

DISMANTLING DISCRIMINATORY BARRIERS: ACCESS TO ASSISTED REPRODUCTIVE SERVICES FOR SINGLE WOMEN AND LESBIAN COUPLES

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In Victoria, single women and lesbian couples are prohibited from accessing clinically based assisted reproductive services unless they are classified as 'clinically infertile'. This article argues that recent judicial decisions illustrate that the discrimination perpetrated against these women may create serious legal and social issues. A maze of legislation regulating the legal parentage of children born as a result of assisted reproductive services is examined. It is argued that amending the Infertility Treatment Act 1995 (Vic) to eradicate the need for 'clinical infertility' is the first small step towards dismantling existing discriminatory barriers.

I INTRODUCTION

Assisted Reproductive Technology ('ART')¹ refers to the body of medical and scientific knowledge and research which when applied enables the creation of a child who could not have been conceived/born without the intervention and application of that technology.² Lesbians and single heterosexual women are using assisted conception with increased frequency but the law has not come to terms with these social practices.

This article will examine some of the sensitive and complex issues arising from the exclusion of single women/lesbian couples from assisted conception.³ It is argued that in Victoria the exclusion of single women and lesbian couples from accessing assisted reproductive services and in particular clinically based donor insemination may create serious legal and social issues. Such exclusion compels some of these women, albeit at times unwillingly, to locate their own donors. Consequently, the possibility of anonymity between donor and recipient is remote. This lack of anonymity then allows the donor to make an application for, and potentially be granted, a parenting order pursuant to the *Family Law Act 1975* (Cth) (*'Family Law Act'*). Such an order may then wreak havoc within the family comprised of single women and child or a lesbian couple and child. Heterosexual

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¹ Much of the older literature refers to ART but the more common terms and the terms used in this paper are 'assisted reproductive services' or 'assisted conception'.

² Family Law Council, *Creating Children – A Uniform Approach to the Law and Practice of Reproductive Technology in Australia*, Parl Paper No 333 (1985).

³ See Jenny Millbank, "'Which, then, would be the 'husband' and which the 'wife'?": Some Introductory Thoughts on Contesting 'the Family' in Court" (1996) 3(3) *E Law – Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v3n3/millbank.html>> at 8 December 2004; Bronwyn Statham, '(Re)Producing Lesbian Infertility: Discrimination in Access to Assisted Reproductive Technology' (2000) 9 *Griffith Law Review* 112.

couples requiring assistance to conceive may choose to use a known donor but are not obliged to do so and thus are not similarly vulnerable.

Legislation regulating access to infertility treatment is the obvious target of scrutiny. A maze of legislation regulates the legal parentage of children born as a result of assisted reproductive services. Eligibility for assisted conception is inextricably bound up with other Commonwealth and State legislation. The *Family Law Act* has deeming provisions and State and Territory legislation enact presumptions of parentage.⁴

Three landmark Victorian decisions have brought these issues into acute focus. *McBain v State of Victoria*⁵ (*McBain*) relates to whether single women can access assisted conception. *Re Patrick*⁶ concerns a parenting order made in favour of a known donor. *Re Mark (an application relating to parental responsibilities)*⁷ (*Re Mark*) involves a discussion of the operation of the *Family Law Act* in relation to the parentage of children born through a surrogacy arrangement. The discussion of *Re Mark* is limited to the status of the donor of semen used in the donor insemination process *not* in surrogacy arrangements. It is acknowledged that surrogacy arrangements may create their own moral and legal dilemmas regarding the status of the donor which are beyond the scope of this paper.

The judgment in *Re Patrick*, in which a parenting order was made in favour of a known donor, provides no indication as to whether the lesbian couple would have chosen clinical anonymous donor insemination if it had been available rather than using a known donor. However, the basis for examining *Re Patrick* is whether parenting orders may differ if lesbian couples were permitted access to clinically assisted reproductive services. It is suggested that, in contrast to heterosexual couples who may avail themselves of the benefits of assisted conception and may choose whether to use a known or anonymous donor, the legislative framework which informed Guest J's decision in *Re Patrick* reveals a discriminatory network enveloping single women/lesbian couples. Moreover, one of the keys to eliminating discrimination against single women and lesbian couples is to permit them access to clinically based infertility treatment. Such reforms will go some way to simplifying the interrelated complex legislative provisions and afford single women and lesbian couples similar opportunities as those which are available to their heterosexual counterparts. This article argues that whatever view is taken of the use of assisted reproductive services by lesbians and single women, the law governing this area should be amended so that it resolves rather than creates problems.

⁴ *Status of Children Act 1996* (NSW); *Status of Children Act 1974* (Vic); *Family Relationships Act 1975* (SA); *Artificial Conception Act 1985* (WA); *Parentage Act 2004* (ACT); *Status of Children Act 1978* (Qld); *Status of Children Act 1978* (NT); *Status of Children Act 1974* (Tas).

⁵ (2000) 99 FCR 116.

⁶ (2002) 28 Fam LR 579.

⁷ (2003) 31 Fam LR 162.

II BACKGROUND

Most people are born into families consisting of a mother, father and frequently one or two siblings. The majority of people expect one day to establish a family of their own. However there are significant numbers of people who are unable to conceive their own offspring unaided. Reproductive services 'have emerged to medically assist those who are unable to conceive "naturally"'.⁸ Infertility may be 'cured' and reproductive services 'are promoted as a medical "treatment" for infertility'.⁹ The definition of infertility is in itself a moot point which has encouraged much discussion and remains a focal point of this article.¹⁰

The possibility of reproducing without sexual intercourse, through assisted insemination, has existed for over a century.¹¹ It represents the most basic form of reproductive services. In the last quarter of the 20th century reproductive services made huge strides, allowing for procreation in circumstances previously thought to be beyond the realm of human endeavour.¹² Common forms of assisted reproductive services now include donor insemination, in vitro fertilisation ('IVF'), gamete intra-fallopian transfer ('GIFT') and intra cytoplasmic sperm injection ('ICSI').¹³

There is no basis for assuming that single women, whether lesbian or heterosexual, feel the distress associated with infertility any less than their counterparts in heterosexual relationships.¹⁴ Today we are faced with the emergence of different kinds of families, one of them being the 'homo-nuclear' family.¹⁵ This family differs from the traditional 'nuclear family' in that the parents are of the same rather than the opposite sex. This family is comprised of gay and lesbian couples together with their children. Children born into or raised

⁸ Anita Stuhmcke, 'Lesbian Access to In Vitro Fertilisation' (1997) 7 *Australian Gay and Lesbian Law Journal* 15, 16.

⁹ Ibid. About 15 per cent of couples are unable or fail to conceive within 12 months of trying. See H W Gordon Baker, 'Male Infertility' in Leslie J De Groot and J Larry Jameson (eds), *Endocrinology* (4th ed, 2001) 2308.

¹⁰ See, eg, Stuhmcke, 'Lesbian Access to In Vitro Fertilisation', above n 8, 16.

¹¹ The first recorded successful donor insemination dates back to 1884. See Ken Daniels and Erica Haimes (eds), *Donor Insemination: International Social Science Perspectives* (1998).

¹² During the calendar year 2002, 149 women received donor insemination in licensed places throughout Victoria. These treatments resulted in 43 pregnancies: Infertility Treatment Authority, *Annual Report 2003*. During the period 1 January 2001 to 31 December 2002, 6 527 women were given treatment procedures in licensed places throughout Victoria resulting in 1 681 pregnancies: Infertility Treatment Authority, *Annual Report 2002*, 23.

¹³ These include: donor insemination – '[a]rtificial insemination with donor sperm'; GIFT – '[a] medical procedure of transferring an oocyte/s (egg/s) and sperm to the body of a woman'; ICSI – 'a micromanipulation technique where a single sperm is injected into the inner cellular structure of an oocyte'; IVF – '[c]o-incubation of sperm and oocyte outside the body of a woman'. For these and other definitions of relevant terminology see Infertility Treatment Authority, *Annual Report 2003*, 17.

¹⁴ Commonwealth, *Is it Medically Legitimate to Provide Assisted Reproductive Treatments to Fertile Lesbians and Single Women?*, Research Paper 23 2000-01 (2001) 19.

¹⁵ This term is coined from the judgment of Guest J in *Re Patrick* (2002) 28 Fam LR 579, 650. Fiona Kelly, 'Redefining Parenthood: Gay and Lesbian Families in the Family Court – the Case of *Re Patrick*' (2002) 16 *Australian Journal of Family Law* 204, 214 points out that feminists and queer theorists have criticised this phrase in that it prioritises the traditional nuclear family over other family models encouraging lesbian families to conform to a heterosexual model.

in these families, while not falling within the traditional mould of the nuclear family, nevertheless require the attention and protection of the law.

To a large degree throughout Australia, legislation discriminating between heterosexual couples and same sex couples has been or is in the process of being eradicated. In 2001 in Victoria 57 statutes were amended introducing the gender-neutral concept of 'domestic relationship'.¹⁶ The effect of these amendments is to equate heterosexual and same sex couples in a number of areas of the law.¹⁷ Specifically omitted from reform were the issues of adoption and access to infertility treatment.¹⁸ It is not entirely surprising that Parliament, as part of a general legislative package, would refrain from legislating in respect of the sensitive issue of children.¹⁹

Statistics indicate that one parent families with dependant children comprise 10.7 per cent of family types.²⁰ Data also indicates that in a comparison of family types between 1976-2001, the proportion of couple only families and one parent families has increased while the proportion of couple families with children has decreased.²¹ Furthermore, in a survey conducted by the Victorian Gay and Lesbian Rights Lobby Survey Working Group of 670 people, 21 per cent indicated that children were part of their relationship. Of those who did not have children, 41 per cent said they want to have children of which the majority (63 per cent) would prefer to have children with their partner.²²

A discussion of the eligibility of single women and lesbian couples to access assisted reproductive services usually includes detailed debate on whether single women/lesbian couples make appropriate parents. Arguments normally emphasise the 'welfare of the child' and include matters such as gender roles and

¹⁶ See *Statute Law Amendment (Relationship) Act 2001* (Vic); *Statute Law Further Amendment (Relationship) Act 2001* (Vic). These amendments introduced the gender neutral terminology of 'domestic relationship' rather than 'de facto relationship' into various areas of the law.

¹⁷ See, eg, *Property Law Act 1958* (Vic) ss 275(1), 276 and *Crimes (Family Violence) Act 1987* (Vic) s 3. This was consistent with the Labor Party's election commitment to implement the recommendations of the March 1998 report by the Equal Opportunity Commission of Victoria, *Same Sex Relationships and the Law* (1998).

¹⁸ But see *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA) which has included adoption and infertility treatment in its reform program. See also New South Wales Law Reform Commission, *Review of the Property (Relationship) Act 1984* (NSW), Discussion Paper No 44 (2002); Tasmania Law Reform Institute, *Adoption by Same Sex Couples*, Final Report No 2 (2003).

¹⁹ Note however that on 11 October 2002 the Victorian Government asked the Law Reform Commissioner to undertake a reference in assisted reproduction and adoption. This reference is currently underway and the Consultation Paper has been released. See Victorian Law Reform Commission, *Assisted Reproduction & Adoption: Should the Current Eligibility Criteria in Victoria be Changed?*, Consultation Paper (2003).

²⁰ Australian Institute of Family Studies, *Family Facts & Figures: Family Types, 2001* (2002) <<http://www.aifs.gov.au/institute/info/charts/ftype01.html>> at 8 December 2004.

²¹ *Ibid.*

²² See Victorian Gay and Lesbian Rights Lobby, *Everyday Experiment: Report of a Survey into Same-Sex Domestic Partnerships in Victoria* (2001) 3, 14.

sexual identity, social stigma, the need for two parents, and for a 'father figure'.²³ Deep seated ethical and medical considerations are also of major concern.²⁴ Significant discussions have also developed relating to human rights obligations resulting from the international treaties Australia has signed, such as the *Convention on the Rights of the Child*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*.²⁵

Whilst powerful arguments can be mounted on either side, in this article I do not intend delving into these arguments. I leave ethical and medical debate to another forum. I commence with the premise that single women/lesbian couples may make just as good, bad or indifferent parents as heterosexual couples. A person's sexuality should not be the yardstick for determining the quality or appropriateness of parentage and the sexuality of parents does not impinge upon the welfare of the child. Likewise, traditional stereotypes revolving around the nuclear family have little relevance in a world of changing patterns in family formations.

My starting point is the reality that single women/lesbian couples are becoming parents. That being the case, how may the law ameliorate the difficulties they encounter on the road to parenthood and make life more acceptable for them and their offspring? In the pursuit of this goal it is accepted that the overarching consideration when discussing children born as a result of assisted conception is the 'best interests' principle.²⁶

III LEGISLATION REGULATING ACCESS TO ASSISTED REPRODUCTIVE SERVICES

Only three States in Australia have passed legislation regulating access to reproductive services. Victoria has passed the *Infertility Treatment Act 1995* (Vic) ('*Infertility Treatment Act*'), South Australia the *Reproductive Technology (Clinical Practices) Act 1988* (SA) ('*Reproductive Technology Act*') and Western Australia the *Human Reproductive Technology Act 1991* (WA) ('*HRT Act*'). Providers of reproductive technology in these states must be licensed through a governing body.²⁷

²³ See, eg, Kristen Walker, '1950s Family Values v Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria' (2000) 11 *Public Law Review* 292; Tami Dower, 'Redefining Family: Should Lesbians Have Access to Assisted Reproduction?' (2001) 25 *Melbourne University Law Review* 466. But see, eg, Bill Muehlenberg, 'IVF: Problems and Prospects' (2002) 23 *Australian Family Association (Vic) Newsletter* 20; Joe Santamaria, 'Ethics and Fertility Treatment' (2002) 23 *Australian Family Association (Vic) Newsletter* 13 for contrary arguments.

²⁴ See Commonwealth, above n 14. See also the collection of articles in (2002) 9 *Journal of Law and Medicine*. These may include children's rights issues and questions of the disintegration of the family.

²⁵ Walker, '1950s Family Values v Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria', above n 23. See also the discussion below on *McBain v State of Victoria* (2000) 99 FCR 116.

²⁶ In deciding whether a certain course of action should or should not be taken the interests of the child are the paramount consideration.

²⁷ These are the South Australian Council of Reproductive Technology, Western Australian Reproductive Technology Council and the Infertility Treatment Authority (Vic).

Until recently, the Western Australian legislation also limited access to in vitro fertilisation to heterosexual couples. Ground breaking amendments have extended access to reproductive technology to include single women and same sex couples who for medical reasons are unable to conceive, or where a biological child is likely to be affected by a genetic abnormality or disease.²⁸ Single women, heterosexual or lesbian, may access donor insemination. This legislation, the first of its kind in Australia, allows same sex couples and single women to access reproductive technology on the same terms as their heterosexual counterparts.²⁹

Section 8 of the *Infertility Treatment Act* regulates the requirements for a person to undergo a treatment procedure.³⁰ A procedure can only be utilised if three criteria are satisfied.

