the couple live together 'on a genuine domestic basis'.
Home insemination	This is the preferred term for a range of practices often referred to as 'self-insemination', generally involving insemination of a woman using sperm from a known donor in a home or private environment.
Known parent adoption	This is the term used throughout the paper to refer to the truncated form of adoption proposed by the Commission for non-birth/non-biological parents to adopt their children. According to the Commission's current Interim Recommendation, this would include those children were born into a same-sex relationship before the law changes, or conceived outside the Victorian clinic system (including through home insemination, overseas or interstate clinics) before or after the law changes.

We are aware that these terms may have different meanings to different people. While being used for this paper, we suggest that community consultation is needed to find terminology that is acceptable for the majority of families.

SUMMARY OF FAR/VGLRL RECOMMENDATIONS

1. In addition to the Commission's principles outlined in 2.36, we base our recommendations and response to Position Paper 2 on the following principles:
   - Recognition that it is in the best interests of children's health and wellbeing that their families are recognised and protected as equal to all other kinds of families.
   - An assumption of the desirability of equality between heterosexual-couple headed families and all other families.
   - Same-sex parented families, and families of any structure involving gay, lesbian, bisexual, trans and intersex parents, are legitimate structures in which to raise children.
   - No matter what the circumstances, method, place or date of conception, all children should have the same level of legal recognition and protection of their relationship with their parents/family members.
   - Family should be a matter of self-definition: that is, people should be able to define for themselves who makes up their family. The law should recognise and protect a diversity of family types, including families of more than two parents.
   - Women should have control of their fertility, and reproduction should remain as autonomous as possible. The law should not effectively coerce men or women into undergoing unnecessary medical procedures.
   - The legal status of 'donor' must be clarified regardless of the circumstances, location or date of the donation.

   An additional principle that informs many of our responses to this paper is the number of Interim Recommendations that are interdependent. Therefore we would regard reforms as a 'suite' rather than a series of individual recommendations amongst which the Victorian Government could pick and choose.
2. We support the Commission's Interim Recommendation 1 that "the law should recognise the birth mother's female partner as a parent of the child" and the extension of this principle to male same-sex parents.
3. Recognition of same-sex relationships should be extended to all Victorian laws relevant to the child-parent relationship, including the *Infertility Treatment Act* 1995, the *Status of Children Act* 1974 and the *Adoption Act* 1984, representing full automatic retrospective equality between children of heterosexual and same-sex parented families under Victorian law.
4. The process for demonstrating consent for the purposes of FAR/VGLRL recommendation 3 should be as simple as registration of the child's birth and parentage at Births, Deaths and Marriages.
5. We support the Commission's Interim Recommendations (as outlined in Interim Recommendations 2 to 10) of deemed adoption and some form of truncated process for known parent adoption, but **only** alongside FAR/VGLRL recommendation 3.
6. If the Commission retains its Interim Recommendations (2 to 7) of deemed adoption, this should be extended to cover:
   - Children conceived through the Victorian clinic system after the law changes (as per the Commission's Interim Recommendations), where consent and counselling are required;
   - Children conceived through the Victorian clinic system before the law changes where consent and counselling have already occurred (as the Commission enquires);

- Children conceived before the law changes through the Victorian clinic system for storage and screening of "known donor sperm for self-insemination" (currently available only through Melbourne IVF), where consent and counselling have already occurred.
- Children conceived after the law changes through the Victorian clinic system for storage and screening of "known donor sperm for self-insemination" (currently available only through Melbourne IVF), where consent and counselling are required.
- Children who will be conceived outside the Victorian clinic system after the law changes, for example through home insemination, where consent is demonstrated through a consent and counselling process conducted by an accredited counsellor (see FAR/VGLRL recommendation 10, below, re counselling requirements).

