

## **Active Fathers, Natural Families and Children's Origins: Dominant Themes in the Australian Political Debate over Eligibility for Assisted Reproductive Technology**

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### **Abstract**

Extending eligibility criteria for assisted reproductive technologies (ART) to lesbian and single heterosexual women is a controversial topic in Australia. The media debate after the 2000 legal judgment, *McBain versus Victoria*, and the content of submissions to the 2003-06 Victorian law reform process indicate the extent to which many Australians ostensibly disapprove of unconventional family forms. In this paper, three dominant themes in contributions to the public debate and law reform process are analysed—'active' fathering, the distinction between social and medical infertility, and children's right-to-know their biological origins. The paper argues these themes reveal very different concerns that do not necessarily reflect homophobia or concerns specific to lesbian or single heterosexual family formation. First, the notion that children have a right to a social father reveals much about gendered contestations in heterosexual parenthood. Second, appeals to social/medical infertility and natural families reveal the continuing influence of Christian views about God-given natural law. Third, the strength of opinion about children's rights to knowledge of their biological origins emphasises the value placed on biogenetic notions of relatedness even by those more accepting of unconventional family configurations.

**Key Words** – Assisted reproductive technology, access issues; assisted reproductive technology and kinship; lesbian parents; donor insemination; fatherhood; children's rights

## Introduction

Few subjects cause more controversy than the prospect of extending to lesbians or single heterosexual women clinically assisted reproductive technologies (ART) such as donor insemination and *in vitro* fertilisation (IVF). From June to August 2000, Australia was in the thrall of a media debate on this topic. The debate commenced after Melbourne gynaecologist, Dr John McBain, won a court case against the State of Victoria.<sup>1</sup> Dr McBain took legal action on behalf of his client, Leesa Meldrum, a single heterosexual woman prevented because of her relationship status from eligibility for clinical donor insemination or IVF in her home state. In what became a highly controversial legal ruling, Justice Sundberg of the Federal Court found that the Victorian legislation, the *Infertility Treatment Act 1995* (Vic), contravened the federal *Sex Discrimination Act 1984* (Commonwealth, hereafter Cth), in denying some women access to assisted reproduction on the grounds of their relationship status.

This ruling may have faded into public obscurity, as had a similar decision brought down in South Australia several years earlier,<sup>2</sup> were it not for the timely intervention of the Australian Prime Minister, John Howard. The day after the McBain decision became public, Howard declared his intention to repeal the relevant sections of the *Sex Discrimination Act 1984* (Cth) in order to give those Australian states limiting assisted reproduction to heterosexual couples the legal right to discriminate. He was quoted in bold print on the front page of every major newspaper in the country: 'This issue involves overwhelmingly the right of children to have the reasonable expectation of the affection and care of both a mother and a father'. Melbourne's daily tabloid newspaper, the *Herald Sun* published a poll claiming that 90% of its readership supported the Prime Minister (Taylor & Probyn 2000). The Prime Minister carried through with the threat to repeal the Commonwealth sex discrimination legislation although the bid subsequently failed on a legal technicality (see Rabsch 2002).

It is timely in 2006 to revisit the media controversy surrounding the McBain decision, given the range of viewpoints it revealed about family relationships in Australia, and indeed the vehemence with which some people were prepared to defend the heterosexual nuclear family form. A similar debate will, no doubt, resurface in the media later this year, when the Victorian Law Reform Commission (hereafter, the Commission or VLRC) makes public their recommendations for changes to the Victorian ART laws. Recommendations include easing eligibility criteria for single heterosexual women and lesbian couples on the grounds that Victorian laws are inconsistent with other states (see VLRC 2005). In 2002, the Victorian Labor Government took a more measured approach than the Prime Minister to the considerable legislative and policy challenges posed by the McBain decision. Due to the inconsistencies and ambiguities in Victorian law and policy that became apparent post-McBain, the State Government referred assisted reproduction, adoption and some related legislation to the Commission, a statutory body with the authority to make recommendations for law reform on the basis of legal research and community consultations (see VLRC 2004).