- (1) A woman who undergoes a treatment procedure must-
 - (a) be married and living with her husband on a genuine domestic basis; or
 - (b) be living with a man in a de facto relationship.
- (2) Before a woman undergoes a treatment procedure she and her husband must consent to the carrying out of the kind of procedure to be carried out.
- (3) Before a woman undergoes a treatment procedure-
 - (a) a doctor must be satisfied, on reasonable grounds, from an examination or from treatment he or she has carried out that the woman is unlikely to become pregnant from an oocyte produced by her and sperm produced by her husband other than by a treatment procedure; or
 - (b) a doctor, who has specialist qualifications in human genetics, must be satisfied, from an examination he or she has carried out, that if the woman became pregnant from an oocyte produced by her and sperm produced by her husband, a genetic abnormality or a disease might be transmitted to a person born as a result of the pregnancy.

Conditions for accessing assisted reproductive services are similar in South Australia and Victoria. Section 13 of the *Reproductive Technology Act* limits access to heterosexual couples who are either married or living together.³¹ In South Australia an unmarried heterosexual couple must have lived together for a

²⁸ *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA) was passed on 17 April 2002 and came into operation on 21 September 2002. In Western Australia, until these recent amendments, single women were unable to access IVF. There were however no eligibility criteria for donor insemination. Any woman, irrespective of status, was and is eligible to receive this treatment. See *HRT Act* s 23.

²⁹ See *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA) s 74, amending *HRT Act* s 23. *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA) amending *Artificial Conception Act 1985* (WA). See *Artificial Conception Act 1985* (WA) s 6A which presumes that the same sex-partner of a person who undergoes an artificial conception procedure is the parent of the child. See Commonwealth, above n 14. See also C Kendall and M Dharmananda (2001) 'Report of the Western Australian Ministerial Committee on Lesbian and Gay Law Reform', 8 *E Law – Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v8n4/kendall84.html>> at 8 December 2004.

³⁰ A 'treatment procedure' is defined in the *Infertility Treatment Act* s 3, as 'the artificial insemination of a woman with the sperm from a man who is not the husband of the woman; or a fertilisation procedure'.

³¹ See also *Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995* (SA) reg 11 which imposes additional requirements relating to fitness to parent.

minimum of five years or for six years with an aggregate of five years.³² Both the Victorian and South Australian Acts have been challenged in the courts.³³

A Single Women and Lesbian Couples in the Courts

The fight for single women/lesbian couples to access reproductive services irrespective of considerations of medical infertility is an ongoing struggle, but one in which the tide is slowly turning in their favour. This struggle has been extensively documented and it is not intended to provide anything more than a brief summary of the relevant case law.³⁴ While the emphasis of this article is on the Victorian position, the similarity between the legislation in Victoria and South Australia makes it appropriate to briefly examine the South Australian experience.

B South Australia

The first breakthrough in South Australia emerged through the 1993 case of *Yfantidis v Jones*.³⁵ This case concerned a single heterosexual woman who had one fallopian tube and approached a medical centre to assess whether her remaining fallopian tube was functional. It was assessed that microsurgery was a viable option to remedy the badly damaged remaining tube. The clinic refused to perform microsurgery as Yfantidis did not comply with the marital status requirements.³⁶

Yfantidis complained to the Equal Opportunity Tribunal which rejected her claim. On appeal the tribunal's decision was overturned and DeBelle J concluded that the doctor (clinic) was guilty of discriminatory conduct. The importance of this case for single women/lesbian couples lies in the court's recognition that the clinic treated Yfantidis less favourably than a married woman or one in a de facto relationship, thus discriminating against her.

In *Pearce v South Australian Health Commission ('Pearce')*,³⁷ the issue before the court was whether the State legislation was in conflict with s 22(1) of the *Sex Discrimination Act 1984* (Cth) ('*Sex Discrimination Act*'). This section provides that it is unlawful to discriminate against a person on the ground of marital status. If State legislation is found to be inconsistent with the Commonwealth

³² *Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995* (SA) s 13(3), also includes the risk of transmission of a genetic defect to a child as an additional situation where a fertilisation procedure may be used.

³³ There are no reported decisions regarding the Western Australian legislation.

³⁴ See, eg, Statham, above n 3; Kristen Walker, 'The Bishops, The Doctor, His Patient and the Attorney General: The Conclusion of the *McBain* Litigation' (2002) 30 *Federal Law Review* 507; Stuhmcke, 'Lesbian Access to In Vitro Fertilisation', above n 8; Kristen Walker, 'Should There be Limits on Who May Access Assisted Reproductive Services?' (2002) 6 *Flinders Journal of Law Reform* 67; Lindy Willmott and Sally Kift, 'Assisted Reproductive Technology: Legislators Please Legislate' (2000) 20 *Proctor* 22.

³⁵ (1993) 61 SASR 458. For a detailed and very good discussion of this case see Statham, above n 3.

³⁶ Yfantidis also refused to involve her partner in discussions and it was a requirement of the clinic that her partner also submit to a full examination and that they engage in counselling services provided at the clinic.

³⁷ (1996) 66 SASR 486.

legislation, then, pursuant to s 109 of the *Constitution*, the State legislation is invalid to the extent of the inconsistency.³⁸

In *Pearce*,³⁹ the Court found it 'immediately apparent that there is a direct inconsistency between the two sets of legislation'. Thus pursuant to s 109 of the *Constitution* sections 13(3) and (4) were rendered invalid to the extent of the inconsistency.

C Victoria

For Victoria, the constitutional validity of s 8 of the *Infertility Treatment Act* came under the scrutiny of the Federal Court in *McBain*.⁴⁰ Once again, the question was whether the Victorian legislation was inconsistent with the federal *Sex Discrimination Act*. Dr John McBain, a medical practitioner specialising in reproductive services techniques, examined Meldrum and concluded that she required IVF treatment in order to conceive. However, because she is a single woman, he was prohibited from treating her. A challenge was mounted to the validity of the legislation. The argument was simple. Dr McBain was unable to obey both the State *Infertility Treatment Act* and the Commonwealth *Sex Discrimination Act*. As in *Pearce*, a declaration was sought that s 8(1) of the *Infertility Treatment Act* was inoperative on the grounds that it was inconsistent with s 22 of the *Sex Discrimination Act* and thus invalid pursuant to s 109 of the *Constitution*.⁴¹

Sundberg J, in the Federal Court, concluded that s 8 of the *Infertility Treatment Act* requires that a woman be either married or living in a stable de facto relationship to be eligible for a treatment procedure. Dr McBain was thus forced to treat Meldrum, a single woman, less favourably than a married woman or one in a de facto relationship. The sections are directly inconsistent, it being impossible to obey s 8(1) of the *Infertility Treatment Act* and s 22 of the *Sex*

³⁸ In *Pearce*, the plaintiff, a single woman who had separated from her husband but wished to participate in the IVF program, sought a declaration that the *Reproductive Technology Act* ss 13(3), 13(4) were inconsistent with s 22(1) *Sex Discrimination Act 1984* (Cth) (*'Sex Discrimination Act'*). Section 13(3) *Reproductive Technology Act* requires that a 'fertilisation procedure' may only be carried out if 'the husband or wife (or both) appear to be infertile'; s 13(4) includes persons who have cohabited as husband and wife for certain periods of time.

³⁹ (1996) 66 SASR 486, 490.

⁴⁰ (2000) 99 FCR 116. Section 8 of the Victorian legislation, in its original form, limited access to reproductive technology to married couples who were medically infertile or where there was a likelihood that their offspring would be born with a genetic abnormality. However between 1993 and 1995, three couples in long term heterosexual de facto relationships who had unsuccessfully attempted to access reproductive technology lodged complaints of discrimination based on marital status with the Victorian Equal Opportunity Commission: see *MW, DD, TA and AB v The Royal Women's Hospital, Freemason's Hospital and State of Victoria* [1997] HREOCA 6 (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Kohl, 5 March 1997). While the Commissioner was undoubtedly sympathetic to the plight of the hospitals she found their conduct was in contravention of the *Sex Discrimination Act* s 22. In 1997, the *Infertility Treatment Act* was amended to include heterosexual couples living in a de facto relationship.

⁴¹ A single woman had already complained to the Human Rights and Equal Opportunity Commission that the Royal Woman's Hospital had discriminated against her under the marital status ground in s 22 of the *Sex Discrimination Act*. Pursuant to the hearing the hospital had been ordered to pay damages: see *W v D and Royal Women's Hospital* (2000) EOC 93-045.

Discrimination Act. In these circumstances, Sundberg J declared the former invalid.⁴²

The only active opposition in *McBain* in the Federal Court emanated from the Australian Catholic Bishop's Conference and the Australian Episcopal Conference of the Roman Catholic Church ('the Catholic Church'). The Catholic Church was not a party to the proceedings, but Sundberg J had granted it leave to intervene as 'amici curiae'. They therefore did not have standing to take the proceedings any further. In order to overcome this obstacle, the Attorney-General granted two fiats to the Catholic Church to commence proceedings in his name in the original jurisdiction of the High Court.⁴³ The Catholic Church applied to the High Court for writs of certiorari to quash Sundberg J's decision, mandamus to compel him to exercise his jurisdiction according to law and have him reconsider the matter, and prohibition against Dr McBain to prevent him from acting on the decision.⁴⁴

The judges of the High Court decided unanimously that the applications of the Catholic Church should be dismissed.⁴⁵ Whilst substantive and procedural issues were argued in full, none of the judgments discussed the substantive issues. The judgments concentrated on whether the High Court was able to exercise its original jurisdiction and to hear the 'matter'. Although the reasoning of judges differed, the entire bench concluded in the negative.⁴⁶ The High Court thus failed to deal with the substantive issue of the inconsistency between the State and Federal Acts. The decision was based purely on questions of procedure,

⁴² Other sections of the *Infertility Treatment Act* were also declared invalid to the extent they were dependent on what Sundberg J termed the 'marriage requirement' in s 8(1).

⁴³ One can only wonder at the actions of the Attorney-General lending his fiat to the Catholic Church. In a press release on 1 August 2000, the Office of the Prime Minister stated that, on legal advice received, the *McBain* decision (in the Federal Court) represented a correct interpretation of that law and that, as a consequence, the chances of a successful appeal were remote: Office of the Prime Minister, Amendment to *Sex Discrimination Act* (Press Release, 1 August 2000), Appendix 5 to the Senate Legal and Constitutional Committee Inquiry into the Provisions of the Sex Discrimination Bill (No 1) 2000.

⁴⁴ The application for prohibition was abandoned in the course of oral argument.

⁴⁵ For a detailed discussion of this decision see Walker, 'The Bishops, The Doctor, His Patient and the Attorney-General: The Conclusion of the *McBain* Litigation', above n 34.

⁴⁶ Gleeson CJ, Gummow and Gaudron JJ (in a joint judgment) and Hayne J decided it did not constitute a 'matter'. There was no jurisdictional error to which to append a remedy under s 75(v) of the *Constitution* and pursuant to which a writ of certiorari could be granted. Section 76(i) of the *Constitution* was equally unhelpful as there was no 'matter' before the Court and the High Court was unable to determine questions in the abstract. McHugh, Kirby and Callinan JJ decided that the High Court could invoke its original jurisdiction. There was a 'matter' within the meaning of Chapter III of the *Constitution* and thus the High Court had jurisdiction to hear the case. However, certiorari is a discretionary remedy and the three judges agreed that, in the circumstances of the case, it was inappropriate to grant this form of relief.

jurisdiction and discretion.⁴⁷ Significantly, in both *McBain* and *Pearce* the women involved were heterosexual single women who were clinically not socially infertile. This allowed the treatment authorities to limit the widening of the eligibility criteria to that particular category of women – single clinically infertile women.

The remaining States and Territories do not have legislation. A web of State and Federal policy, as well as individual hospital and clinic policy and informal practice guides them. The National Health and Medical Research Council ('NHMRC') publish the most influential guidelines.⁴⁸ The NHMRC is the main funding body for medical research in Australia. While the guidelines are not binding and compliance is voluntary there are financial incentives to follow them.⁴⁹ The guidelines are silent on the criteria for eligibility and some clinics have made reproductive service procedures available to single women and lesbian couples.⁵⁰ However, this is done on an ad hoc basis depending on the regulations of other bodies and agencies providing funding and granting licences.⁵¹

Anti-discrimination legislation may go some way to redress the situation.⁵² In New South Wales, the *Anti Discrimination Act 1977* (NSW) prohibits discrimination on the basis of homosexuality and marital status, making it highly

⁴⁷ Immediately following the Federal Court decision in *McBain*, the Attorney-General indicated that the Federal Government intended to amend the *Sex Discrimination Act* and to introduce a Bill – the Sex Discrimination Amendment Bill (No 1) 2000 (Cth) – to permit States to restrictively regulate access to reproductive technology and enable them to enact provisions similar to s 8 of the *Infertility Treatment Act*: Office of the Prime Minister, above n 43. This would effectively bring the impugned Victorian and South Australian provisions back into force. The House of Representatives passed the Sex Discrimination Amendment Bill on 3 April 2001 and the Bill was introduced into the Senate on 22 May 2001 but lapsed on the calling of the federal election. Following the debacle of *McBain* in the High Court, the Commonwealth Government confirmed its commitment to proceeding with the amendments to the *Sex Discrimination Act* to allow the States to restrict access to infertility treatment. The Bill has been reintroduced into parliament in the form of the Sex Discrimination Amendment Bill 2002 (Cth), the contents of which are substantially the same as its 2000 forerunner. The Bill has stalled, the government perhaps considering that even if it passes the House of Representatives it is unlikely to pass the Senate. With the changed constitution of the Senate following the recent federal election, however, the government may reconsider its position.

⁴⁸ Australian Health Ethics Committee, endorsed by NHMRC, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (2004). The Fertility Society of Australia also publishes guidelines on eligibility to assisted reproduction that clinics generally follow: see Reproductive Technology Accreditation Committee, *Code of Practice for Centres Using Assisted Reproductive Technology* (2002) The Fertility Society of Australia <<http://www.fsa.au.com/pdfs/RTAC-guidelines-2002.pdf>> at 8 December 2004.

⁴⁹ See Willmott and Kift, above n 34. The NHMRC, in its *Conditions for the Award for NHMRC Project Grants Commencing in 2001*, 3, states that assistance under the Medical Research Endowment Account, set up under the *National Health and Medical Research Council Act 1992* (Cth), must not be provided unless the recipient agrees to comply with the ethics guidelines issued by the NHMRC. See also Stuhmcke, 'Lesbian Access to In Vitro Fertilisation', above n 8.

⁵⁰ Prior to the 1996 revisions, the NHMRC guidelines stated that reproductive technology should be provided only to those in 'accepted family relationships' which were generally interpreted as heterosexual relationships. For the current guidelines see NHMRC, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (2004).

⁵¹ See D Sandor, 'Children Born from Sperm Donation: Financial Support and Other Responsibilities in the Context of Discrimination' (1997) 4 *Australian Journal of Human Rights* 175, 183-4.