7. If the Commission retains its Interim Recommendations (8 to 10) of a truncated form of known parent adoption, this should cover children of same-sex parents who have been conceived outside the Victorian clinic system (e.g. through home insemination) before the law changes. Given that this will apply to parents who planned, conceived, birthed and are raising their children together, the process should be minimal, with a presumption in favour of the applicant. For example, it could be as simple as a letter or statutory declaration from both partners to relevant authorities.
8. For the purposes of FAR/VGLRL's recommendation 7, we argue against any form of "intervention" by the Department of Human Services. If a more involved process that the registration of documents (as we recommend) was considered desirable, for the purposes of equality with other parents, this would be much more appropriately conducted by an accredited counsellor as outlined in FAR/VGLRL's recommendation 10.
9. There should be extensive consultation with community members about the processes for deemed and 'known parent' adoption. The processes should be cost free or very cheap, accessible and straightforward, not requiring the hiring of lawyers or other experts.
10. We make a number of recommendations with regard to any consent and counseling requirements for recognition of non-birth/non-biological parents, whatever the method, place or time of conception. These are detailed on page 13, but are in summary:
    - A review of the process should be conducted with affected community members and experts to determine the approach and range of legal and emotional issues covered.
    - In rare circumstances a counsellor may need to refer prospective parent/s to an ethics committee as outlined in Position Paper 1, however the process should not primarily be about 'vetting' or 'gatekeeping' of access to services, but provision of accurate legal information and exploration of relevant legal, financial and emotional issues.
    - The same process should be available to all parents and prospective parents of children conceived through gamete donation, including those conceived outside the clinic system.
    - Consent and counselling should be moved outside the clinic system where it does not apply to patients of that clinic. This can help address access issues, particularly in regional and rural Victoria. Consent and counselling processes should be conducted by counsellors accredited through a system created via consultation with experts and the community.
    - These processes should be supported by accurate printed information, rather than relying on counsellors' knowledge of, for example, complex legal issues.
    - Once parents in a family have undergone consent and counselling, this should be seen to apply for all children born into that relationship, however or whenever they are conceived.

11. We support the Commission's Interim Recommendation 8 that "where a single woman conceives a child as a result of donor insemination [or other ART] and subsequently enters into a genuine domestic relationship with a woman or man, her partner should be able to adopt the child'. This principle should be extended to male single parents.
12. We support the Commission's Interim Recommendation 4 that an adoption order, however obtained, should entitle the non-birth/non-biological parent to be named as a parent on the birth certificate. We also support the reform of all other Victorian legislation to recognize that a child may have two parents of the same sex (Interim Recommendation 12) or more than two parents (Interim Recommendation 14).
13. We support clarification in the Commission's Interim Recommendations 13 that the provider of gametes to a same-sex couple or single person is not the mother, father or parent of any child born as a result of their donation. We emphasise that this must apply equally to all children conceived through gamete donation, regardless of the method, time or place of their conception.
14. We support the Commission's Interim Recommendation 15 and 16 that the option of third parent adoption by the donor be available with full consent of the parents (for example the birth mother and her female partner). This option should be extended to egg donor's, and to the donor's partner if he or she has one, and to an altruistic surrogate (again with consent of the parents). We argue that it should be extended to any adult involved in a child's care. However, we argue that this option should not be available without clear and secure automatic recognition of the non-birth/non-biological parent. As per the Commission's Interim Recommendation 17, all parents of the child should be registered as parents on the births register and birth certificate.
15. We strongly support the Commission's Interim Recommendations 18 and 19 regarding children's right to information about their genetic origins, and the provision of increased support and resources to encourage parents to inform children about their genetic origins.
16. We support the Commission's Interim Recommendation 21 that donors not be able to obtain identifying information about their donor-conceived offspring, and that this should also apply to embryo donors and apply retrospectively if possible. All processes regarding the release of information should be driven primarily by the interests of children. We also therefore support the Commission's Interim Recommendation 24 and 25 regarding release of information to children before age 18, as outlined by the Commission, that this decision be based on the child's maturity and that it be reviewable, whether by VCAT or some more appropriate body, with the inclusion of advocacy and support for the young person.
17. We support the idea of a central registry for information about donor conception outlined in the Commission's Interim Recommendations 22 and 23, and that this should be attached to the Registry of Births, Deaths and Marriages provided that stringent privacy regulations are maintained. We agree that everyone using donor gametes to conceive children should be encouraged to register all relevant information with such a registry, but argue very strongly against any penalty for women who refuse to provide a donor's name.
18. We support amendment of the *Adoption Act* 1984 as outlined in the Commission's Interim Recommendations 26 and 28 to allow adoption by same-sex couples and single people, and review of the Adoption and Permanent Care Manual as outlined in Interim Recommendation 27 to accommodate adoption by same-sex couples. However we express concern that such a review might in any way reinforce the homophobic view that same-sex couples cannot provide excellent parenting and positive role models for children of either sex. See our discussion on page 17.

RESPONSES TO THE COMMISSION'S INTERIM RECOMMENDATIONS AND ISSUES RAISED

THE COMMISSION'S PRINCIPLES

The Commission's Interim Recommendations are based the principles that (in summary):

- children's best interests should be paramount;
- children's interests are served by certainty about the status of their parents;
- all parents should be subject to the usual parental obligations and responsibilities;
- parents should be aware of and plan for the needs of donor-conceived children before their birth; and
- the law should aim to eliminate discrimination based on family type and relationship status.