In this paper, I explore select contributions to the McBain media controversy and to the subsequent law reform community consultation process in Victoria. The rationale for this is that such forums reveal a range of contemporary preoccupations and concerns about family relationships, not only those pertaining to lesbian or single heterosexual parents. As Haines (2002) suggests, ways of thinking about relationships between parents, children and families have a tendency to be taken for granted in the course of most people's day-to-day lives. Underlying assumptions about family relationships tend only to be openly expressed when a new or unusual situation provokes people to articulate their views (see also Edwards 1999).

As the levels of support for the Prime Minister's well-publicised opinion indicate, the notion that children have a right to a social father as well as a mother was a key theme in the post-McBain media debate as it has been in similar debates occurring overseas (see Stacey 1996; Donovan 2000; Haimes & Weiner 2000). However, it was certainly not the only theme and subsuming all objections voiced about single mothers or lesbian parenting to uniform concerns over the absence of a social father does not do justice to the range of viewpoints. The aim of this paper is to understand with due complexity the source of people's concerns about unconventional family configurations rather than dismiss them as moral panic or homophobia. To do so allows for better engagement with their views. Such engagement is particularly necessary in order to distinguish unsubstantiated or inconsistent morally conservative opinions about which family forms should be given state support, from legitimate and informed concerns about how ART is used to create new lives.

The discussion that follows is divided into two main parts. In the first section, an overview and some background is given to relevant Australian laws and policies pertaining to assisted reproduction. In the second section of the paper, I consider in turn three main themes in the political debate—'active' fathering, the distinction between 'social' and 'medical' infertility, and children's right-to-know their biological origins. I argue that these three themes in the debate articulate three very different threats and concerns posed by extending eligibility criteria for ART. First, the preoccupation with active fathers tells us as much about contemporary gendered contestations in heterosexual parenthood as it does about what people think of lesbian or single heterosexual mothers. Second, the social/medical infertility distinction and underlying assumptions about natural families reveals the influence of Christian views about procreation as God-given natural law. Third, the strength of opinion about children's right to know their biological origins emphasises the value placed on biogenetic notions of relatedness, even by those who are accepting of unconventional social family configurations.

## **Eligibility for ART in Australia**

Australia is a world leader in the development of ART and home to the world's fifth IVF baby, Candice Reed, born in Melbourne in 1980. Candice Reed's birth state—Victoria—was the first jurisdiction in the world to develop comprehensive legislation pertaining to the use and development of ART (Waller 2000). In 1984, the Parliament of Victoria enacted the *Infertility (Medical Procedures) Act 1984*, based on the findings of a committee convened to investigate the social, legal and ethical consequences of reproductive technologies (see Government of Victoria 1983). This committee became known world-wide as the Waller Committee. The legislation informed by the Waller Committee's deliberations regulated the emergent technologies IVF and embryo experimentation, in addition to the already well-established practice of donor insemination. Donor insemination had, at that time, already been practised in Australia for at least 30 years as a means of circumventing male infertility in married couples (Kovacs 2003).<sup>3</sup>

Legislative and policy regimes in the different Australian states and territories diverge considerably with regard to how inclusive they are of single heterosexual women and lesbians as recipients of IVF and donor insemination. The various regulatory frameworks rest on a continuum from permissive to restrictive. There is relative ease of access to clinical services, including donor insemination, for lesbians and unpartnered heterosexual women in New South Wales, Western Australia, Tasmania and the Australian Capital Territory. Access is more restricted in South Australia, Queensland and the Northern Territory. The most restrictive legislative regime of all is found in Victoria. Lesbians from Victoria are known to

travel to Sydney and a clinic in the regional New South Wales town of Albury (just over the Victorian border) in order to obtain donor insemination (McBain 2000; McNair et al. 2002).