⁵² See Kristen Walker, 'Should There be Limits on Who May Access Assisted Reproductive Services?', above n 34, 70.

unlikely that clinics will discriminate against single women and lesbian couples seeking to access assisted reproduction services.⁵³ Section 7(l) of the *Anti Discrimination Act 1991* (Qld) prohibits discrimination on the basis of 'lawful sexual activity'. In the Queensland decision of *Morgan v GK*,⁵⁴ it was found that there was no discrimination against JM, a lesbian woman requiring donor insemination to conceive, as she did not fall within the definition of infertility. In this case, JM was excluded from treatment not because she engaged in an 'unlawful sexual activity' but because she refrained from participating in what is considered 'lawful sexual activity' – heterosexual sexual activity.⁵⁵ Variations between State and Territory laws mean that, across Australia, there is unequal access for single and lesbian women who wish to use assisted reproductive services.⁵⁶ Those who are financially and physically able to do so can overcome this inequity by travelling interstate to access assisted conception.⁵⁷ This brings into focus discrimination of a different kind – those who are in the privileged position of choosing where to access treatment and those who are not.

Following the decisions of *McBain* in Victoria and *Pearce* in South Australia, the legislation has not been formally amended. In the aftermath of *McBain*, the Infertility Treatment Authority sought legal advice from Dr Gavan Griffith QC on this decision's effect on the legislation. This opinion concluded that 'the Victorian Act is not transformed by the decision into a law generally regulating alternative methods for conception free of any confining limitation to defined infertility'.⁵⁸ Acting on this advice, the authority amended the guidelines for accessing infertility treatment. These provide that the 'requirements of section 8(2), (3)(a) and (b) of the *Infertility Treatment Act* remain valid except where they refer to the requirement for a husband'.⁵⁹ Similar amendments were made to the guidelines

⁵³ See *Anti Discrimination Act 1977* (NSW) ss 47, 49ZP.

⁵⁴ (2001) EOC 93-154.

⁵⁵ See *JM v QFG and GK and State of Queensland* (1997) EOC 92-876; *JM v QFG & GK* [1998] QCA 228 (Unreported, Davies, Pincus, Thomas JA, 18 August 1998); *Morgan v GK* (2001) ¶ EOC 93-154. See the discussion of this decision in Anita Stuhmcke, 'Limiting Access to Assisted Reproduction *JM v QFG*' (2002) 16 *Australian Journal of Family Law* 245; Simona Gory, 'Constructing the Heterosexually Inactive Lesbian: Assisted Insemination in Queensland' (2002) 16 *Australian Feminist Law Journal* 75. For a good discussion of this case see Statham, above 3. See also Willmott and Kift, above n 34, 22.

⁵⁶ In Victoria s 5(3) of *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000* (Vic) amended the *Equal Opportunity Act 1995* (Vic) s 6, adding 'sexual orientation' to the prohibited bases of discrimination. See Miranda Stewart, 'It's a Queer Thing: Campaigning for equality and social justice for lesbians and gay men' (2004) 29 *Alternative Law Journal* 75.

⁵⁷ See eg Misha Ketchell, 'Lesbians Make Good Parents Too: IVF Couple', *The Age* (Melbourne), 3 August 2000. See also Stuhmcke, 'Lesbian Access to In Vitro Fertilisation', above n 8.

⁵⁸ Opinion of Dr Gavan Griffith QC, 4 August 2000, on file with the author. The Fertility Access Rights Lobby to the Victorian Government obtained an opinion from Peter Hanks QC dated 18 August 2000 in which Hanks argues that the interpretation reimposes the discrimination on the basis of marital status that the Federal Court decision had ruled unlawful: cited in Walker, '1950's Family Values v Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria', above n 23, 298. See also Victorian Law Reform Commission, above n 19, [3.9], indicating a supplementary opinion was requested and obtained from Gavan Griffith QC which confirmed his earlier opinion 12 September 2000.

⁵⁹ Infertility Treatment Authority, 'Eligibility to Infertility Treatment in Victoria', *ITA News – August 2000*. See also Infertility Treatment Authority, *Annual Report 2002*, 10-1.

in South Australia⁶⁰. The effect of these amendments is that single and lesbian women seeking access to assisted conception in Victoria and South Australia must be 'clinically' infertile. This result is disappointing. The judicial approach is based on sound principles of statutory construction. The attitudes of the regulatory bodies, however, evince a narrow, conservative approach to the definition of 'infertility' and eligibility to access assisted reproductive services.

IV WHAT IS INFERTILITY?

Questions of what constitutes infertility are directly relevant to considerations of 'marital status'. Medical/clinical infertility has been defined as 'the inability of a couple to attain or retain a pregnancy following 12 months of regular sexual intercourse without contraception'.⁶¹ However, a definition of clinical infertility is thwart with difficulties. Doctors are often unable to explain why a woman does not conceive. 'Doctors usually assess couples' fertility as between low and normal with only five per cent being regarded as sterile.'⁶² An extended definition of infertility, 'social infertility', has developed to incorporate 'women who are childless not because of a medical or physiological impediment to pregnancy, but because of the personal or social circumstances of their lives.'⁶³

In late 2001, the Victorian Infertility Treatment Authority considered expanding the definition of 'clinical infertility' to include those who are 'psychologically infertile' because they are psychologically unable to have sexual intercourse. The introduction of this new category of people attracted controversy and ultimately led to an abandonment of the expanded definition.⁶⁴ The Authority's choice of label and the expectation that women wishing to come under this umbrella would be obliged to satisfy a psychiatric assessment was also vigorously criticised.⁶⁵

⁶⁰ See South Australian Council on Reproductive Technology, *Quarterly Bulletin*, September 2000, 7; Infertility Treatment Authority; 'Eligibility to Infertility Treatment in Victoria', above n 59. See also Infertility Treatment Authority, *Annual Report 2002*, 10-1.

⁶¹ National Bioethics Consultative Committee, *Access to Reproductive Technology: Final Report to the Australian Health Ministers' Conference* (1991). This definition of infertility has also been used by the Canadian Advisory Council on the Status of Women, *Brief to the Royal Commission on New Reproductive Technologies* (1991) 19. It has been suggested that the reason a 12 month period is chosen is because 85-90 per cent of couples become pregnant within this time. See C Wood and A Westmore, *Test Tube Conception: A guide for couples, doctors and the community to the revolutionary breakthrough in treating infertility including the ethical, legal and social issue* (1983), 14. See also Victorian Law Reform Commission, above n 19, [3.13], citing Dr Ruth McNair, Department of General Practice, Melbourne University.

⁶² See Victorian Law Reform Commission, above n 19, [3.12], citing Robert P S Jansen 'Elusive Fertility: Fecundability and Assisted Conception in Perspective' (1995) 64 *Fertility and Sterility*, 252.

⁶³ See Maurice Rickard, Social Policy Group, *Is it Medically Legitimate to Provide Assisted Reproductive Treatments to Fertile Lesbians and Single Women?* (Research Paper 23, 2000-01, Department of the Parliamentary Library Information and Research Services) 1.

⁶⁴ See, eg, G Kosta and M Ketchell, 'Door opens to baby help for lesbians' *The Age* (Melbourne), 15 November 2001.

⁶⁵ See, eg, J Tomlins, 'Psychologically infertile? No, I'm simply gay', *The Age* (Melbourne), 17 November 2001.

Nowhere in the *Infertility Treatment Act* are the terms 'clinically or medically' infertile used nor is there a requirement of a finding of infertility generally or in a particular form. It is also relevant that in the stated 'purposes' of the *Infertility Treatment Act* no mention is made of limiting treatment to 'clinically' infertile women.⁶⁶ In accordance with s 8(3) of the *Infertility Treatment Act* the examining doctor must make a decision as to whether the candidate is eligible for treatment through a licensed clinic and must conclude that a woman is 'unlikely to become pregnant' other than through a treatment procedure. Unlike 'clinically infertile' the term 'unlikely to become pregnant' is open to a wide interpretation. It may be applied to those married or in de facto heterosexual relationships who are unable to achieve conception within a 12 month period. It may also include a woman in such a relationship who is psychologically unable to engage in penetrable sexual intercourse.

The situation in Victoria today is that the requirement of 'marital status' has ostensibly been abolished but access to a treatment procedure for single and lesbian women is predicated on a diagnosis of 'clinical infertility' or the risk of passing on a genetic condition or disease to a child.⁶⁷ The practical ramifications of this distinction may be quite significant.⁶⁸ This diagnosis may be particularly difficult to reach in instances where women refrain from or infrequently engage in sexual intercourse. The interpretation that the treatment authority has adopted automatically excludes a large proportion of single and lesbian women seeking access to reproductive services. There have been recent reports of Victorian fertility clinics circumventing this requirement and considering a single/lesbian woman 'clinically infertile' if she fails to conceive after self inseminating on four separate occasions. Under these circumstances, she will be entitled to access clinically based assisted conception.⁶⁹ These measures serve to confirm the artificiality of the distinction and the contempt with which some members of the medical profession regard them. In contrast heterosexual married couples and those living in a de facto relationship must satisfy the lower threshold of 'unlikely to become pregnant'.

It has been suggested that a married woman whose husband is infertile is as infertile as a single fertile woman (lesbian or heterosexual) who does not have or want a male partner.⁷⁰ In these circumstances it is not expected that a married woman step outside the boundaries of her marriage to find a fertile partner. Moreover it would be a complete anathema to expect a heterosexual woman (for whatever reason) to engage in sexual activity with a member of the same sex.

⁶⁶ See *Infertility Treatment Act* s 1, 'Purposes'. The other purposes included in the sections are research, using human gametes, zygotes, and embryos, research into infertility, provisions relating to surrogacy agreements and to establish ITA.

⁶⁷ The third requirement, consent of the woman and her husband or her de facto partner, is only relevant in so far as an infertile woman has a husband or a de facto partner.

⁶⁸ See Victorian Law Reform Commission, above n 19, 30-3, on the practical ramifications of this distinction.

⁶⁹ See Jen Kelly, 'IVF Secret Revealed: Single women, lesbians beat state ban on baby treatment', *Herald Sun* (Melbourne), 2 August 2004.

⁷⁰ Walker, '1950's Family Values v Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria', above n 23, 298.

When determining the fertility status of a woman in a heterosexual relationship the doctor will examine both partners in the relationship. Hence the woman's fertility status is only a portion of the equation. It is recognised that a woman whose husband is infertile will not become pregnant to him. In such a case the couple will in all likelihood qualify for infertility treatment as she is 'unlikely to become pregnant'. However a clinically fertile woman who is in a lesbian relationship, who is unwilling to engage in heterosexual intercourse, is also 'unlikely to become pregnant' but will not receive treatment. In both cases the 'problem' lies with the 'partner' and not with the woman who will receive the treatment as she will not be classified as 'clinically infertile'. Yet, in Victoria in order to achieve conception women in lesbian relationships are effectively required by law either to engage in sexual intercourse with a member of the opposite sex or to self inseminate.⁷¹

Single heterosexual women may be socially infertile because the opportunity to have sexual intercourse with a male whom they consider to be appropriate and acceptable either as a sexual partner, a potential donor of semen or both has not presented itself. They may have unsuccessfully actively sought the correct partner, or their chosen lifestyle may have limited the potential for such a relationship. Furthermore, engaging in sexual intercourse with a person who is considered inappropriate may be distasteful or even disturbing.⁷² These women may have a psychological aversion to engaging in penetrable sexual intercourse. With the passing of time they may feel a sense of urgency to achieve pregnancy before the passing of their reproductive years. Many regard sexual intercourse as a private, intimate experience. Women should not be expected to devalue the act and turn it into a mechanical process for the sake of conception.

There have been reports of women 'deceiving' men into having sexual intercourse with them purely to conceive a child. The man may then find himself in the unenviable position of being lumbered with child support payments and other parental responsibilities. 'Men say they need the protection from a new predator – the women who target them for their sperm.'⁷³ Understandably this is regarded as morally reprehensible conduct, but limited options are available for single women/lesbian couples who are not clinically infertile and wish to have children.

A Single Women/Lesbian Couples and Self-Insemination

Women who have undergone high technology reproductive services such as IVF or GIFT will testify that these are uncomfortable, invasive procedures. Unless one is clinically infertile and desperate to conceive a child these procedures are

⁷¹ A recent study indicates that up to 51 per cent of children raised within a lesbian family are conceived through sexual intercourse, although most within a previous heterosexual relationship: Ruth McNair and Deborah Dempsey, 'Family formation and women's roles' (Paper presented at the Eighth Australian Institute of Family Studies Conference, Steps forward for families: Research, practice and policy, Melbourne, 12-14 February 2003).

⁷² Stuhmcke suggests that forcing single women into a situation where they are obliged to engage in one night stands in order to conceive also runs contrary to arguments regarding the welfare of the child: Stuhmcke, above n 55, 252.

⁷³ Amy Cooper, 'The Sperm that Got Away', *Sunday Life*, 18 August 2002, 11.

not generally embarked upon. According to current guidelines that the ITA has issued, single women and lesbian couples are eligible to access these treatments on the same terms and conditions as their heterosexual and 'male partnered' counterparts.⁷⁴ Figures indicate that whilst there have been advances in technology and expertise has improved, the chances of success remain quite slim. A success rate of 25 per cent is expected, many couples will undergo more than one cycle to achieve pregnancy and for some there will only be disappointment, their goal never accomplished.⁷⁵ The treatment is expensive, costing as much as A\$5 000 per cycle without subsidies from the Federal Government.

By contrast donor insemination is a relatively simple procedure. Donor insemination is commonly used by infertility clinics when a woman is able to conceive but her partner is infertile. As opposed to the high cost of IVF treatments, it is a relatively cheap exercise with a cost of approximately A\$600 per attempt.⁷⁶

It has been suggested that, effectively, the Victorian legislation not only prevents single women and lesbians from accessing State and privately run donor insemination services, it may also penalise those who carry out such procedures without authorisation through fines and imprisonment.⁷⁷ Guest J in *Re Patrick*⁷⁸ suggests that these provisions target unlicensed or non complying medical operators rather than informal arrangements. Self insemination may be a viable option for some single women and lesbian couples. It is debatable whether a woman who self inseminates will attract criminal sanction.⁷⁹ Gavan Griffith QC is of the opinion that the provision of sperm by a donor to a licensed clinic to be used for purposes of self insemination is not in itself unlawful.⁸⁰

B Some Arguments against Self-Insemination

In reality single and lesbian women are electing to self inseminate using known donors without recourse to clinical facilities. Others may choose to self inseminate but would prefer to use sperm collected under clinical supervision. These options should be available for those who choose them. Similarly,

- ⁷⁴ See the earlier discussion of the amendment to the guidelines following the decision in *McBain*.
- ⁷⁵ Louis Waller, 'The costs of treating infertility' (1999) 7 *Journal of Law and Medicine* 183, 185. See also Tara Hurst and Paul Lancaster, *Assisted Conception Australia and New Zealand 1999 and 2000*, Australian Institute of Health and Welfare National Perinatal Statistics Unit and The Fertility Society of Australia, Assisted Conception Series, No 6, Sydney 2001, Tables 1-10, 34-6. For an example of success rates in relation to IVF pregnancies after transfer of fresh embryos, in 1992 there were 8.6 viable pregnancies per 100 oocyte retrieval cycles whereas in 2000 there were 17.9.
- ⁷⁶ Rickard, above n 63, endnote 21.
- ⁷⁷ See *Infertility Treatment Act* ss 6, 7; *Reproductive Technology Act* s 13(1). See also Jenni Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?', (1998) 12 *Australian Journal of Family Law* 99, 118.
- ⁷⁸ *Re Patrick* (2002) 28 Fam LR 579, 650.
- ⁷⁹ See Walker, '1950's Family Values v Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria', above n 23, 305.
- ⁸⁰ See Victorian Law Reform Commission, above n 19, [4.37]. The paper also points out that assumptions as to the illegality of self insemination may result in potential users refraining from obtaining health or legal advice and the inability to obtain information from doctors who also assume it is illegal.

clinically supervised donor insemination should also be a viable option for single and lesbian woman.