FAR AND VGLRL POSITION

FAR and the VGLRL strongly support all these principles. In addition, FAR and the VGLRL's response is based on the following principles:

- Recognition that it is in the best interests of children's health and wellbeing that their families are recognised and protected as equal to all other kinds of families.
- An assumption of the desirability of equality between heterosexual-couple headed families and all other families.
- Same-sex parented families, and families of any structure involving gay, lesbian, bisexual, trans and intersex parents, are legitimate structures in which to raise children.
- No matter what the circumstances, method, place or date of conception, all children should have the same level of legal recognition and protection of their relationship with their parents/family members.
- Family should be a matter of self-definition: that is, people should be able to define for themselves who makes up their family. The law should recognise and protect a diversity of family types, including families of more than two parents.
- Women should have control of their fertility, and reproduction should remain as autonomous as possible. The law should not effectively coerce men or women into undergoing unnecessary medical procedures.
- The legal status of 'donor' must be clarified (ie that a donor is not a parent) regardless of the circumstances, location or date of the donation.

An additional principle that informs many of our responses to this paper is the number of Interim Recommendations that are interdependent. For example, Interim Recommendations in this paper aimed at encouraging lesbians to use clinics should only occur alongside the Commission's Interim Recommendations in Position Paper 1 regarding not only opening up access to clinics, but also removal of processes which allow sperm donors to restrict recipients of their anonymous donation to heterosexual couples only (thus addressing the extreme shortage of donors available to single women and lesbian couples). Therefore we would regard reforms as a 'suite' rather than a series of interim recommendations amongst which the Victorian Government could pick and choose.

RECOGNITION OF NON-BIRTH/NON-BIOLOGICAL PARENTS

The Commission makes an Interim Recommendation that a birth mother's female partner be recognised as the legal parent of their child. The recommended mechanism is 'deemed adoption': that is, if a woman consents to her female partner undergoing fertility treatment in a Victorian clinic, she is automatically 'deemed' the adoptive parent of any child born as a result of that treatment, from the time of the child's birth. This consent includes a counselling requirement.

As outlined by the Commission at present, this would not cover children conceived outside the Victorian clinic system (e.g. overseas or interstate, or through self-insemination), or children conceived before the legislation changes. The Commission acknowledges that it is trying to encourage people to use the clinics, based on the assumption that this choice will be universally available if its earlier recommendations to remove discrimination in accessing fertility services are implemented. It does not recommend that 'deeming' *should* apply to children conceived through the clinics before the law changes, but raises the question of whether it could.

For children conceived before the law changes, outside Victoria or by home insemination, the Commission recommends it be 'possible' for the non-birth parent to adopt the child. In contrast with automatic 'deemed' adoption, however, the Commission recommends an 'opt in' process for the non-birth parent involving counselling etc. The Commission suggests this be less onerous than the so-called 'stranger' (traditional) adoption process, but that the Department of Human Services should be able to 'intervene' if the applicant is 'manifestly not a fit and proper person' to adopt.

FAR AND VGLRL POSITION

FAR and the VGLRL strongly support the Commission's recommendation that "the law should recognize the birth mother's female partner as a parent of the child", and argue that this principle should also be extended to male same-sex parents.

FAR and the VGLRL have a number of concerns about the 'deemed adoption' process and the proposed truncated form of adoption which we will refer to as 'known parent' adoption, as outlined below. FAR and the VGLRL argue for the amendment of the *Status of Children Act* and other Victorian legislation as the primary mechanism.

An alternative mechanism: amending the *Status of Children Act* and other relevant laws

FAR and the VGLRL argue that recognition of same-sex relationships should be extended to all Victorian laws relevant to the child-parent relationship, including the *Infertility Treatment Act 1995*, the *Status of Children Act 1974* and the *Adoption Act 1984*. Accordingly, the Victorian *Status of Children Act* would automatically deem (presume) the domestic partner (as defined in Victorian law to include same-sex and different-sex partners) of a biological parent to be the parent, whether or not they are also a biological parent. The ACT legislation provides a positive model that offers such clarity to all children conceived through gamete donation, including children conceived through home insemination.

This presumption would be based on consent, which could be shown for example by registration of both parents on the birth certificate. Once the non-birth/non-biological parent is recognized (e.g. on a birth certificate) their parental obligations would be permanent, including if the parents separate.

Such a mechanism would automatically cover, for example:

- The male partner of a woman who gives birth to a child.
- The female partner of a woman who gives birth to a child.
- The male partner of a man who fathers a child through surrogacy (provided the biological father's legal parentage is also recognized, an issue we presume will be tackled in Position Paper 3).