The wording and guiding principles of the Victorian *Infertility Treatment Act 1995* presume users of assisted reproduction are infertile heterosexual couples requiring medical intervention or donor sperm in order to conceive. 'The best interests of the child' are of paramount consideration and the most important of the principles guiding the Act. The implication is also that being born to a heterosexual couple is in the child's best interests (VLRC 2004). Donor insemination, along with the more medically complex procedures *in-vitro* fertilisation (IVF), gamete intra-fallopian transfer (GIFT), and intra-cytoplasmic sperm injection (ICSI), are defined in the Act as *treatment procedures* that can be implemented only by approved doctors at licensed premises. Only married couples were eligible to receive treatment procedures until a December 1997 amendment extended eligibility to heterosexual couples in *de facto* relationships. The law was changed after several discrimination complaints were brought before the Victorian Human Rights and Equal Opportunity Tribunal (McBain 2000).

The July 2000 Federal Court ruling in the case of McBain versus Victoria made redundant the heterosexual relationship status requirement in the *Infertility Treatment Act 1995* (Vic) on the grounds that it contravened the federal *Sex Discrimination Act 1984* (Cth). Since that time, lesbians and single heterosexual women in Victoria assessed as 'clinically infertile' have been eligible to obtain IVF. However, women who are not married or in *de facto* heterosexual relationships and who have no medically discernible reproductive disorders remain ineligible for donor insemination (Infertility Treatment Authority (hereafter, ITA) 1999). Lesbians and single heterosexual women considered to be fertile who want to get pregnant must either utilise self-insemination with sperm obtained from men they know, or travel interstate to use clinical donor insemination.

### Three Dominant Themes in the Political Debate

I turn now to consider in more detail three dominant themes in concerns about extending eligibility for assisted reproduction to lesbians or single heterosexual women in Victoria and the assumptions or reasoning underlying these viewpoints.

#### 'Active' Fathers

This issue involves overwhelmingly, in the opinion of the government, the right of children in our society to have the reasonable expectation, other things being equal, of the affection and care of both a mother and a father (Australian Prime Minister, John Howard, quoted in the *Herald Sun*, Wednesday August 2, 2000, p.4).

Perhaps the main theme to dominate the post-McBain media debate was the notion that children have a right to a social father. As mentioned earlier in the paper, this was John Howard's publicly stated position on the issue. However, this assertion about children's rights soon became subsumed into a broader discussion about contemporary fatherhood in which the concept 'active fathering' figured prominently.

For several weeks after the McBain decision became public knowledge, a vast array of feature articles and opinion columns on the state of contemporary father/child relationships appeared in *The Age*, the *Herald-Sun* and national broadsheet *The Australian*. These were characteristically interspersed with articles that featured interviews with lesbian parents and their children, as if the editorial staff were keen to avoid accusations of representational bias.

For example, a carefully researched and ostensibly approving article in *The Australian* about lesbian parents Kerry and Wendy, and their daughter Erin, referred to as a 'happy family' throughout (Wynhausen 2000), was conspicuously flanked by two sizeable reflections on the social value of contemporary fathers (Stapleton 2000; Brearley & Niesche 2000).

'Active' fathering was portrayed as live-in, responsive and responsible caregiving at each stage of a growing child's life. The latest book by a well-known parenting educator, Michael Grose, that promoted this concept, figured prominently in a number of feature articles and opinion pieces (for example, Gray 2000; Baskett 2000; Grose 2000). Tim Fischer, former Deputy Prime Minister, who had recently retired from politics, was praised in an article that featured Grose's book for turning his back on his high profile career to spend more time with his wife and sons (Baskett 2000).

For instance, Baskett (2000) outlined the childrearing activities fathers should engage in at each developmental stage of their child's life, beginning in early infancy. The appropriate focus for the father, regardless of the child's age, was seen to be developing a sense of intimacy and involvement through taking responsibility for some aspects of the child's daily care. Taking the time to become familiar with the child's likes, dislikes and concerns was also seen as a priority for active fathers. Sensitivity and hands-on caregiving as well as bringing home money were emphasised as an active father's rightful domain.