The associated health risks and lack of genetic information are some of the main reasons for opposing self insemination. If donor sperm is not used to achieve conception a single woman must indulge in a casual sexual encounter with all the associated dangers. In a clinical setting the sperm donor is tested for sexually transmitted diseases including HIV/AIDS and hepatitis which may be transmitted through semen. No such benefit is automatically conferred when sperm is self-administered.⁸¹ In some instances when a known donor is used outside the clinical setting the recipient may have detailed knowledge of the donor's background but this is not always the case. In accordance with the *Infertility Treatment Act* a licensed centre and a doctor carrying out the procedure must keep rigorous records of details of the donor including any known physical abnormality.⁸² Thus self-insemination may give rise to an increased risk of a genetic abnormality. In addition, clinically administered insemination requires that all participants in the process, including the wife of the donor (if there is one), attend counselling sessions.⁸³ Thus the parties are better equipped to deal with the specific dynamics resulting from donor insemination including issues which may impact on the welfare of a child born from this procedure. Recent guidelines which the ITA have issued indicate that lesbian women will in the near future be able to have the sperm of a known donor stored, screened and tested and then returned to them for the purpose of self insemination. This will go some way to eliminating the hazards of self insemination.⁸⁴

However, it is argued that the far most reaching consequences of self-insemination are the lack of anonymity of the donor and the potential for developing a personal relationship between donor, recipient and offspring. Recent investigations reveal that only 47 per cent of lesbian women who use clinic insemination do so for safety reasons while 58 per cent do so because they specifically require an anonymous sperm donor.⁸⁵ It is to this 58 per cent that this paper now turns.

The Commonwealth, States and Territories have all enacted legislation dealing with presumptions of parentage in respect of children born from assisted reproductive services. Before delving into the intricacies of the legislation it is

⁸¹ The donor in *Re Patrick* (2002) 28 Fam LR 579 was tested for sexually transmitted diseases.

⁸² See *Infertility Treatment Act* ss 66, 63. This information is then given to the Infertility Treatment Authority: see *Infertility Treatment Act* ss 64, 65. The guidelines of the Fertility Association of Australia also recommend extensive screening of sperm including blood testing, genetic testing bacteriological testing for communicable disease. These guidelines also recommend rejection of semen if any of the donor's blood relatives have conditions including diabetes, epilepsy and mental disease. See Fertility Society of Australia, Reproductive Technology Accreditation Committee, *Code of Practice for Centres Using Assisted Reproductive Technology* (2002), on 'Guidelines for Screening for Gamete Donation', 34.

⁸³ *Infertility Treatment Act* s 16; *Infertility Treatment Regulations 1997* (Vic) reg 7.

⁸⁴ See Infertility Treatment Authority, 'Storage of Sperm by Women using Known Donors for the Purposes of Self Insemination', <http://www.ita.org.au/_documents/news/Self-Insemination_Guidelines_November_03.pdf> at 8 December 2004; See Kelly, above n 69; Amanda Dunn, 'Lesbians get OK for donor sperm', *The Age* (Melbourne), 3 August 2004.

⁸⁵ McNair and Dempsey, above n 71.

imperative to provide a brief historical background to the legislation. It is suggested that this issue may only be effectively addressed by examining the contextual framework in which the Victorian *Status of Children Act 1974* (Vic) (*Status of Children Act*), the *Infertility Treatment Act*, as well as s 60H of the *Family Law Act* were passed.⁸⁶ Currently, heterosexual couples, same sex couples and single women confront similar obstacles when seeking surrogacy arrangements, these are complex and outside the scope of this paper.⁸⁷

V A BRIEF HISTORICAL SURVEY OF THE LEGISLATION

In the mid 70s legislation was introduced throughout most of Australia equating the legal status of legitimate and illegitimate children.⁸⁸ In Victoria these provisions are contained in the *Status of Children Act*.⁸⁹ With the advent of reproductive technology in the late 70s and early 80s it was recognised that legislation was required to regulate access to reproductive services and to determine the parentage of children born from treatment procedures. In Victoria the Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation was established under the directorship of the then Law Reform Commissioner Professor Louis Waller, and published a series of reports and an Issues Paper. In its final analysis, the Committee recommended that legislation be passed governing the regulation of reproductive services and the legal status of the children and parties involved in the process. In 1984 in response to these recommendations two pieces of legislation were introduced into the Victorian Parliament. They were the *Status of Children (Amendment) Act 1984* (Vic) which provided for establishing both paternity and maternity where donor gametes are used, and the *Infertility (Medical Procedures) Act 1984* (Vic) which provided a system for regulation of reproductive services.⁹⁰ These two Acts were seen as a legislative package aimed at keeping pace with advances in medical technology. The *Status of Children (Amendment) Act 1984* (Vic) was incorporated as Pt II of the *Status of Children Act* headed 'Status of Children – Medical Procedures'. In 1995 the *Infertility Treatment Act* replaced the 1984 Act. It established the

⁸⁶ Where the writer thinks it is appropriate there is some reference to the legislation in other States in the footnotes.

⁸⁷ See Victorian Law Reform Commission, above n 19, [6.22]-[6.33].

⁸⁸ See *Status of Children Act 1974* (Tas); *Status of Children Act 1978* (Qld); *Status of Children Act 1974* (Vic); *Status of Children Act 1978* (NT); *Family Relationships Act 1975* (SA), *Parentage Act 2004* (ACT); *Status of Children Act 1996* (NSW).

⁸⁹ *Status of Children Act 1974* (Vic). All further references to State legislation will be to the relevant Victorian legislation.

⁹⁰ Both Bills were introduced into the Legislative Council on the 20 March 1984. The Status of Children (Amendment) Bill was assented to on 15 May 1984. The passing of the Infertility (Medical Procedures) Bill was delayed owing to the public response and the need to amend the Bill in accordance with a further report from the Waller Committee entitled *Report on the Disposition of Embryos Produced by In Vitro Fertilisation* and the 'Warnock Report'. For a consolidated version of the various 'Waller Reports' see Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, *Consolidated Reports of the Victorian Inquiry into IVF and Related Issues 1982-1984* (1990); Mary Warnock, *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* (1985), a product of the equivalent of the Waller Committee in the United Kingdom.

Infertility Treatment Authority and regulates the performance of assisted reproductive services. It also expanded the access to information provisions.

At the Commonwealth level there was also an awareness of the need to regulate parental rights and obligations relating to children born from assisted reproductive services. The *Family Law (Amendment) Act 1983* (Cth) inserted s 5A into the *Family Law Act*, which deemed certain children including those born from reproductive services 'children of the marriage'. This response was restricted, as the Commonwealth did not have legislative power over ex-nuptial children. Thus s 5A governed the position for children of the marriage and the State legislation regulated ex-nuptial children born as a result of assisted reproductive services. In 1987, following the referral of powers from the States to the Commonwealth, s 60B was introduced into the *Family Law Act* regulating paternity and maternity of children born 'as a result of assisted conception procedures'. Section 60B was incorporated into the *Family Law Reform Act 1995* (Cth) in its entirety and became s 60H. Section 60H in turn refers to 'prescribed laws' which are contained in Schedules 6 and 7 of the *Family Law Regulations*. These schedules (where appropriate) refer to the relevant State legislation, if State legislation exists. The prescribed legislation in the *Family Law Act* covers the entire gamut of assisted reproductive services contained in the *Status of Children Act* but only in relation to heterosexual married couples or those living in a de facto relationship.⁹¹ The Regulations to the *Family Law Act* therefore provide the *essential* link between the Commonwealth and State legislation. The object of referring to the State legislation in the Commonwealth Act was to create uniformity between the State and Federal legislation.

The interrelationship between the State and Commonwealth legislation provides a complex and intricate web of legislation. However it is suggested that, in referring to the State legislation in the Regulations to the Commonwealth Act, the Federal government intended that the State and Federal Acts complement each other. This is unsurprising given that the Commonwealth had specifically set out to create a scheme of uniform statutes between the Commonwealth, States and Territories, whereby social parents may be recognised as legal parents and biological parents may be excluded from parental rights and obligations.⁹²

This article is concerned with the status of the known donor of semen for the purposes of the *Family Law Act*. The important provisions for the purposes of this paper are s 60H(3) of the *Family Law Act* which deals with the paternity of children born to a single women and s 10F of the *Status of Children Act* which relieves the donor of sperm to single women of all rights and liabilities in relation to a child born from his semen.

⁹¹ See *Family Law Regulations 1984* (Cth) sch 6. These include children born from artificial insemination procedures, donor ovum and donor semen where implantation procedure is used.

⁹² In July 1980, the Standing Committee of Commonwealth and State Attorneys-General recommended that uniform legislation be passed in all Australian jurisdictions relating to children born as a result of artificial conception procedures. The Standing Committee confirmed these recommendations in 1981, 1982 and 1983.

The cases of *Re Patrick* and *Re Mark* provide some insight into the complexity of this legislation. The decision of *Re Patrick* in the Family Court of Australia highlights the risks associated with self-insemination from a known donor. These risks are different from the physical danger of genetic abnormality or contracting sexually transmitted diseases. They are the deep-seated emotional and mental trauma that may result from the perceived intrusion of a third party, the donor, into the life of the 'homo-nuclear' family. The next portion of this paper is devoted to discussing *Re Mark* and *Re Patrick* and the judicial attempts to unravel this complex legislative scheme.⁹³

VI TWO PARENTS AND A FATHER – THE STORY OF PATRICK⁹⁴

Patrick was born into a 'homo-nuclear' family comprising himself and his parents i.e. his biological mother and her female partner the co-parent. Pursuant to orders of the Family Court and despite the objections of his parents, it was decided that it was in Patrick's best interests to have contact with his genetic progenitor, the donor of the semen from which he was conceived ('the donor').⁹⁵

The *Family Law Act* is a heterosexual focused piece of legislation. This is unsurprising given that it was enacted pursuant to the 'marriage, divorce' and 'matrimonial causes' power contained in s 51 (xxi) and (xxii) of the *Constitution*. The *Family Law Act* primarily regulates the financial consequences of the breakdown of a legal marriage, as well as arrangements in respect of children born of such a marriage. Australia is a federation and, until 1986, ex-nuptial children fell outside the jurisdiction of the Federal Parliament and thus outside the Family Court. The Commonwealth power was limited to making laws in respect of 'marriage, divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants'.⁹⁶ Custody and access disputes relating to ex-nuptial children were dealt with in the relevant State Courts. Between 1986 and 1990 all States, with the exception of Western Australia, passed almost identical legislation referring to the Commonwealth the 'matters' of child custody, guardianship, access, maintenance, and childbearing

⁹³ The legislative provisions are discussed in depth later in the article under the heading 'Commonwealth Deeming Provisions and State Presumptions'.

⁹⁴ *Re Patrick* (2002) 28 Fam LR 579. Patrick was not the child's real name but a pseudonym given to him by the Family Court to protect his anonymity.

⁹⁵ See Nicole Strahan, 'Gay Sperm Donor Wins Right to visit Son', *The Weekend Australian*, 6 April 2002, 9. The terminology used to identify the members of this type of family has also raised difficulties. See Kelly, above n 15.

⁹⁶ *Constitution* s 51 (xxi), s 51 (xxii).

expenses.⁹⁷ Today, the *Family Law Act* confers jurisdiction in respect of all children including ex-nuptial children and consequently children born into a 'homo-nuclear' family.

Sections 64C and 65C of the *Family Law Act* allow an application for contact to be brought by and made in favour of 'any person concerned with the care welfare and development of a child'.⁹⁸ In *KAM v MJR and Another*⁹⁹ a child 'F' was born to a woman 'G' involved in a lesbian relationship with 'M'. This relationship was not considered to be a permanent domestic relationship. Nevertheless, 'M' actively participated in the upbringing of 'F' and even after the breakdown of the relationship continued to have contact with 'F'. When 'G' terminated contact between 'M' and 'F', 'M' made an application to court for contact on the basis that she was a person concerned with the care welfare and development of 'M'.¹⁰⁰ Burr J decided that any person could apply for a parenting order but in order to proceed beyond a mere application they must pass a threshold test that they are 'concerned with the care welfare and development of the child'. The test is not a demanding one and in appropriate circumstances a mere 'interest' or 'concern' about the child in question may satisfy this test.¹⁰¹ Once the threshold is crossed, the court will consider the individual facts and circumstances of the case. The court will then determine whether it is appropriate and in the best interests of the child to make a parenting order and if so, the appropriate form of the order.¹⁰²

In *Re Patrick* the donor crossed the threshold and was regarded as someone concerned with the child's care welfare and development. There was thus no issue regarding his standing to make an application for contact. In June 2000, following the donor's initiation of proceedings for contact with Patrick, orders were made by consent. In terms of these orders the mother and co-parent were awarded joint responsibility for the long term day to day welfare and development of Patrick and the donor was granted contact with Patrick for two

⁹⁷ *Commonwealth Powers (Family Law – Children) Act 1986* (NSW); *Commonwealth Powers (Family Law – Children) Act 1986* (Vic); *Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law) Act 1987* (Tas) and *Commonwealth Powers (Family Law – Children) Act 1990* (Qld). The Family Court of Western Australia as a State Family Court is invested with both Federal and State jurisdiction. The Commonwealth government immediately acted on the reference and passed the *Family Law Amendment Act 1987* (Cth) inserting Division 2 of Part VII into the *Family Law Act*. The effect of these changes was to expand the operation of the *Family Law Act* with regard to guardianship, custody, access, childbearing expenses and maintenance to children of the marriage, ex-nuptial children and step children. Between 1996 and 2001, additional 'matters' were referred when all States, with the exception of South Australia and Western Australia referred to the Commonwealth the power to legislate in respect of parentage testing, but only for the purposes of Commonwealth Law.