FAR and the VGLRL note that this measure would give children of same-sex parents parity in terms of recognition of their parents/family in state law as children of heterosexual couples, and complete the process of removing discrimination in Victorian law against same-sex couples and families commenced by the Victorian Government in 2001 with the Victorian *State Law Amendment (Relationships) Act* 2001 and the *Statute Law Further Amendments (Relationships) Act* 2001.

As the Commission has concluded, children of same-sex couples should not be treated less favorably by the law than children of different-sex couples. Discriminatory laws are contrary to Victoria's human rights obligations, and to the health and wellbeing of children and of all family members. As the Commission has noted, legal recognition of diverse family types is an important way of countering discrimination. FAR and the VGLRL argue that differential treatment of different family types, even where the intention is to effectively give equal legal protection, is problematic.

Importantly, this measure would also enable children to benefit without their parents having to take action – ie children whose parents did not know about, could not afford to access or were not comfortable with a potentially onerous 'opt in' process such as adoption would not be disadvantaged. Perhaps most importantly, this measure can include all children no matter when or how they were conceived, and would also cover children born in other jurisdictions with comparable laws who move to Victoria.

Amendment of the *Status of Children Act* and other legislation would also be in keeping with changes made in some other countries, and in the NT, the ACT, and WA in Australia, and with what was recommended by the Tasmanian Law Reform Institute. Consistency with other states is desirable, and adds to the impetus for change at a federal level.

FAR and the VGLRL's concerns with 'deemed' and 'known parent' adoption

FAR and the VGLRL recognises and appreciates that the Commission has attempted to address important issues of federal law, such as the *Child Support Assessment Act*, through development of the 'deemed adoption' mechanism for children conceived in clinics, and a truncated process for what FAR and the VGLRL will term 'known parent' adoption for children conceived before the law changes, or outside the clinic system.

However, FAR and the VGLRL has concerns with these options as the only or primary mechanisms for recognizing non-birth/non-biological parents. In summary, these are:

Desirability of parity for all families

Different mechanisms for recognizing the parental status of a non-birth/non-biological partner depending on that person's gender contravenes the Commission's principle of aiming "to eliminate discrimination against children and parents based on their family type and relationship status". FAR and the VGLRL appreciate the Commission's intent and the obstacles it faces in federal law, however we argue this should happen only alongside amendments to the *Status of Children* and other *Acts* that would grant effective equality, at least in state law.

Different methods of recognition (deemed and known parent adoption) means that there could be children within the one family – born at different times, using different methods of conception, and/or to different birth mothers – with different legal relationships with their parents and potentially no legal relationship with their siblings. Certainly there would be children in the community with different legal relationships with their parents depending when and how they were conceived. This is a far from desirable situation, particularly in view of the fact that the conception choices of many same-sex parents have historically been limited by discriminatory laws.

Uncertainty about the impact in federal law

The Commission itself does not seem to be sure that a form of 'deemed adoption' would achieve its intention in federal law (page 21-22) or be portable to other jurisdictions. This uncertainty may lead to test cases for both the 'deemed' and more streamlined 'known parent' adoption. It may also, given the current federal political environment, prompt amendments to the federal *Family Law Act* aimed at excluding new forms of adoption from recognition in federal law. Such uncertainty may make adoption an unattractive option for some parents, leaving their children without legal protection. Any mechanism which is not widely supported in the community, particularly one which requires 'opting in', will not achieve its aims, leaving some children without legal protection.

Problems with requiring the use of clinics

There are many reasons why children of lesbian women may not have been conceived in Victorian clinics, including that most lesbian women have been denied access to clinics in Victoria; that many women prefer to conceive at home or to do inseminations themselves; that restrictions on gay donors donating to clinics have effectively excluded many women from using their known donor through a clinic process; and the extreme shortage of anonymous clinic donors available to lesbian couples and single heterosexual women.

FAR and the VGLRL agrees that removing discriminatory access to fertility services as recommended in the Commission's Position Paper 1 would, if passed into law, mean that more women will use the services provided by clinics. FAR and the VGLRL have both argued that it would be desirable and in the best interests of children for all prospective parents to have access to screening and counselling provided by clinics.

However, FAR and the VGLRL recognise that some women will continue to conceive through home insemination, with or without the assistance of services that can be provided by clinics. We argue that their children should not be given less rights and recognition because of the method and location of their conception. This is strongly supported by evidence from NSW that, despite liberal laws allowing universal access to ART, around 50 percent of lesbian couples still choose known donor home insemination. Please refer to this research by McNair, Dempsey, Wise and Perlesz 2002, cited in the Commission's Occasional Paper 2004 *Outcomes for Children Born of A.R.T. in a Diverse Range of Families*. Thus FAR and the VGLRL argue there should be a simple, universal process for recognizing the parents of all children created with donor gametes, regardless of the parents' gender, and the method, time or place of conception.