Active fathering appeared to address the claim made by some lesbian mothers who wrote to the papers that children only need a father-figure in their lives as a masculine 'presence' or occasional 'male role model'. As such, active fathering was distinguished from the kinds of playful 'rough and tumble' or 'human toy' activities that fathers are conventionally said to enjoy with their children, while mothers perform the day-to-day work of childrearing. To give an example, under the headline, 'a real man prefers fathering to football', Don Edgar, a prominent social policy commentator, berated fans of the Australian rules football team who had expressed annoyance that their star player had missed a finals match to be at the birth of his child. Edgar emphasised active fathering as a consensus project of women and men, who were portrayed as 'thoroughly sick' of the manner in which the contemporary workplace makes demands on family time and regards men as 'economic tools' (Edgar 2000: 13). Active fathering was thus framed as a set of culturally valorised attitudes and behaviours that enhanced the family partnerships between men, women and their children, all of whom were seen to benefit from fathers putting family before work.

The attention paid in the media at this time to valorising active fathers gestured towards a perceived lack of congruence between the childrearing goals of lesbian-parented or single mother families and those of the contemporary heterosexual nuclear family. While the former group were ostensibly down-playing the need for men to participate in raising children, the trend within heterosexual families is overwhelmingly to encourage men to 'be there' and provide substantial assistance to their female partners in the parenting of the children. As Lupton (2000) and many other contemporary sociologists note, there has been far more emphasis in recent years on egalitarian models of parenting within nuclear families, with the post-Women's Liberation inroads many mothers have made into the paid workforce and the concomitant demise of the permanent stay-at-home mother. Research conducted over the past decade with heterosexual men and women has strongly suggested that attitudes to parenting are changing for both, as the cultural valorisation of the breadwinner husband and home-based wife continues to decline (for example, Gerson 1993; Doucet 1995; Lupton & Barclay 1997). Heterosexual women increasingly want and expect their partners to engage in childrearing and men, in turn, are expressing a greater desire to become more involved with the day-to-day lives of their children.<sup>4</sup>

There is a strong argument to be made that many of the 'active fathering' supporters were not so much motivated by a concern for the welfare of children being raised by lesbian or single mothers as by their perceptions of the appropriate interests of contemporary heterosexual fathers. Cannold (2002) notes that such displays of indignation and conscientious public defences of the social value of fathers have been conspicuously absent when the single women seeking access to assisted reproduction do so in the context of a past socially approved relationship with a man. She provides the example of the media debate that erupted in the UK as a consequence of the legal action of widow, Dianne Blood. Blood, who asserted a right to conceive with her dead husband's sperm, and subsequently gave birth to two children, was rarely castigated in the media for depriving her children of a social father. Rather, the media debate at that time and place focused on whether or not there should be an ethical requirement that individual men give consent for their sperm to be used to facilitate posthumous conception.

The over-arching emphasis in this debate on the benefits of close father/child relationships in heterosexual families strongly gestures toward the changing value of children to heterosexual men. At this historical moment, intimate relationships between heterosexual men and women carry increasingly fewer expectations of life-long endurance. Beck and Beck-Gernsheim (1995) have attributed the cultural valorisation of the more involved and caring father—the 'active' father of this debate—to the contemporary impermanence of the marital tie or sexual bond. According to these authors, in the developed West, it is the parent-child bond that has come to represent the only permanent intimate relationship, and devoting time to this relationship is more and more believed to guard against the ever-present threat of being without the sense of place and belonging that comes from sustaining intimate relationships:

Where other aims seem arbitrary and interchangeable, belief in the afterlife vanishes and hopes in this world prove evanescent, a child provides one with a chance to find a firm footing and a home (Beck & Beck-Gernsheim 1995: 107).

Although about 70% of Australian children continue to be born to married parents living in conventional nuclear family households, between one-third and one-half of marriages now end in divorce (Australian Bureau of Statistics (ABS) 2001). Beck (1992) notes how the increasing incidence of divorce has created the perception of shifts in the 'distribution of burdens and opportunities' between the genders, when it comes to children:

To put it schematically, the woman is left after divorce with children and without an income, the man by contrast with an income and without children ...to the degree that economic inequality exists between women and men ... fathers become aware of their disadvantage, partially legally and partially naturally. The woman has possession of the child as a product of her womb, which we all know does belong to her, biologically and legally. The property relations of ovum and sperm become differentiated (Beck 1992: 113).