⁹⁸ These are novel provisions which were inserted into the *Family Law Act* in 1995. See Frank Bates, 'Child Law and the Homosexual Partner – Recent Developments in the United States' (1992) 1 *Australian Gay and Lesbian Law Journal* 20; Frank Bates, 'Child Custody and the Homosexual Parent: Some Further Developments in Australia and the United States' (1992) 2 *Australian Gay and Lesbian Law Journal* 1.

⁹⁹ (1998) 24 Fam LR 656. In *Re Evelyn* (1998) 23 Fam LR 53 the Full Court of the Family Court concluded that the biological parent does not stand in a preferred position to a non biological applicant and the best interests of the child is the determining factor in making a parenting order.

¹⁰⁰ *KAM v MJR and Another* (1998) 24 Fam LR 656, 657.

¹⁰¹ *Ibid* 667-8. Justice Burr summarised his conclusions and findings in point form.

¹⁰² *Ibid*.

hours every third Sunday, to increase with age.¹⁰³ The biological mother and co-parent subsequently applied to discharge these orders.

This was the first reported occasion that the Family Court of Australia was confronted with a contact dispute between the donor of semen and the child's parents. The Court in *Re Patrick* determined that prior to commencing insemination the parties entered into an agreement relating to the role the donor would play in the child's life. The terms of the agreement were hotly contested, but Guest J accepted the donor's version that he would be known as the child's parent, be involved on a regular basis and have contact one or two days per week. However, Guest J held that such agreement did not confer binding parental rights on the parents nor did it define the status of the donor.¹⁰⁴

In resolving the issue of contact between the donor and Patrick, the judgment revolved around two questions. First, and foremost, was whether it was in Patrick's best interests to have contact with the donor.¹⁰⁵ Of secondary importance was the issue of whether in law the donor is regarded as Patrick's parent.¹⁰⁶

A Patrick's Best Interests

Guest J approached the hearing as he would any other for contact or residence. He regarded Patrick's best interest as the paramount consideration. The best interest principle constituted the 'cornerstone' of his Honour's judgment and remained the 'final determinant'.¹⁰⁷ Whilst the Family Court has jurisdiction to hear such a dispute the tools at its disposal are hopelessly inadequate. The *Family Law Act* was not drafted to take into account the particular nuances of the 'homo-nuclear' family. Guest J was obliged to apply the *Family Law Act* to a scenario emanating from a same-sex relationship. The *Family Law Act* primarily caters to the normative heterosexual nuclear family and pays no attention to the specific family dynamics within the 'homo-nuclear' family. Patrick's case highlighted a number of inadequacies within the *Family Law Act*. Guest J recognised the deficiencies in the law and made a number of recommendations to remedy these defects.¹⁰⁸ However, his Honour, on the evidence before him, found that the father had 'much to offer the child in achieving the milestones of his development over the forthcoming years'.¹⁰⁹ After examining expert evidence Guest J answered the first question in the affirmative and decided it was in Patrick's best interest to have contact with the donor.

In reaching his conclusion Guest J extensively relied on and accepted the evidence of an expert clinical psychologist who supported the donor's

¹⁰³ *Re Patrick* (2002) 28 Fam LR 579, 582.

¹⁰⁴ *Ibid* 612.

¹⁰⁵ *Ibid* 589.

¹⁰⁶ *Ibid* 642.

¹⁰⁷ *Ibid* 589.

¹⁰⁸ *Ibid* 647.

¹⁰⁹ *Ibid*.

application.¹¹⁰ Mr Papaleo (the expert) opined that the mother and co-parent found the donor's contact with Patrick "fundamentally intrusive" to their relationship [and] attacked the very stability of their union.¹¹¹ Furthermore, the mother regarded the donor as having used her as 'a surrogate to have a child.'¹¹² Against this angry and volatile background the expert maintained that it was in Patrick's best interests to 'know who his father is' and recommended that he have contact with the donor 'once every 2 to 4 weeks ... be it 2 hours, 4 hours, 8 hours or a day.'¹¹³ The expert classified the tripartite situation of the mother, co-parent and the donor, as seen through Patrick's eyes, akin to him having 'two parents and a father'. He furthermore suggested that the donor's role could be seen as one down from a parent but 'as a loving caring regular, familiar male adult figure in his life'.¹¹⁴

Guest J accepted this analysis and relied on 'psychological relatedness' rather than 'biological relatedness' as the primary consideration when determining the welfare of children.¹¹⁵ He concluded that the donor had a strong and unrelenting wish to be part of Patrick's life and it was in Patrick's interest to have ongoing contact with the donor.¹¹⁶ His Honour accordingly made orders granting the donor significant contact with Patrick commencing with four hours each alternate Sunday. Interestingly, the amount of contact which Guest J ordered was significantly greater than the experts recommended. Within roughly two and half years of the making of the orders, the donor would have contact with Patrick each alternate weekend on a Friday until the commencement of school or crèche on a Monday and one half of all school holidays. This regime represents the most common pattern of care when father-child contact occurs on the breakdown of a heterosexual relationship.¹¹⁷

Ironically, contrary to Guest J's assertion that 'biological relatedness' was irrelevant to his decision making process it played a significant part. The donor's 'biological relatedness' rather than his 'psychological relatedness' provided him with the first stepping stone to establish a psychological relationship with Patrick. He was regarded as a person concerned with the care welfare and development of Patrick and able to initiate legal proceedings. This enabled him to build on that relationship and eventually to obtain extensive contact orders. Furthermore,

¹¹⁰ The Child Representative intended to call Dr Adler as an expert witness but agreed to also call Mr Papaleo as, at an earlier hearing on the 10 February 2000, it was ordered that the parties attend upon him for the purpose of preparing a report to be presented to the Court. Dr Adler recommended that unless the mother and co-parent consented to more contact, the donor be allowed contact with Patrick at least twice a year for no more than three hours at a time. For details of Dr Adler's recommendations see *Re Patrick* (2002) 28 Fam LR 579, 625-31. Guest J for the most part accepted Mr Papaleo's evidence and rejected Dr Adler's.

¹¹¹ Ibid 631.

¹¹² Ibid.

¹¹³ Ibid 634. Pursuant to the orders made by Guest J, the donor was granted a greater amount of contact commencing with four hours every alternate Sunday and increasing with age.

¹¹⁴ Ibid.

¹¹⁵ Ibid 632.

¹¹⁶ Ibid 640-1.

¹¹⁷ See Bruce Smyth, Catherine Caruana and Anna Ferro, 'Father-Child Contact After Separation: Five Patterns of Care' (2004) 67 *Family Matters* 20, 26.

Guest J seemed to place greater importance on the donor's 'biological relatedness' to Patrick rather than the co-parent's 'psychological relatedness' to Patrick.

B Who are Parents under the Family Law Act?

In deciding the second issue as to whether the donor is regarded as a parent under the *Family Law Act*, his Honour briefly touched on the legal position of the co-parent.¹¹⁸ What is her status at law? The question of the legal status of the co-parent was addressed with relative ease but the simplicity of the solution highlights the heterosexual emphasis of the legislation. Unlike a partner in a heterosexual relationship the *Family Law Act* ignores the co-parent. She is unequivocally not regarded as a parent or for that matter a step-parent.¹¹⁹ This does not mean that a parenting order cannot be made in her favour. Her position is comparable to the donor's and, pursuant to ss 64(C) and 65(C), she may be regarded as a person who is concerned with the care, welfare or development of the child.¹²⁰ This places the co-parent in a rather invidious position. Within the family unit she is regarded as a parent. The court system allows limited recognition in that she may be able to make application for a parenting order, but she is not legally recognised as a parent. Recent studies indicate that where children are conceived within a lesbian relationship, in 75 per cent of cases the parties to the relationship considered the biological mother and the co-parent to be the parents of the child.¹²¹ Inevitably the legislature will need to grapple with the standing of the co-parent and make the appropriate amendments to the legislation.

However, it is the status of the donor which provokes immediate debate and is more pertinent. This was not the first reported occasion that the Family Court was confronted with this question. In *Re B and J*,¹²² a case dealing with the liability of a known donor for child support, Fogarty J found that pursuant to the *Child Support (Assessment) Act 1989* (Cth) the donor was not liable to pay child support.¹²³ This is because s 5 of the child support legislation when defining the word 'parent' specifically uses the word 'means' 'which confines an artificial conception procedure 'parent' to a parent under s 60H of the Family Law Act.'¹²⁴ Fogarty J concluded that for the purposes of child support the donor was not a parent. His Honour however indicated in obiter that a broader interpretation may be given to 'parent' for the purposes of the *Family Law Act*. While not liable for child support pursuant to the child support legislation, a donor may be liable for

¹¹⁸ *Re Patrick* (2002) 28 Fam LR 579, 640.

¹¹⁹ Hence in *W v G* (1996) Fam LR 49 the co-parent was obliged to pay child support but not pursuant to the *Family Law Act* or the Child Support Legislation but on the equitable principle of estoppel.

¹²⁰ See *KAM v MJR and Another* (1998) 24 Fam LR 656 discussed above. In *Re Mark* (2003) 31 Fam LR 162, 165, discussed below, Brown J confirmed that both the biological father and his gay partner were people concerned with the care welfare and development of a child born as a result of a surrogacy arrangement.

¹²¹ McNair and Dempsey, above n 71.

¹²² (1996) 21 Fam LR 186.

¹²³ However see the decision of *ND v BM* (2003) 31 Fam LR 22 in which the Court decided a donor of sperm was liable for child support where the child was conceived through sexual intercourse.

¹²⁴ *Re B and J* (1996) 21 Fam LR 186, 196-7.

child maintenance under the *Family Law Act*. Fogarty J did not limit this expansive interpretation of 'parent' to child maintenance but suggested such a person may be regarded as parent for the entire Part VII of the *Family Law Act*. In particular parental responsibilities could reside with a donor and the other parent until the court determines otherwise.¹²⁵ According to Justice Fogarty, the provisions in the child support legislation are exclusive whereas those in the *Family Law Act* are expansive.¹²⁶

Guest J, in the writer's opinion, correctly rejected Fogarty J's expanded interpretation of 'parent' under the *Family Law Act*. His Honour accurately concluded that if State and Territory presumptions would have no effect on orders made pursuant to the *Family Law Act* this would have serious and unintended consequences for sperm donors.¹²⁷ While deciding that, under the *Family Law Act*, the donor was not a parent, he observed that, given the donor's involvement in Patrick's conception and his effort to build a relationship with Patrick, 'it is a strange result that he is not'.¹²⁸ Guest J however conceded that it would be equally strange for an unknown donor to find he has parental responsibilities under the *Family Law Act*. He elaborated on these comments and stated that in the particular circumstances in *Re Patrick* it is difficult to understand that the donor is excluded as a parent and similar and appropriate recognition should be accorded to the 'biological father' as to the 'parents'.¹²⁹ His Honour thus struggled to reconcile the legal position with his perception of the practical realities and reluctantly concluded:

[I]n the absence of express provisions in federal law, the Family Law Act can and should be read in light of such state and territory presumptions, thereby leaving the sperm donor, known or unknown, outside the meaning of "parent". Where this leaves individuals such as the father is a matter for the legislature.¹³⁰

He thus conceded the relevance of the State presumptions and found that the sperm donor should be left outside the meaning of parent.¹³¹ The dilemma which confronted Guest J as to the status of the donor pursuant to the *Family Law Act* once again came before the Family Court in *Re Mark*.¹³²

¹²⁵ Ibid 197.

¹²⁶ Ibid. For a review of this decision see Dorothy Kovacs, 'The Aid Child and the Alternative Family' (1997) 11 *Australian Journal of Family Law* 141; D Sandor, 'Children Born from Sperm Donation: Financial Support and Other Responsibilities in the context of Discrimination' (1997) 4 *Australian Journal of Human Rights* 175.

¹²⁷ See below for a detailed explanation of these presumptions.

¹²⁸ *Re Patrick* (2002) Fam LR 579, 645.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² (2003) 31 Fam LR 162.

VII THE STORY OF MARK – MR X IS A PARENT

Mark was born as a result of a surrogacy agreement between Mr X and Mr Y, a gay couple, and Ms S and Mr S, a heterosexual couple.¹³³ Ms S gave birth to Mark but has no genetic connection to Mark as she carried an embryo harvested from a donor egg and Mr X's sperm. In terms of the surrogacy agreement Ms S and Mr S relinquished any and all rights in respect of Mark and acknowledged that neither of them were his 'legal, natural or biological' parents.¹³⁴ The agreement also stipulated the parties' intention that Mr X and Mr Y be the parents of Mark.¹³⁵ Mr X and Mr Y applied to the Family Court of Australia for orders that they have joint responsibility for the long term care welfare and development of Mark, that he live with them and that they be jointly responsible for his day to day care welfare and development and that he have contact as agreed from time to time with Ms S.¹³⁶ Correctly, using the best interests of Mark as the criteria for making parenting orders, Brown J granted these orders.¹³⁷

Mr X and Mr Y were clearly people concerned with care welfare and development of Mark and there was no serious question as to their standing to bring the application and for parenting orders to be made in their favour. However, in the course of her judgment her Honour suggested, but refrained from making a positive finding, that 'it may well be that Mr X is Mark's parent for the purposes of the Family Law Act'.¹³⁸ It is this novel concept and Brown J's acknowledgment that such a finding might 'lead to the imposition of responsibilities or entitlements on a class or classes of people who previously considered themselves immune from such responsibilities or entitlements'¹³⁹ that form the basis of the ensuing discussion. Moreover it is suggested that the tenor of her discussion and her subsequent critique of Guest J's decision in *Re Patrick* indicates that Brown J's views are not limited to known donors in the context of surrogacy arrangements but extend to all donors of sperm known and unknown. Thus, until the Full Court of the Family Court determines the status of the donor of sperm, 'under the *Family Law Act 1975* (Cth) it is unclear whether a person

¹³³ 'Surrogacy involves an agreement made with a woman who is, or who is to become, pregnant, ... who will surrender the child born from the pregnancy permanently to another person or people who wish to become the child's parents': Victorian Law Reform Commission, above n 19, [6.1]. In Victoria altruistic surrogacy arrangements are void and thus unenforceable: see *Infertility Treatment Act* s 61. Commercial surrogacy arrangements are illegal. See *Infertility Treatment Act* s 59. In *Re Mark* Brown J held that the illegality in Victoria of commercial surrogacy arrangements was irrelevant to her decision: (2003) 31 Fam LR 162, 175.

¹³⁴ *Re Mark* (2003) 31 Fam LR 162, 163.

¹³⁵ Orders were also made in the US State Court declaring Mr X the biological father and Mr S not the father, and that Mr X should be recorded on the birth certificate as the father. A birth certificate was issued in the USA declaring Mr X the father and Ms S the mother: *ibid* 164.

¹³⁶ *Ibid*.

¹³⁷ Section 65E of the *Family Law Act* specifically states that when deciding whether to make a particular parenting order the best interests of the child are the paramount consideration.