Cost of Known Donor Self Insemination (take-home) process, currently available only through Melbourne IVF at the Royal Women's Hospital (information obtained through RWH Counselling Department)

1. Initial doctor's consultation fee (as a private patient)	approximately $130
2. Storage of sample with Andrology at the RWH	approximately $198 annual fee
3. Administration fee – includes counselling and administration	$500 one-off fee
4. First 4 "take-home' attempts	no charge
5. Subsequent attempts	approximately $40 per attempt

Note other charges include:

1. Additional fees for ovulation drugs, scans to ensure timing – as a private patient if required (estimated approximately $500 per cycle based on cost of managing donor insemination cycle)

2. Cost of "Dry Shipper" (storage for 'take home' sample) $100 refundable deposit

As the service is only available week-day business hours, if you are ovulating over the weekend you need to pay for the dry shipper and arrange pick-up of the sample by COB Friday.

We also argue that women should control their own fertility, and that to penalize women by requiring them to undergo a potentially more expensive, intrusive or onerous “opt in” process for choosing to attempt conception at home is effectively to coerce them into unnecessary medical procedures. Thus FAR and the VGLRL have also argued for retention of the current option of storage and screening of known donor sperm for home insemination. However we note that issues of cost, access and lack of knowledge about this service will mean that women will continue to choose home insemination without such a service That their children could be disadvantaged by this is contrary, we argue, to the Commission’s principle of the centrality of the rights of the child.

Concerns around suggested ‘known parent’ abridged adoption processes

FAR and the VGLRL are very concerned about the Commission’s Interim Recommendation 10 in terms of any form of surveillance or ‘intervention’ by the Department of Human Services. If, as we argue, this ‘abridged’ form of adoption is the remedy offered to same-sex parents who have raised their children together from birth, such an intervention would be inappropriate. The problem the Commission seeks to remedy in the case of these parents is an unjust and discriminatory law. This law has meant that while the male partner of a woman who gives birth can automatically be recognised as the parent, even if he is not the biological father, the female partner of a woman who gives birth cannot.

In remedying this historical injustice, whether through the ‘abridged adoption’ or some other mechanism, the Victorian Government (and the Commission) should not subject same-sex parents to unwarranted intrusion or surveillance by a government department. There are appropriate mechanisms in Victorian law and DHS procedures for action in cases where someone parenting a child is “manifestly not a fit and proper person” to do so, in the laws and procedures related to child protection and mandatory reporting.

We argue that if some process for ‘known parent’ abridged adoption is desired apart from the lodging of documents, this might be more appropriately carried out by an accredited counsellor as outlined in our response to Interim Recommendations 2 to 7. This would represent greater equality with other same-sex parents covered by the deeming provision.

Issues arising from ‘non-compliance’

Such a process (DHS investigation and potential ‘intervention’) may perhaps not be onerous in fact, but FAR and the VGLRL argues that its very existence is likely to deter at least some parents from pursuing adoption of their children. FAR and the VGLRL notes that the long history and ongoing existence (despite Victorian anti-discrimination laws) of institutionalized homophobia within fertility and other health services, as well as within the courts and government services. In the health field at least, there is strong research evidence for its effect in deterring lesbian women from accessing health services, with a consequent rise in health risks as outlined in the Ministerial Advisory Committee on Gay and Lesbian Health 2002 report, *What’s the Difference?*

In 2003, the Tasmanian Government chose to amend adoption laws rather than its *Status of Children Act* (and other relevant legislation) as the mechanism for recognising non-birth/non-biological parents. However this was quickly challenged by the community, lobbyists and lawyers, leading to a new round of investigations and submissions, and to possible further amendments in the near future. Notably, FAR and the VGLRL have been informed that in the two years since the law was changed, there have been no applications for adoption.

FAR and the VGLRL notes that there is strong feeling in some parts of the community that any measure which does not represent full equality with heterosexual-parented families is not acceptable. FAR and the VGLRL notes that there are parents in the community who find it difficult to accept the

idea that they would be required to 'adopt their own children' – children whose conception they have planned, whose births they have been present at, and who already have parental responsibility in every way (including in many cases having obtained Family Court parenting orders) but legally.

As we have argued above, any mechanism that is not widely supported in the community, no matter what its intention, will not achieve the Commission's main aim of providing equal protection to the rights and best interests of all children. This is particularly the case for any mechanism that requires parents to 'opt in', rather than providing equal automatic protection to all children, at least in terms of state law.