These arguments sit well with the politicisation of fathers' rights in Australia in recent years, in the context of publicly aired grievances about men's curtailed possibilities for contact with or residence of children post-divorce or separation. For instance, the groups Fathers for Family Equity and Lone Fathers have consistently lobbied federal Members of Parliament in recent years in the hope of effecting automatic 50-50 residence provisions for mothers and fathers in the event of divorce. This initiative received endorsement from Prime Minister, John Howard, who in June 2003 announced an enquiry into 'joint custody'. The Government's community consultation process on the proposed reforms finished in early 2005 and changes to the *Family Law Act 1975* (Cth) were introduced later in 2005. The

changes promote shared parenting and shared responsibility for children between divorcing women and men although they stopped short of the initial proposition that children automatically spend equal time with each parent (see Caruana 2005).

The debate about active fathers demonstrated that it is difficult to separate out a notion of children's rights from the interests of the adults who have emotional investments in their care and welfare. In this regard, the post-McBain versus Victoria media debate proved a highly suitable vehicle for the public airing of concerns about the role of men in conventional nuclear families, particularly under conditions of separation or divorce.

### **Social and Medical Infertility**

A second theme considered in this paper is the heated and complex policy debate over so-called social and medical infertility that ensued in the wake of McBain versus Victoria. This thread of the controversy emphasised the extent to which heterosexual relationships are believed to constitute the natural and therefore unchanging appropriate relational form when it comes to having and raising children. However, the concept of nature on which such beliefs are based was revealed as extremely shifting ground.

Franklin (1993) observes that conceptive technologies such as donor insemination and IVF have great potential to unsettle the perceived naturalness of heterosexuality because they demonstrate that humans can intervene successfully to separate reproductive activity from heterosexual activity. If technology can alter the way in which people can have children, it demonstrates that heterosexuality is not an unchanging or immutable process on which we need necessarily depend for human reproduction. However, paradoxically, Franklin contends, the possibilities posed by ART often have the opposite effect. They provide instead a good opportunity for the re-invention of a natural basis for heterosexuality in family formation, instead of broadening public perceptions about what are or could be other valid relational foundations for parenthood. The social/medical infertility trajectory of the post-McBain debate provides a contemporary Australian illustration of her point.

In McBain versus Victoria, Justice Sundberg of the Federal Court found that fertility treatment conformed unambiguously with the definition of services in the *Sex Discrimination Act 1984* (Cth) (del Villar 2000). Section 22 of the Act forbids discrimination in the provision of goods and services on the grounds of sex or marital status.<sup>5</sup> After the decision was handed down, the ITA immediately sought legal advice to ascertain its policy implications. At this juncture, (then) federal Minister for Health, Michael Wooldridge, intervened with a distinction between two categories of women seeking reproductive services: the *socially* and the *medically* infertile.

Wooldridge claimed there was an important difference between women who 'lacked a male partner' and those wanting access to 'medically required services' (Whelan 2000, p. 4). The former group were deemed ineligible for ART because 'there is a simple alternative, which is intercourse'. The Minister referred to the federal *Medicare Act 1984* (Cth), in its requirement that services provided from the public purse be 'clinically relevant' (Whelan 2000, p. 4). He threatened to prosecute doctors who provided subsidised reproductive services to single women and lesbians with no physical reproductive disorders. The next day, Wooldridge was quoted as saying assisted reproduction for lesbians was analogous to an artificial procedure such as cosmetic surgery undertaken to enhance one's physical appearance (Koutsoukis, Hawthorne & Gosch 2000).

The legal opinion received by the ITA from Gavan Griffith, Queen's Counsel, reinstated the infertility requirement. This was in keeping with the logic, if not the pejorative tone, of Dr

Wooldridge's comments. Then Chief Executive Officer of the ITA, Helen Szoke, in announcing the regulatory body's decision emphasised two points made by Griffith: first, *McBain versus Victoria* clearly waived the marriage requirement insofar as this contravened the *Sex Discrimination Act 1984* (Cth); and second, that it was:

...made within the context of the over-riding features of the *Infertility Treatment Act 1995* and, of particular interest to the Authority, made in the context that there is a requirement for what is now colloquially known as 'clinical infertility' (Szoke 2000, p. 1).