¹³⁸ *Re Mark* (2003) 31 Fam LR 162, 174. Brown J did not make a positive finding as there was no contradictor in the case and she considered that in an area as legally and socially complex as this there may be other arguments which may be put.

¹³⁹ *Ibid*.

who donates sperm to a single woman is the parent of a child born as a result of a donation.¹⁴⁰

If Brown J is correct in her conclusion that the donor of sperm may be regarded as a parent pursuant to the *Family Law Act*, potentially, a child born as a result of artificial conception may have three or even four parents.¹⁴¹ However, the *Family Law Act* specifically uses terminology indicating that the Act contemplates only two parents. Section 60B of the *Family Law Act* refers to the right of children to be cared for by *both* their parents as well as the right of contact with *both* their parents. There is no reference to children having the right to be cared for by *all* of their parents.¹⁴² This makes Brown J's analysis problematic. Does this mean that the social parent in a lesbian relationship will not, or should not, be regarded as a parent and that biological relatedness should be the sole determinant of parentage? Guest J, in *Re Patrick*, avoided this outcome and, rather than adopting a 'three parent model', he classified Patrick's biological and social mother as his 'parents' and the donor as his 'father'.¹⁴³

More disturbing than whether the *Family Law Act* is designed to deal with three or more parents is the potential impact of this decision, if followed, on the family unit.¹⁴⁴ The significance of this decision is that a parenting order may not only be made in favour of the donor as occurred in *Re Patrick*, but the donor may also be regarded as the 'parent' of the child. This would mean that until a contrary court order, donors of semen will have full 'parental responsibility' pursuant to s 61C of the *Family Law Act*. Parental responsibility is defined in s 61B of the *Family Law Act* as 'all the duties, powers, responsibilities and authority which by law, parents have in relation to children.' The donor of semen would thus have wide rights and responsibilities in relation to children born from assisted conception. This has serious ramifications for all those involved in the donor insemination process. In an attempt to determine the status of a donor of sperm under the *Family Law Act*, the next portion of this paper examines Brown J's discussion in *Re Mark* of Guest J's conclusion in *Re Patrick* that a donor of sperm for the purposes of the *Family Law Act* should not be regarded as a parent.

A 'Parent' under the Family Law Act and the Child Support Legislation

Section 7 of the *Child Support (Assessment) Act 1989* (Cth) – the child support legislation – states that 'unless the contrary intention appears, expressions used in this Act and in Part VII of the *Family Law Act* have the same respective meaning

¹⁴⁰ Victorian Law Reform Commission, above n 19, [5.28]; see also generally [5.21]-[5.28]. This paper confirms that there are now different views as to the status of the donor.

¹⁴¹ This may occur when donor sperm as well as a donor egg is used.

¹⁴² See *Tobin* (1999) 24 Fam LR 635, 645.

¹⁴³ *Re Patrick* (2002) 28 Fam LR 579, 639. See Deborah Dempsey, 'Donor, Father or Parent? Conceiving Paternity in the Australian Family Court' (2004) 18 *International Journal of Law, Policy and the Family* 76 for a thoughtful and insightful analysis of the separation of the concepts of 'parent' and 'father'.

¹⁴⁴ As no positive finding was made and the fact situation before her Honour was one of surrogacy it is suggested that her Honour's conclusion may be regarded as obiter dicta. However when confronted with the situation of a conventional donor a similar finding may be reached.

as in that Act.' The effect of this section is that unless a 'contrary intention' is identified in the child support legislation expressions in this legislation are to have the same meaning as in the *Family Law Act*.

Guest J rejected Fogarty J's suggestion in *Re B and J*¹⁴⁵ that the child support legislation evinced a 'contrary intention' from the *Family Law Act*.¹⁴⁶ His Honour decided that, in assessing who is a 'parent' of a child born from an artificial conception procedure, the child support legislation and the *Family Law Act* should be read in conformity. Hence, according to Guest J, a donor of sperm cannot be regarded as a 'parent' pursuant to either the child support legislation or the *Family Law Act*.¹⁴⁷

In order to conclude that the donor of semen was a parent under the *Family Law Act* but *not* under the child support legislation, it was thus imperative that Brown J find evidence of a 'contrary intention' in the latter. According to her Honour, the omission of a definition of 'parent' or any limiting expression such as 'means' in the *Family Law Act* indicated 'a contrary intention'. 'Parent' in the two Commonwealth statutes should not be understood as having the same meaning.¹⁴⁸

In reaching this conclusion, her Honour relied extensively on Fogarty J's comments in *Re B and J* that s 60H of the *Family Law Act* 'enlarges rather than restricts the category of people who may be regarded as parents', and may thus include a donor of sperm.¹⁴⁹ Her Honour also relied on the unreported decision of Faulks J in *Stone v Bowman* ('*Stone*').¹⁵⁰ *Stone* concerned the application of a lesbian couple for orders granting them residence, joint responsibility for the long term care and day to day welfare of a child born from donor insemination, as well as a declaration that the donor was not a parent.¹⁵¹ In the course of his judgment, his Honour remarked that s 60H(3) is 'principally, if not exclusively, an extending definition of a child to include people who would not otherwise be included as parents'.¹⁵² Thus, according to Brown J, while the word 'means' in the child support legislation restricted the meaning of 'parent', a wider definition of 'parent' was permissible for the purposes of the *Family Law Act*.

In favour of Guest J's narrower interpretation, it may be argued that, if Parliament intended 'parent' be given different interpretations in the two Federal Acts, a definition of 'parent' unrelated to the *Family Law Act* would have been inserted in the child support legislation. An examination of the explanatory memorandum

¹⁴⁵ (1996) 21 Fam LR 186.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Re Patrick* (2002) 28 Fam LR 579, 644-7.

¹⁴⁸ *Re Mark* (2003) 31 Fam LR 162, 167-9.

¹⁴⁹ *Ibid* 168.

¹⁵⁰ See *Stone v Bowman* (Unreported, Family Court of Australia, Faulks J, 28 February 2000).

¹⁵¹ Faulks J made orders that the child reside with the couple and that they have the joint responsibility for the long term care and day to day welfare of the child. Although the donor was a party to the proceedings and consented to the order, Faulks J refused to make an order declaring that the donor was not a parent. His Honour reasoned that it was not in the child's best interests to eliminate someone who may have parental responsibility for her. Furthermore it was not necessary to make a decision on that day. His Honour did however indicate without deciding that he favoured the view of Fogarty J in *Re B and J* (1996) 21 Fam LR 186.

¹⁵² *Stone v Bowman* (Unreported, Family Court of Australia, Faulks J, 28 February 2000) 16.

to the Child Support (Assessment) Bill 1989 (Cth) reveals that, in the case of a child born from artificial conception procedures, the *Family Law Act* 'controls' who is regarded as a parent.¹⁵³ The word 'controls' may be indicative that s 60H provides a basic statement of who is regarded as a parent for the purposes of both statutes. There is no suggestion that the provisions in the one Act are wider than the other or the possibility that a person may be regarded as a parent under the one statute and not the other. A plain reading implies that if you are a parent under the *Family Law Act* you will be regarded as a parent under the child support legislation and vice versa. Furthermore, given that one of the purposes of the child support legislation was to remove the responsibility for child support from the public to the private sphere it is highly unlikely that Parliament would eliminate the donor as a potential payer of child support and yet continue to recognise him as parent for the purposes of the *Family Law Act*.¹⁵⁴

B A Parent is the Biological Mother or Father of the Child

In *In the Marriage of Tobin* ('*Tobin*'),¹⁵⁵ the Full Court of the Family Court concluded that the meaning of 'parent' in the context of child maintenance is the 'biological mother or father of the child and not a person who stands in *locus parentis*.'¹⁵⁶ Guest J in *Re Patrick* had referred to the judgment in *Tobin* as indicating that the donor might be regarded as a 'parent'. His Honour however distinguished the fact scenario in *Re Patrick* from *Tobin* as the child in *Tobin* had not been conceived through an artificial conception procedure.¹⁵⁷

Tobin concerned an application for either maintenance or child support for a child who had been subject to a State care and protection order. The parties to the proceedings were husband and wife who had been declared guardians of this child. The Full Court of the Family Court dismissed the application against the husband for both child support and maintenance. In the process the Full Court was obliged to examine whether the husband could be considered a 'parent' under the *Family Law Act*.¹⁵⁸ Relying on *Tobin*, Brown J found that the word 'parent' should be given its ordinary non technical, dictionary meaning 'the father, mother or the progenitor of a child'.¹⁵⁹ Her Honour was satisfied that 'the ordinary meaning of the word parent encompasses a person in Mr X's position'.¹⁶⁰ Although the court in *Tobin* specifically referred to the child maintenance provisions in the

¹⁵³ See Explanatory Memorandum, Child Support (Assessment) Bill 1989 (Cth) 5.

¹⁵⁴ See CCH, *Australian Family Law Child Support Handbook* (at 4-10-98) ¶2-120.

¹⁵⁵ (1999) 24 Fam LR 635.

¹⁵⁶ *Ibid* 645.

¹⁵⁷ *Re Patrick* (2002) 28 Fam LR 579, 646.

¹⁵⁸ The Full Court did not negate the possibility of the word 'parent' having different meaning under the Child Support Legislation and the *Family Law Act*. So far as child support was concerned, they saw nothing which would enlarge the category of people beyond those which Fogarty J had identified in *Re B and J* (1996) 21 Fam LR 186, ie adopted children and those born as a result of artificial conception – thus excluding the husband in this position. See *Child Support (Assessment) Act 1989* (Cth) s 5; *Tobin* (1999) 24 Fam LR 635, 645.

¹⁵⁹ *Re Mark* (2003) 31 Fam LR 162, 170-1.

¹⁶⁰ *Ibid* 170. Her Honour did predicate her remarks with the fact that Mr X intended fathering a child and is not a 'sperm donor' as the word is commonly understood.

is born to a married woman as a result of assisted conception.¹⁷⁵ If both the man and the woman consented to the procedure, or if there is prescribed State legislation under which the child is the child of the woman and the man, then the child is their child for the purposes of the *Family Law Act*.¹⁷⁶

Sections 10C(1) and 10C(2) of the *Status of Children Act* specifically deal with the presumption of paternity where a married woman conceives a child as a result of donor insemination. Provided the procedure took place with the husband's consent there is an irrebuttable presumption that the husband is the father of the child and the donor is presumed not to be the father.¹⁷⁷ Schedule 6 of the *Family Law Regulations 1984* (Cth) Act specifically prescribes ss 10C(1) and (2) of the Victorian *Status of Children Act*, thus ensuring uniformity between the two statutes.

Hence so far as a child born into heterosexual relationship is concerned, the law both at a Commonwealth and State level goes to extreme lengths to confer parentage on the non-biological parent and to grant him the same legal status as the biological father of a child born from natural conception. This situation may be contrasted with the position of the co-parent in *Re Patrick* who, it is suggested, should be in the equivalent position of the non-biological father in a heterosexual relationship. Where the child is born into a same sex relationship the co-mother is given no legal recognition or protection and may simply be relegated to a person with an interest in the welfare of the child.

Sections 60H(2) and (3) of the *Family Law Act* attempt in other circumstances to preserve recognition afforded to the parentage of a person under State legislation. Section 60H(2) regulates the maternity of a child born to an unmarried woman. According to this section, if the child is regarded as the child of that woman under a prescribed law of a State or Territory, then whether or not the child is biologically hers, it is regarded as her child for the purposes of the *Family Law Act*. There is no prescribed legislation for Victoria.¹⁷⁸ No express provisions are included in the Victorian Act relating to presumptions of *maternity* of a child born to a single woman from artificial conception.

The *Status of Children Act* recognises that children might be born to single women or women in lesbian relationships or without the consent of the husband

¹⁷⁵ In the context of this discussion 'married' includes heterosexual parties living together on a genuine domestic bases and 'husband' includes the male partner in such a relationship.

¹⁷⁶ See *Family Law Regulations 1984* (Cth) sch 6. There are prescribed laws for all States and Territories except Queensland. See *In the Marriage of P* (1997) 141 FLR 214 for the Family Court's interpretation of these provisions.

¹⁷⁷ See Anthony Dickey, *Family Law* (4th ed, 2002) 323-4. The man is presumed to have consented but proof of consent is rebuttable. Even if it is proved that the husband did not consent to the procedure then in accordance with s 10F of the Status Act the semen donor will retain no rights and incur no obligation in respect of the child.

¹⁷⁸ Prescribed legislation exists only in relation to South Australian, the Australian Capital Territory and the Northern Territory as the legislation in these jurisdictions specifically covers this situation. See *Family Law Regulations 1984* (Cth) sch 7. The most recent version of these regulations still refer to the *Artificial Conception Act 1985* (ACT) this has since been replaced with the *Parentage Act 2004* (ACT).

in a heterosexual relationship. Section 10F of the *Status of Children Act* clarifies the position of the donor at law.

Where semen is used in a procedure of artificial insemination of a woman who is not a married woman or of a married woman otherwise than in accordance with the consent of her husband, *the man who produced the semen has no rights and incurs no liabilities in respect of a child born as a result of a pregnancy occurring by reason of the use of that semen unless, at any time, he becomes the husband of the mother of the child.* (emphasis added)

The import of this section is that it strips the donor of the semen of any rights or obligations in relation to a child born either to a single woman or a married woman without the consent of her husband.

The Minister for Health explained the purpose of s 10F succinctly:

In each case the provisions make it clear that the donor of the genetic material shall *not have* (sic) *legal relationship with the child*. In addition, honourable members will observe that proposed section 10F protects from legal liability the donor of semen where that semen is used in an AID procedure involving single women.... (emphasis added)

The Government does not condone the practice of artificial insemination of single women by donor. Nonetheless, it recognises that artificial insemination by donor can be effected by very simple means and away from approved hospitals. Donors who may have unwittingly provided semen used unlawfully in these ways should not be placed at risk of being regarded as the legal father of any child born as a result of such procedures. For that reason section 10F is proposed to be included.¹⁷⁹

In *Re Mark*,¹⁸⁰ Brown J remarked that if Guest J's analysis in *Re Patrick* is correct and the donor of semen is not regarded as a parent of a child born of artificial conception procedures, the biological mother of a child may also not be considered a child's parent. It is suggested that when the *Status of Children Act* was enacted, while it was envisaged that single women may self inseminate – hence the enactment of s10F – it was not contemplated that single women or lesbian couples would access clinically based assisted conception either in the form of donor insemination or the more complex reproductive procedures. So far as the legislature of the day was concerned, it was beyond the realm of possibility for single woman to gain access to and conceive children through the use of donor eggs. There was thus no need to provide for the parentage of children born to single women or lesbian couples. Accordingly, in the case of self insemination the biological position would prevail, and the biological mother would be presumed to be the mother of the child. Today, as clinically infertile single women and lesbian couples may utilise assisted reproductive services the situation may arise where a donor egg is used and the birth mother has no

¹⁷⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 18 April 1984, 3969 (T Roper, Minister for Health).