FAR and the VGLRL's recommendations for deemed and 'known parent' adoption

If the Commission was to retain its Interim Recommendation for deemed and some form of truncated known-parent retrospective and prospective adoption, FAR and the VGLRL argues that:

- These should not be the only or primary mechanisms for recognition of same-sex non-birth/non-biological parents, as argued above. FAR and the VGLRL understand that there may be some legal issues with having both the Commission's recommended process and amendment to the *Status of Children Act*, related to the prospect of people 'adopting' children who are already – at least for the purposes of Victorian law – their legal children. However, we suggest that the Commission should explore ways to resolve such issues, in light of the benefits of the *Status of Children* approach outlined above.
- There should be much more extensive community consultation about the recommended processes. FAR and the VGLRL suggest, for example, that the process must be cost-free or very cheap, accessible and straightforward, not requiring the hiring of lawyers or other experts. It could be as simple as registering names on a birth registration form enabling parents to be on the birth certificate, as is the case in WA, or a useful, straightforward consent process.

  We note for information that the current process for obtaining Family Court parenting orders should, in theory, be reasonably straightforward for same-sex parents, particularly it is almost always the case that there is no conflict involved. Yet in the experience of many, the costs can run into the thousands of dollars, not including lost income for this time-consuming process.
- The same process should cover all children, whenever they were born, and whether they were conceived within the Victorian clinic system, or outside it (whether at interstate/international clinics or through home insemination).
- That for known-parent adoption, there should be a presumption in favour of granting the non-birth/non-biological parent's application.
- That the Commission delete Interim Recommendation 10, around 'intervention' by DHS. FAR and the VGLRL argue (see below) that such a function would be much more appropriately served by a universal consent and counseling process.

FAR and the VGLRL's recommendations for any consent and counselling requirement

FAR and the VGLRL also has concerns about the role and nature of counselling if required as part of any process for obtaining recognition of non-birth/non-biological parents, whether their children are conceived within or outside the Victorian clinic system. We are particularly concerned about the appropriateness of asking parents who have raised their children together since birth to go through a 'counselling' process, arguing that simple registration should be adequate.

FAR and the VGLRL recommends the following with regard to any consent and counselling requirement for deemed or known parent adoption:

- The process should be as useful as possible for all participants. FAR and the VGLRL recommends a process of consultation with relevant experts and community members to determine the range of

issues, both legal and emotional, which should be dealt with in the process. Please refer to the Bouverie Centre response to Position Paper 2, which explores these issues in greater detail.

- The process should not primarily be about ‘vetting’, for example of the suitability of non-birth/non-biological parents for legal recognition, nor should it primarily be about ‘gate-keeping’ of access to services. FAR and the VGLRL acknowledge that in some rare circumstances concerns may be raised about a need to refer the matter to an ethics committee, in line with our response to the relevant Interim Recommendations in Position Paper 1.
- Rather, we argue, the process should be primarily about provision of accurate legal information about and exploration of the full range of legal, financial and emotional issues relevant to each family including for example: the legal and financial issues relevant to their family formation, the role and responsibilities of all parties, potential issues for children conceived through gamete donation etc.
- The same form of consent and counselling process should be available to all parents and prospective parents of children conceived through gamete donation, not just to same-sex prospective or current parents.
- Once parents have undergone a consent and counselling process, it should apply to all children born into that family – ie they would not need to undergo the same process for all subsequent children, whoever was the birth/biological parent.
- The Commission should recommend resources go into developing accurate, exhaustive printed information clarifying legal position for all parties in a range of possible family formations, rather than relying on counsellors’ knowledge of the complex legal issues involved.
- Access issues should be considered. FAR and the VGLRL suggest that the Commission recommend creation of a training/accreditation system for additional counsellors in the community outside the clinic system, in particular to ensure access in rural/regional Victoria.

ADOPTION IN PARTNERSHIPS ENTERED INTO AFTER CHILD’S BIRTH

The Commission makes an Interim Recommendation that where a single woman conceives a child and subsequently enters a domestic partnership with a woman or man, her partner should be able to apply to adopt the child. Where a child is born into a domestic partnership (whether same-sex or not) that subsequently breaks up, the child’s legal parents would retain their legal status and obligations. New partners of either parent would be step-parents, as is currently the case with heterosexual separated parents, e.g. they could apply for family court parenting orders.

FAR AND VGLRL POSITION

FAR and the VGLRL supports the recommendation that a woman or man who becomes the same-sex partner of a birth mother/biological father who is a sole parent after the birth of the child should, with the birth mother/biological father’s consent, be able to adopt the child without extinguishing the birth mother/biological father’s parental status. This represents equality with heterosexual parents.