Griffith maintained that despite the waiver of the heterosexual relationship requirement, there was still a requirement for infertility. He based this on certain comments made by Justice Sundberg in the *McBain versus Victoria* judgment, read in conjunction with Section 8 (3)(a) of the *Infertility Treatment Act*. Justice Sundberg stated:

What has to be characterised is the provision of medical treatment that is designed to overcome any trait that precludes fertilisation occurring in the conventional manner. Fertility treatments dissect biological processes and focus on overcoming any one of a series of problems that may arise before, during or after intercourse, and which preclude fertilisation (Sundberg quoted in Szoke 2000, p. 2).

Section 8 (3)(a) of the *Infertility Treatment Act 1995* (Vic) states:

Before a woman undergoes a treatment procedure 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.

The negation of the requirement 'sperm produced by her husband' was a clear consequence of the Sundberg ruling (Skene 2000). However, Griffith maintained that 'an oocyte produced by her' would retain its relevance for women seeking IVF or clinical donor insemination.

The Victorian lesbian activist group, Fertility Access Rights Lobby (hereafter FAR), quickly mobilised and obtained an alternative legal opinion from Peter Hanks, Queen's Counsel.<sup>6</sup> Hanks asserted Griffith's advice reinstated direct discrimination on the basis of relationship status, precisely the kind of discrimination the judgment sought to remedy. This is because it allowed for a situation where a married woman with no physical reproductive disorders was eligible for donor insemination if her husband was infertile whereas a single heterosexual or lesbian woman was excluded. Or, to make use of the distinctions introduced into the debate by Wooldridge, there was no suggestion in Justice Sundberg's judgment that partnered heterosexual women with no physical reproductive disorders should have to find a fertile man to have sex with, rather than receive donor insemination or IVF. This alternative legal opinion failed to convince the ITA.

Arguably, value judgements designating a clinical requirement based on the couple for one group of women but not another did not appear discriminatory to the authorities because they were based on an underlying assumption that vaginal intercourse is an unchanging natural process with reference to which families are created. The two person process – intercourse – is perceived as natural, and when that process fails to lead to conception and birth medical intervention is justified as treatment through a subtle shift in the meaning of natural. In other words, the dominant biomedical model of infertility is predicated on a naturalisation supporting the maintenance of nuclear families; the idea that there are *natural causes* of infertility that deserve treatment. The problem with this reasoning, as Franklin (1993) argues,

is that it reveals nature as shifting ground that constitutes in itself no stable foundation on which to base a value judgement. Furthermore, it construes as 'unnatural' those who do not have intercourse. Unnatural becomes equated with 'immoral' or inferior.

Franklin's point that there has been a subtle shift in thinking of nature as 'a natural way to have a baby' to nature as 'natural causes of infertility' was more explicit in submissions from members of the general public to the 2004 Victorian Law Reform Commission community consultation. In a number of submissions, Christian members of the public objected to extending donor insemination or IVF to lesbian or single heterosexual women due to their beliefs in procreation as God's natural law. There was no suggestion in many submissions that the use of technology itself was an unnatural intervention in God's natural law. By implication in these submissions, ART is justified when processes based on natural law fail. For instance, submission 148 read as follows:

My fundamental argument [against extending eligibility criteria for ART] comes from natural law. In the natural world (where there is no advanced medical technology and where healthy men and women are fertile) a baby is produced only when a fertile man has sex with a fertile woman. Nature discriminates. It produces no babies from same-sex couplings. It is not discriminatory for society to replicate in law a pattern that occurs naturally by the discrimination of nature itself.

In a similar vein, submission 136 objected to extending eligibility criteria on the following grounds:

Conception belongs to the love of two persons (of the opposite sex)...human beings are created in the image and likeness of God.