¹⁸⁰ (2003) 31 Fam LR 162, 168.

Family Law Act, Brown J concluded that the same definition would apply to all parenting orders.¹⁶¹

Consistent with the proposition that in the absence of an exhaustive definition of 'parent' the word must be given its ordinary meaning, Brown J referred to the decision of Kay J in *ND and BM*.¹⁶² In this case a man agreed to donate sperm – via sexual intercourse as opposed to self insemination – to a woman who had previously been his partner in a heterosexual relationship but was in a lesbian relationship at the time of the donation. An application was made and granted for child support against the donor. Kay J held that, notwithstanding that it was the intention of the parties that the man be a donor and not have any rights nor liabilities, as the child was conceived in the 'usual and customary manner' and not through artificial conception procedures, the donor was a parent and liable for child support.¹⁶³

It is suggested that Guest J was correct in distinguishing *Tobin* from *Re Patrick*, and *ND v BM* should be similarly dealt with. Neither of these children was born as a result of assisted conception, making s 60H, which was specifically enacted to deal with children born as a result of artificial conception procedures, inapplicable and irrelevant.¹⁶⁴ The parentage of these children must be determined according to the presumptions of parentage in the *Family Law Act*.¹⁶⁵ The fact that a child is born to a lesbian couple as occurred in *ND and BM* does not necessarily mean that s 60H applies. However, this raises the interesting issue of the relevance of the intention of the parties. In *ND v BM*, Kay J found that it was the parties' intention that the donor of sperm have no legal rights to the child, that the child would not be advised of its biological father and that, in the event of a breakdown in the relationship of the lesbian couple, they would provide financial assistance for the child.¹⁶⁶ Nevertheless, his Honour concluded that as the child was conceived through sexual intercourse the donor was liable for child support. Thus the intention of the parties with regard to the status of the donor, and the rights and obligations that flow from this status was regarded largely as irrelevant, with the manner of conception determinative.

Conversely, in *Re Mark*, the manner of conception was irrelevant and the intention of the parties conclusive in determining parentage and the corresponding rights and obligations. Brown J held that Mr X had provided his genetic material with the 'express intention' of fathering a child. He was therefore not a sperm donor as the term is commonly understood, even though the child was conceived through an assisted conception.¹⁶⁷ These are anomalies which are beyond the scope of this paper and which the legislature will in due course be required to deal with.

¹⁶¹ Part VII Divisions 5 and 6 'parenting orders – what they are and parenting orders other than child maintenance orders'. See *Re Mark* (2003) 31 Fam LR 162, 169.

¹⁶² *ND v BM* (2003) 31 Fam LR 22.

¹⁶³ *Ibid* 27.

¹⁶⁴ See Explanatory Memorandum, Family Law Amendment Bill 1987 (Cth) 6, 8.

¹⁶⁵ See *Family Law Act 1975* (Cth), Subdivision D – Presumptions of Parentage.

¹⁶⁶ *ND v BM* (2003) 31 Fam LR 22.

¹⁶⁷ *Re Mark* (2003) 31 Fam LR 162, 170.

A sperm donor in the context of a surrogacy arrangement 'is not a sperm donor (known or anonymous) as the term is commonly understood',¹⁶⁸ and undoubtedly 'a finding that Mr X is not Mark's parent sits awkwardly with the reality of Mark's life.'¹⁶⁹ However, contrary to Brown J's assertions it is equally untenable for the donor or someone in the position of the donor in Patrick to be regarded as a parent. The ensuing discussion will illustrate that if a woman is eligible for infertility treatment and uses an anonymous donor in a clinical setting, the chances of the donor making a successful application to the Family Court for a parenting order is negligible. It is thus imperative for Victorian single women and lesbian couples to be given the opportunity of accessing assisted reproductive services.¹⁷⁰

The next portion of this article examines Brown J's contentious assertion in *Re Mark* that 'parent' should be given its ordinary meaning, encompassing 'a person in Mr X's position', the donor of sperm.¹⁷¹ It explores the relationship between the Commonwealth *Family Law Act* and the Victorian *Status of Children Act* and *Infertility Treatment Act*. It is against the backdrop of these three pieces of legislation that the notion of who is or should be regarded as a parent under the *Family Law Act* is examined. Brown J in *Re Mark* disagreed with Guest J's assertion that s 60H 'should be read in the light of State and Territory legislation dealing with the position of donors of semen for artificial insemination procedures.'¹⁷² Her Honour rejected this conclusion and declared that this would result in construing a Federal law 'in the light of State law for which there is no constitutional basis.'¹⁷³

VIII COMMONWEALTH DEEMING PROVISIONS AND STATE PRESUMPTIONS

Section 60H of the *Family Law Act* creates the relationship of parent and child by deeming a child born as a result of an 'artificial conception procedure' his, her or their child.¹⁷⁴ Sections 60H(1) and (4) regulate the circumstances where a child

¹⁶⁸ Ibid.

¹⁶⁹ Ibid 173.

¹⁷⁰ See discussion below of Access to Information – The Victorian Legislation.

¹⁷¹ *Re Mark* (2003) 31 Fam LR 162, 170.

¹⁷² Ibid 171.

¹⁷³ Ibid 172. In *Re Patrick*, Guest J had referred to an article by D Sandor, 'Children Born from Sperm Donation: Financial Support and Other Responsibilities in the Context of Discrimination' (1997) 4 *Australian Journal of Human Rights* 175: (2002) 28 Fam LR 579, 644-5. This article is critical of Fogarty J's judgment in *Re B and J* (1996) 21 Fam LR 186. The writer is of the opinion that s 60H *Family Law Act* should be read in the light of the State Act, leaving donors known and unknown outside the meaning of parent. Sandor referred to Hodgson J's judgment in *W v G* (1996) 20 Fam LR 49, 62-5 in support of this argument. Her Honour rejected the contention that support for this argument could be found in this judgment.

¹⁷⁴ See Brown J in *Mark* (2003) 31 Fam LR 162, 166. The definition of 'artificial conception procedure' in s 60D *Family Law Act* includes artificial insemination; and the implantation of an embryo in the body of a woman. 'Child of a marriage' under s 60F(1) *Family Law Act* includes 'a child who is under subsection 60H(1), the child of the husband and wife.

occur when a heterosexual couple *chooses* to use a known rather than an unknown anonymous donor. It is suggested that herein lies the ultimate discrimination perpetrated against single women/lesbian couples and the 'homonuclear' family. The next portion of this paper examines the provisions relating to access to information under the *Infertility Treatment Act*. It is argued that these provisions to a large extent shield the heterosexual family from an anonymous donor's application for a parenting order.¹⁹⁰

In response to 'a substantial and growing view that the values of honesty and integrity are crucial to the creation of a happy family,¹⁹¹ the *Infertility Treatment Act* provides for the establishment of three registers. These are the 1984 Central Register, the 1995 Central Register and the Donor Treatment Procedure or Voluntary Register.¹⁹² Victoria has established a system where children born as a result of assisted conception may access their biological heritage in a similar fashion to adopted children. From the age of 18, a child born from assisted conception is entitled to unconditionally access information identifying the donor i.e. their biological parent.¹⁹³ This information is obtained through the 1995 Central Register.¹⁹⁴ The donor consents to making this information available when donating his/her gametes.¹⁹⁵ Qualification for this register is predicated on the basis that the information was provided after 1 January 1998, the date when

¹⁹⁰ Brown J, in *Re Mark* (2003) 31 Fam LR 162, 174, commented that the legislative provisions such as s 141(3) *Health Act 1988* (Vic) already allow the donors anonymity to be breached and it is for the legislature to protect donors from the consequences of being found a parent. It is suggested that these breaches are at the moment highly unlikely to occur.

¹⁹¹ Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, *Report on Donor Gametes in IVF* (1983) 26.

¹⁹² See *Infertility Treatment Act* pt 7, Records and Access to Information. The 1984 Central Register records information about children born as a result of donor procedures and was established under the *Infertility (Medical Procedures) Act 1984* (Vic). This register contains identifying and non-identifying information. Identifying information can only be released with the consent of the person to whom it relates. The 1995 Register allows access to identifying information. The Donor Treatment Procedure Information Register is set up to allow anyone involved with a donor treatment procedure to voluntarily apply for inclusion on the register. It is the only register which facilitates communication between half siblings. For details of the operation of these provisions see Louis Waller, 'The Costs of Treating Infertility' (1999) 7 *Journal of Law and Medicine* 183, 189. See also Infertility Treatment Authority, *Annual Report 2002*, 16-17. At its inception the provisions relating to access to information were regarded as the most 'audacious' part of the ITA. See Gabrielle Wolf, 'Frustrating Sperm Regulation of AID in Victoria under the Infertility Treatment Act 1995 (Vic)' (1996) 10 *Australian Journal of Family Law* 71.

¹⁹³ *Infertility Treatment Act* ss 79 (1)(b), 80(2).

¹⁹⁴ The licensee of any centres licensed to perform fertilisation procedures and doctors performing donor insemination must maintain comprehensive and meticulous records of treatment procedures and at six monthly intervals forward the information to the Infertility Treatment Authority this information will then be kept in the Central Register.

¹⁹⁵ See Infertility Treatment Authority, *Annual Report 2002*, 16; *Infertility Treatment Act* ss 79(1)(b), 80(2). In South Australia a child born of donor procedures is entitled to non-identifying information only, in Western Australia identifying information may under some circumstances be available: *Reproductive Technology Act 1988* (SA) s 18(1); *Human Reproductive Technology Act 1991* (WA) s 49. South Australia is currently considering allowing children born as a result of ART access to identifying information about the donor. See South Australian Council on Reproductive Technology, *Conception by Donation: Access to identifying information in the use of donated sperm, eggs and embryos in reproductive technology in South Australia*, Discussion Paper, April 2000. The NHMRC guidelines on the use of assisted reproductive technology recommend that '[p]ersons conceived using ART procedures are entitled to know their genetic parents': NHMRC, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*, above n 48, 16.

the *Infertility Treatment Act* came into effect. In an effort to protect persons from the psychological effect of obtaining information identifying their biological heritage, the *Infertility Treatment Act* stipulates that prior to the disclosure of the information the recipients must be satisfied that the applicant has received counselling about the potential consequences of receiving this information.¹⁹⁶ Non-identifying information may be provided about the donor before or after the treatment procedure.¹⁹⁷ Identifying information may only be provided to persons undergoing a treatment procedure or the parents of a child if the donor has *first* consented to disclosure of this information and subject to any conditions which the donor may impose.¹⁹⁸ Likewise, donors may also request non-identifying and identifying information about the recipient woman and/or her husband as well as pregnancies and their outcomes.¹⁹⁹ However, identifying information may only be disclosed if there is consent to the disclosure of this information and subject to any conditions or limitations imposed by the woman or her male partner.²⁰⁰ Importantly for the purposes of this article, identifying information in relation to a child under 18 may only be provided with the consent of the child's parents or guardian. If the child has turned 18 the child must consent to the release of such information.²⁰¹

These provisions thus ensure that unless both parents consent to the disclosure of identifying information, the donor has no right to and cannot access such information. As an adult, the child is entitled to decide whether to make identifying information available to the donor. Until the age of 18, the *Infertility Treatment Act* forms a barrier between the donor and the parents and child. The family unit is protected. While the donor may be aware a child has been born he has no knowledge of the identity of the child or the parents. He thus cannot be classified as someone concerned with the care welfare and development of the child. The donor will therefore have no standing to make a similar application to the Family Court for a parenting order as that made in *Re Patrick* or *Re Mark*.

In Victoria the *Infertility Treatment Act* ensures that clinically fertile single women/ lesbian couples are barred from using the semen of an anonymous donor. Without the protection of the *Infertility Treatment Act* the known parents are exposed to an application from the known donor for a parenting order. Moreover, since the decision in *Re Mark*, the law may regard the genetic progenitor of the child as a parent. In *Re Patrick* and *Re Mark*, the relevant provisions of the *Family Law Act* and the statutory presumptions were examined. However, no or very little consideration was given to the *Infertility Treatment Act* and its repercussions.²⁰² Whilst it is acknowledged that the *Infertility Treatment Act* does

¹⁹⁶ See *Infertility Treatment Act* s 80(2), which also provides that reasonable efforts must be made to advise the donor that the information is about to be given and to advise the donor of the need for and availability of counselling services.

¹⁹⁷ *Infertility Treatment Act* ss 71(3), 75(1).

¹⁹⁸ See *Infertility Treatment Act* ss 71(4), 75(2).

¹⁹⁹ See *Infertility Treatment Act* ss 72, 73, 76.

²⁰⁰ See *Infertility Treatment Act* ss 72(4), 72(7), 72(8), 78(2).

²⁰¹ See *Infertility Treatment Act* s 77(2).

²⁰² See *Re Patrick* (2002) 28 Fam LR 579, 649-50. His Honour dismissed the criminal sanctions accompanying self insemination as a means of controlling unregulated donor insemination.

biological connection to the child. In this situation the reasoning of Brown J in *Re Mark* suggests that in the event of the birth mother not being the biological mother of a child, then pursuant to the *Family Law Act*, the birth mother may not be regarded as the mother of the child.¹⁸¹ Clearly legislation is required to regulate the parentage of a child born from this procedure.

However, for the purposes of this discussion on the status of the donor, section 60H(3) of the *Family Law Act* which regulates the paternity of a child born to an unmarried woman as a result of an artificial conception procedure is the important section. Faulks J in *Stone v Bowman* commented that 'the provisions of section 60H(3) are only intelligible in the context of the relevant State legislation'.¹⁸² The effect of this section is: if under a prescribed law of a State or Territory the child is regarded as a child of the donor, he will likewise be regarded as the father of the child under the *Family Law Act*. However, there are no laws prescribed in the regulations to the *Family Law Act* relating to s 60H(3).¹⁸³ Fogarty J in *Re B and J*¹⁸⁴ stated that the position could not have been clarified by a prescription in the *Family Law Regulations 1984* (Cth) of s 10F of the Victorian *Status of Children Act* or the equivalent provisions in the legislation of the other States and Territories. His Honour pointed out that s 60H(3) allows for the prescription of a positive that is that the 'child is the child of the man', whereas the State Act provides for a negative that is 'no rights and no liabilities' attach to the donor of sperm.¹⁸⁵

It is thus suggested that s 10F of the *Status of Children Act* has a dual purpose.¹⁸⁶ In the first instance it divests the donor of any rights in respect of a child born from donor insemination thus protecting the parents, the child and the family unit. In the second instance it ensures that the donor of semen cannot be branded the legal father of a child born as a result of assisted reproductive services, thus shielding the donor from claims for child support or other economic responsibilities.

These provisions illustrate that Commonwealth and State legislation fail to recognise changes in family structures in our modern society. They primarily take into account those children born into traditional heterosexual nuclear

¹⁸¹ See Victorian Law Reform Commission, above n 19, [5.17].