BIRTH CERTIFICATES

The Commission recommends that an adoption order, whether obtained by 'deeming' or other processes, should entitle the non-birth/non-biological parent to be named as a parent on the birth certificate. It recommends changes to the *Births, Deaths and Marriages Registration Act* 1996 and all other Victorian legislation to recognise that a child may have two parents of the same sex.

FAR AND VGLRL POSITION

FAR and the VGLRL recommends that the female partner of a woman who gives birth or the male partner of a man who fathers a child through surrogacy (provided the biological father's parental status is recognised) should be able to be registered as a parent on the birth certificate, in the same way that the male partner of a woman is able to be registered, whether or not he is the biological father.

FAR and the VGLRL also argues that, in line with the Commission's recognition that there may be more than two parents in a family (for example including the donor and/or his or her partner, if the family chooses) that all parents should be able to be listed on the birth certificate. This should be available equally to same-sex and different-sex parented families.

THE STATUS OF DONORS

Under current law, the legal status of donors for children conceived by women without a male partner is unclear, even for children conceived within the clinic system. The law states that a donor has no rights or liabilities in respect of the child, but is silent as to whether he is the child's father. The Commission recognises that this uncertainty is detrimental to children, and recommends that the law should presume a donor for a child conceived through a 'treatment procedure' not to be the child's father. Donors would still, if the family chooses, be able to have a relationship with the child, including applying for parenting orders through the Family Court.

FAR AND VGLRL POSITION

FAR and the VGLRL supports amending the legislation to clarify that the provider of gametes to a same-sex couple or single person is not that child's mother, father or parent, in the same way that it provides that a gamete provider to a heterosexual couple is not that child's mother, father or parent.

FAR and the VGLRL argues that this same clarity about the legal status of donors must apply to all children regardless of the method, time or place of conception. The ACT legislation provides a positive model that offers such clarity to all children conceived through gamete donation, including children conceived through home insemination.

THIRD-PARENT ADOPTION

The Commission recognises that some families may wish their donor/s to be recognised as the legal parent/s. It recommends that a donor be able to adopt the child (without extinguishing the parent/s' legal status); that this should happen with the consent of the birth mother (and her partner if she has one); that all parties must receive appropriate counselling; and that the application for adoption must occur before the child is a year old. This would require Victorian law to change to recognise that a child can have more than two parents.

If a donor adopts the child, the Commission recommends he be registered as a parent on the birth certificate. The Commission points out that under current federal law, this is unlikely to mean the donor would be liable for child support, as relevant federal law assumes a child has only two parents.

FAR AND VGLRL POSITION

FAR and the VGLRL welcome consideration of the option of third parent adoption by the gamete donor (with consent of the parents) and argues that this should be available to male same-sex parented families.

We also argue strongly that such an option should also be extended, to the donor's partner if he or she has one, and to altruistic surrogates. We note that in countries where some form of surrogacy is supported, relationships between recipient parents and surrogates (whether gestational or traditional surrogates) are often longstanding. FAR and the VGLRL also argue that third and fourth parent adoption should be available for children in all families, not only same-sex parented families or other families of children conceived through gamete donation. That is, adoption should be available to any adult actively involved in the care and parenting of children, as currently happens without legal support in families that include co-parents.

FAR and the VGLRL note that there already exist a number of families that include, for example, a lesbian couple and a gay male couple sharing parenting of a child or children, or a single woman sharing parenting with a gay male couple. This is the diverse nature of the families that exist in our community now; children in living in all these families deserve equal recognition and protection under the law.

However, FAR and the VGLRL argues that third (and fourth) parent adoption must ONLY be available if same-sex parents are automatically deemed to be the legal parents at birth, in the same way that heterosexual parents are. Otherwise, a gamete donor may potentially have the same or event greater legal standing than a non-birth mother, for example. This would be a highly problematic scenario and carries the risk of increased conflict. This is an example of a recommendation that relies on the acceptance of other recommendations – if this Interim Recommendation is adopted without automatic recognition of non-birth/non-biological parents, it will potentially undermine their legal status.

Given that the most pressing legal issue facing most children of same-sex parents is the need to have their non-birth/non-biological parent legally recognised as their parent, it is vital that any moves to increase the number of people who can be legally recognised as parents comes only after or alongside the removal of discriminatory family-related Victorian laws.

CHILDREN'S RIGHT TO INFORMATION

The Commission makes a number of recommendations relevant to a child's right to information about their biological origins, including that women who conceive children through self-insemination be required to notify the donor's name to a central registry. The Commission asks whether there should be any penalty for a woman who refuses to provide a donor's name. The Commission also recommends that children be able to ask for identifying information about donors before the age of 18, and this should be granted dependent on their maturity.

FAR AND VGLRL POSITION

FAR and the VGLRL supports a child's right to information about their biological origins, and notes that in contrast with the historical practices of many heterosexual-couple headed families, same-sex and single parents tend to be very open with their children about their biological origins. Indeed, many lesbian women have gone (and continue to go) to great lengths to ensure that their children have access to such information, for example by choosing to use a known donor despite the lack of legal protections, rather than to access an interstate clinic where there was no guarantee that the child would ever have access to identifying information about their donor.

FAR and the VGLRL also support the idea of a central registry, however argues strongly against any form of penalty for women who refuse to provide a donor's name. Given the history of homophobic discrimination enshrined in the law at state level and federal level, and the uncertainty of the impact of changes to state law on federal laws around child support, social security etc, FAR and the VGLRL argues that it would be most unfair to penalize women for not wanting to record this information, especially in light of the fact that male partners of women giving birth can simply be recorded on the birth certificate whether or not they are the biological father.

FAR and the VGLRL support the right of children conceived through gamete donation to apply for access to identifying information about their donor/s before the age of 18, given the evidence that this information tends to be important to children at earlier developmental stages. We agree that the decision to release information should depend on the child's maturity, and that it could happen without the donor's consent in the case of donors who donate prior to the law changing, given the evidence that of the great potential benefit to some children.

However, donors who donate after the law changes should be asked for their consent, and earlier donors should be contacted and offered the opportunity to talk through their concerns before such contact information is given. We note that many donors are already asked by clinics whether they would be willing to be contacted before the child is 18, and that many indicate willingness to do so. The decision by a counsellor as to the child's maturity to receive such information should be reviewable, whether by VCAT or some other, perhaps more appropriate body.

GENERAL ADOPTION

The Commission makes a number of Interim Recommendations relevant to Adoption (Chapter 6). The Commission concludes that allowing single people and same-sex couples to adopt children is justified according to the principle of the best interests of the child. The Commission therefore recommends that the eligibility criteria in the *Adoption Act* be expanded to permit same-sex couples to adopt children in all circumstances in which heterosexual couples can, including being subject to the full range of assessment criteria applied to all people who apply to adopt children. The Commission also recommends that the *Adoption and Permanent Care Procedures Manual* be reviewed to accommodate applications by same-sex couples.

FAR AND VGLRL POSITION

FAR and the VGLRL supports the recommendation that the *Adoption Act 1984* should be amended to allow the court to make an adoption order in favor of a same-sex couple. In terms of single people having access to adoption, FAR and the VGLRL endorse the Commission's statement that that single people are able to provide a secure and loving environment for a child. FAR and the VGLRL support the Commission Interim recommendation that the *Adoption Act* be amended to make the criteria for making an adoption order in favor of a single person consistent with those that apply to the making of an order in favor of a couple.

FAR and the VGLRL also support any attempts to allow intercountry adoption by same-sex couples and will continue to advocate for such policy change.

FAR and the VGLRL supports the recommendation that the Adoption and Permanent Care Procedures Manual should be reviewed to accommodate applications by same-sex couples. We note with some concern, however, the discussion in 6.30 and 6.31 preceding this Interim Recommendation.

We welcome, of course, changes in policy and procedure aimed at eliminating discrimination on the basis of sexual identity, gender or marital status of adoption or permanent care applicants. The issue of concern for FAR and the VGLRL is that raised about "whether a child would be exposed to people of both sexes", and the Commission's effective recommendation that the review of procedures could address such concerns.

Although we note that the Commission has comprehensively concluded that children's interests and wellbeing are not in any way contravened by being raised by same-sex parents, the raising of this concern and the language used is disturbing because it echoes the language used by many who argue against reform based on a belief that being raised by same-sex couples is not in the best interests of children "because all children need a mother and a father".

We also note research which shows that a person's ability to parent well, including the ability to provide positive role models to both male and female children, is not dependent on the parents' gender or sexual identity, but rather on 'family cohesion, minimal conflict, good quality parent-parent and parent-child relationships, consistent parenting style … and positive intergenerational family relationships.' (McNair, R, 2004, *Outcomes for Children Born of A.R.T in a Diverse Range of Families, Victorian Law Reform Commission Occasional Paper*, page 2).

FAR and the VGLRL agree that it is beneficial for children to have meaningful relationships with a diversity of people, including men and women. Our concern is that by recommending that adoption and permanent care assessment processes include assessment of whether a child will be exposed to people of both sexes, the Commission may unintentionally reinforce existing prejudices amongst policy-makers and staff in agencies responsible for setting and implementing such processes.