¹⁸² *Stone v Bowman* (Unreported, Family Court of Australia, Faulks J, 28 February 2000) [16].

¹⁸³ See James McConvill and Eithne Mills, 'Re Patrick and the Rights and Responsibilities of Sperm Donor Fathers in Australian Family Law' (2003) 3 *Queensland University of Technology Law and Justice Journal* 298, in which the authors agree with Guest J's analysis that s 60H(3) provides a barrier to the donor of semen being regarded as a parent of the child. However, they suggest that the *Family Law Act* should be amended so that, where it is considered in the best interest of the child, a known donor may be considered a parent. The authors distinguish between known and unknown donors and suggest it is highly unlikely that it will be found to be in the best interest of the child for an unknown donor to be regarded as a parent for the purposes of *Family Law Act*: 318.

¹⁸⁴ (1996) 21 Fam LR 186.

¹⁸⁵ *Ibid* 192-3.

¹⁸⁶ See Victoria, *Parliamentary Debates*, Legislative Council, 21 March 1984, 1940 (Jim Kennan Attorney-General). In cases where donors unwittingly provided semen should not be at risk of being regarded as the legal fathers. See also Victoria, *Parliamentary Debates*, Legislative Assembly, 18 April 1984, 3969 (T Roper, Minister for Health) where the same sentiments are echoed.

families. They seek to propagate and protect these families and these children with little consideration for the 'homo-nuclear' family and their children. Other than excluding the donor of semen from rights and liabilities arising from non clinical donor insemination the legislation makes no provision for the maternity or paternity of children born to single women/lesbian couples as a result of donor insemination or other more complex assisted reproductive services. It is suggested that Brown J failed to take into account the background to the legislative position and the concern with uniformity at both a Commonwealth and State level. Thus in the author's opinion Guest J was correct in concluding that 'in the absence of express Federal law the *Family Law Act* can and should be read in the light of State and Territory presumptions thereby leaving the sperm donor known or unknown outside the meaning of "parent"'.¹⁸⁷ This does not necessarily mean that the State Act should prevail over the Commonwealth legislation, but rather that the ambiguous Commonwealth provisions should be interpreted in a manner consistent with the State provisions. '[A] proper construction of all of section 60H, means that it is only relevant ... by reference to the relevant law of the State or Territory.'¹⁸⁸

In the next portion of this paper it will be argued that in prohibiting single women from accessing anonymous donor insemination the law is creating a discriminatory climate that the Commonwealth deeming provisions and State presumptions of parentage largely perpetuate. A link is drawn between the difficulties single women/lesbian couples encounter in accessing anonymous donor insemination and some of the practical consequences arising from this prohibition. This article challenges the contention that the donor of semen to a single woman/lesbian couple should be regarded as anything more than the genetic progenitor of a child born from the process. This is best illustrated by comparing the potential differences in outcome if Patrick had been born into a traditional nuclear family rather than a 'homo-nuclear' family.

A Access to Information – Victorian Legislation

Guest J in *Re Patrick* accepted that the donor of sperm was not a parent for the purposes of the *Family Law Act*. However, his Honour ultimately permitted the known donor to intrude on the family under the 'best interest' principle. This begs the question of whether in similar circumstances a known donor would or should be permitted contact with a child born to a heterosexual couple. It is argued that because of the relevant provisions in the *Infertility Treatment Act*, the chances of such a scenario presenting itself before the Family Court are unlikely.¹⁸⁹ This may

¹⁸⁷ *Re Patrick* (2002) 28 Fam LR 579, 645.

¹⁸⁸ *Stone v Bowman* (Unreported, Family Court of Australia, Faulks J, 28 February 2000) [16].

¹⁸⁹ In *Re Patrick* (2002) 28 Fam LR 579, 646, Guest J referred to three cases which had come before the courts involving artificial conception procedures, however none of these cases concerned a known donor applying for a parenting order. In *the Marriage of P* (1997) 141 FLR 214 considered the position of a husband who had initially consented to the wife undergoing an artificial conception procedure. *Tobin* (1999) 24 Fam LR 635 dealt with the situation of a child who was previously in foster care and whether a guardianship order and other parenting orders made by the Family Court conferred the status of parent on the husband. *Re Births, Deaths and Marriages Registration Act 1997* (2000) 26 Fam LR 234 concerned an application by a heterosexual married couple for a declaration that they, as donors, were parents of a child carried by a surrogate mother.

provide for the use of semen from a known donor, the heterosexual couple has the choice whether or not to use a known or anonymous donor.²⁰³ The same-sex couple is deprived of choice and is on occasions through financial and other circumstances forced to use a known donor with the associated ramifications.²⁰⁴

IX HETEROSEXUAL COUPLES – WHAT IS THE DIFFERENCE?

With the assistance of the law and medical technology, heterosexual couples are permitted to regard the social partner as the legal parent. The Commonwealth deeming provisions and State presumptions of paternity irrefutably presume that this is the case. The *Infertility Treatment Act* preserves all parties' anonymity and with it the family structure. By way of contrast, in the 'homo-nuclear' family the co-parent who is similarly positioned to the male partner in a heterosexual union has no legal standing.

In Victoria, socially infertile single women/lesbian couples are ineligible to access clinically run donor insemination. For many of these women, there is only one viable option – self-insemination. In these circumstances single women/lesbian couples are obliged to locate their own donor through whatever means possible. In *Re Patrick*, the biological mother had specifically sought out the donor after she had placed an advertisement in the newspaper and had interviewed prospective candidates.²⁰⁵ Once a suitable donor is found, in all likelihood negotiations will be entered into as to the terms of the transaction, automatically establishing a personal relationship between themselves and the donor. Issues of a power imbalance between the parties are possible given that single women/lesbian couples are vulnerable. After all, the donor has something that they desperately need. Even if a formal written agreement is entered into, the courts will not enforce such an agreement unless it coincides with the best interests of the child.²⁰⁶

It is suggested that if the donor, through force of circumstances, becomes familiar with the parents then his status should be confined exactly to what he is: the donor of the genetic material. This differs from the situation where, pursuant to the provisions of the *Infertility Treatment Act*, the donor and/or recipients agree to provide identifying information to one another or when, at the age of 18, a child is unconditionally entitled to such information.²⁰⁷ It is acknowledged that different considerations may apply in a surrogacy arrangement but essentially donors known and unknown should fall outside the parameters of the *Family Law Act*.

²⁰³ *Infertility Treatment Act* ss 18, 19.

²⁰⁴ See earlier discussion 'Single Women and Self Insemination'. See also Deborah Dempsey, 'Donor, Father or Parent? Conceiving Paternity in the Australian Family Court' (2004) 18 *International Journal of Law, Policy and the Family* 76 for an interesting and insightful description of the use of known donors and the way a lesbian couple may perceive the donor.

²⁰⁵ *Re Patrick* (2002) 28 Fam LR 579, 604-5.

²⁰⁶ *Ibid* 648. See also Fogarty J in *Re B and J* (1996) 21 Fam LR 186, 195.

²⁰⁷ See discussion of the provisions of the *Infertility Treatment Act* above. This situation is where single women/lesbian couples are forced to self inseminate because of statutory provisions prohibiting them from accessing anonymous donor insemination.

If, as decided in *Re Patrick* or *Re Mark*, in specific circumstances it is in the child's best interests for a known donor to have contact with their progeny, similarly it may be in the best interests of a child born to a heterosexual couple to have contact with the known or unknown donor. Surely identical rules should apply to a child born within a heterosexual relationship? However, this would defeat the objects of the statutory presumptions and challenge the dynamics of the nuclear family. There is also a real possibility that a donor's intrusion into the heterosexual family could destroy the family unit. The fact that the mother, father and donor may all love the child, or that the donor may make a positive contribution to the welfare of the child, is beside the point.

It is acknowledged that some single women and lesbian couples may out of choice elect to self inseminate rather than access anonymous clinic run donor insemination. Reasons given for taking this option include the desire of the parents to know the donor, for the child to know the identity of all biological parents, the cost of clinic insemination and beliefs regarding women's rights to control their fertility. However, options and choices are the key words. Heterosexual couples have options denied to single women and lesbian couples. Recent studies indicate that only 22 per cent of lesbian women who elected to self inseminate did so because they were ineligible to access a donor insemination program.²⁰⁸ However, those 22 per cent have been discriminated against, they were obliged to self inseminate, whereas if permitted they would have used clinical insemination.

The provisions of the *Status of Children Act* and the *Infertility Treatment Act* indicate it is in the 'best interests' of all concerned to safeguard the anonymity of the legal parents, donor and children born from assisted conception. A shroud of secrecy is thrown over information identifying parent or child and the biological father is divested of all rights and obligations. However, single women and lesbian couples are not afforded this protection. Pursuant to an order of court they may be obliged to accept the presence of an unwanted third party notwithstanding that they are prohibited from accessing anonymous donor insemination.

For most lesbian couples the issue of whether to have children is carefully considered before embarked upon.²⁰⁹ In most cases the parties are in a stable long term relationship and are as committed to one another as a heterosexual couple in a relationship of similar duration.²¹⁰ The lesbian couple in *Re Patrick* desired to establish a family, a 'homo-nuclear' family. There was essentially no room in their relationship for a father. In his judgment in *Re Patrick*, Guest J acknowledged the need for State acts to provide lesbian women and their donors with the same facilities and services as heterosexual couples.²¹¹ His Honour

²⁰⁸ McNair and Dempsey, above n 71.

²⁰⁹ This was certainly the case in *Re Patrick* (2002) 28 Fam LR 579. At the time the donor was located the parents were separated as the co-mother wanted to carefully consider whether she wanted a child in their relationship.

²¹⁰ McNair and Dempsey, above n 71.

²¹¹ *Re Patrick* (2002) 28 Fam LR 579, 650.

recognised the need for the law to validate different kinds of families and, furthermore, that the 'homo-nuclear' family may present in various types of formations.²¹² One cannot but agree with Guest J that 'save for the obviousness of being a same-sex couple ... [t]he issue of their homosexuality is, in my view, irrelevant.'²¹³ Yet for all Guest J's good intentions this decision indicates that his ideas are entrenched in the ideal nuclear family and the need for a father/male figure.²¹⁴ The donor who was not one of Patrick's primary caregivers was awarded extensive contact. The orders for contact were similar to those made on the breakdown of a heterosexual relationship, indicating that Guest J regarded the dispute as essentially akin to a heterosexual dispute over contact with a child.²¹⁵ On two occasions during the course of his judgment, Guest J inadvertently referred to the donor as the 'husband' rather than using his chosen terminology, 'father'.²¹⁶

X CONCLUSION

This article serves to illustrate the heterosexual nature of a number of statutes. Little consideration is given to those in same-sex relationships and their offspring. Historically, the legislation is grounded in the heterosexual nuclear family and the law has not progressed sufficiently to include the 'homo-nuclear' family. There is little doubt that the law represents a tangled maze resulting in contradictory decisions such as *Re Patrick* and *Re Mark*, but there is room for optimism.

Whilst the Victorian Infertility Treatment Authority's interpretation of Sundberg J's decision in *McBain* is certainly disappointing, the impact of this decision must not be underestimated. It is a major breakthrough for single women heterosexual and lesbian, in a number of respects. First, public attention has been drawn to the plight of women wanting to have children and their difficulties in accessing assisted conception. Second, single women and lesbian couples now have their foot in the door; it is certainly not fully open but it is ajar. Clinically infertile single women and lesbian couples may now access assisted conception.

Moreover, the decisions of *McBain*, *Re Patrick* and *Re Mark* have created an impetus and climate for change. As part of its pre-election commitment in 1999 the Labour party undertook to refer 'adoption' and 'assisted reproduction' to the Victorian Law Reform Committee for consideration. This commitment appeared dormant until the dismissal of the *McBain* appeal in the High Court and the death

²¹² *Ibid.*

²¹³ *Ibid* 651.

²¹⁴ See Kelly, above n 15, in which the author insists that reform in this area must resist seeing the homo-nuclear family as missing a father.

²¹⁵ See Smyth, Caruana and Ferro, above n 117.

²¹⁶ *Re Patrick* (2002) 28 Fam LR 579, 615. Note that in the judgment published in the *Family Law Cases*, *Re Patrick: An application concerning contact* (2002) FLC 93-096, the reference to 'husband' also appears in paragraphs 187 and 224.

of Patrick.²¹⁷ On 11 October 2002, the Victorian Government asked the Law Reform Commissioner to undertake a reference in assisted reproduction, adoption and altruistic surrogacy arrangements.²¹⁸

Undoubtedly when the *Artificial Conception Act 1984* (Vic) was passed nearly 20 years ago it set out to assist clinically infertile married heterosexual couples. In 1995 the *Infertility Treatment Act* also confined the eligibility to assisted conception to married couples. However within two years, in 1997, the Victorian government was forced to reconsider the eligibility criteria.²¹⁹ The *Infertility Treatment Act* was amended to allow heterosexual couples living in a de facto relationship to access assisted conception.²²⁰ These amendments went some way in reflecting contemporary demands and alterations to family structures, but fail to take into account single women and gay and lesbian couples. The entire gamut of complex family formations emerging through assisted reproductive conception must be considered and catered for. The 'homo-nuclear' family reflects an important modern social trend which the law must keep pace with and manage.

Constitutional constraints restrict the range of recommendations which the Law Reform Commissioner may make and which may be implemented at a State level. Clearly the *Family Law Act* and *Status of Children Act* require revision. The *Status of Children Act* is in desperate need of reform to include and protect the appropriate biological and social parents of children born from assisted conception procedures. However, without complementary Federal legislation and backing such changes will have little impetus.²²¹

Amending the *Infertility Treatment Act* to eradicate the need for 'clinical infertility' is the first small step towards dismantling existing discriminatory barriers. Single women/lesbian couples must be able to access assisted conception procedures on the same terms as their heterosexual counterparts – this will go some way to levelling the playing field. As the law stands, single women and lesbian couples will continue to bear children, they will continue to self-inseminate and they will continue to be discriminated against.

²¹⁷ See Julie Szego, 'Battle for Boy Ends in Double Tragedy', *The Age* (Melbourne), 3 August 2002, 1.

²¹⁸ For current projects of the Victorian Law Reform Commission see its website <<http://www.lawreform.vic.gov.au>> at 8 December 2004.

²¹⁹ In 1997, the Human Rights and Equal Opportunity Commission found that three couples in long-term heterosexual de facto relationships refused access to ART had been discriminated against on the basis of their 'marital status'. See *MM, DD, TA and AB v The Royal Women's Hospital, Freemason's Hospital and State of Victoria*, HREOCA 6 (Unreported, Human Rights and Equal Opportunity Commission, Commissioner Kohl, 5 March 1997).

²²⁰ See *Infertility Treatment (Amendment) Act 1997* (Vic) which came into operation on 3 June 1997.

²²¹ Since the referral of powers over children, the operation of the Status Act in isolation, without prescription in the *Family Law Act*, is limited mainly to determining parentage for the purpose of inheritance and for payment of compensation to child of a person who is killed.