Furthermore, a standard ending to the submissions from members of the public affiliated with Christian religious organisations read: 'It is right and proper for the dangers and perceived problems of unnatural family units to be discussed' (see submissions 37, 38, 49-54, 307, 308 and 334).

Comments such as the above take it as given that unchanging and universal mandates from God about heterosexual families are expressed in the act of intercourse, whether or not the act itself leads to conception. This is an assertion that condemns all other forms of sexual expression as unnatural and therefore immoral. However, as Gilding (1997) contends, biologically derived explanations for the family condemning homosexual sex as unnatural cannot accommodate the considerable evidence of homosexual behaviour among many animal and insect species. They also cannot explain the full extent of cultural variation and historical change in family formation. Biological explanations for the family based on God-given decree would seem to demand that the heterosexual nuclear family has existed in unchanging form throughout history when this simply cannot be substantiated in the historical record.

To conclude this discussion of purported natural and unnatural bases for ART, the McBain versus Victoria decision marked the emergence in Australian legal discourse of donor insemination and IVF as 'services'. This was potentially an historical moment of what Franklin and McKinnon (2001, p. 4) would call 'defamiliarisation', in which the commonsense understanding that assisted reproduction constitutes a remedial treatment for the failure of natural processes was, at least momentarily, challenged and disrupted. However, donor insemination and IVF were quickly reincorporated into the naturalising propensities of the treatment metaphor, in the arena of social policy rather than law. Convictions about natural and unnatural families reappeared in submissions to the VLRC, based on similar

understandings that heterosexual intercourse is a fundamental process with reference to which families are created. The post McBain versus Victoria public debate in July-August 2000 and November 2001 ultimately produced a policy position that deemed lesbians and single heterosexual women with 'medical infertility' eligible to access *in vitro* fertilisation whereas those with no diagnosable reproductive disorder remained ineligible for donor insemination through Victorian reproductive medicine clinics. At the time of writing this remains the status quo.

### **Children's 'Right to Know' their Biological Origins**

The third theme which came to prominence in the post McBain versus Victoria debate was the notion that children have a right to know their biological origins. Some articles evoked an immediate parallel between children born of donor insemination and children adopted at birth. The problematic link perceived between the two practices was that both potentially allow for a situation where children can grow up without knowledge of one or both of their biological parents. Many of the writers pursuing these kinds of preoccupations were not interested in the institutional form that the family takes or the gender of a child's parents. They were often at pains to distinguish themselves from those who believed that children need fathers. Their musings were about the status of the biological connections, viewed as fundamental or inevitable, into which each child is born.

For instance, in an article entitled 'Blood ties', that appeared the weekend after the McBain versus Victoria decision was brought down, Jerums recounted the story of one adult adoptee's search for and encounter with his biological father. She saw the truth of this man's status as his father's son as an embodied truth; it was believed manifest in aspects of his personality and aptitudes, his likes and dislikes, and the way he looked and spoke. This perceived evidence of shared biological substance is what, to Jerums, fundamentally made this man his father's son despite the 40 year absence of a social relationship:

All the signs are there. They look alike. Think and talk alike. Stand the same way — legs apart, toes pointing outwards. Each is good with his hands and both hate the taste of cucumber. Sure enough, Mark Granland is his father's son. It's uncanny, considering the two met for the first time in 1997 (Jerums 2000, p. 10).

Jerums was preoccupied with the tangible (visible or otherwise sensory) signs of biological connections as the source of their emotional resonance and endurance. By contrast, writer Joanna Murray-Smith evoked genealogy; a more abstract notion of the history and culture such connections represent. Children conceived from donor sperm, in Murray-Smith's view, should not be regarded as unanchored individuals; they are inevitably connected to past lives and experiences via blood ties. Such connections are thought to provide the meaningful context in which their own lives will unfold; they constitute a story about the past. The inference here is that with only part of the biological story, the child's story remains partial as well:

Biological fathers are permanent, even if they are absent — because blood is. ...The creepiest aspect of the long, complicated in-vitro story, further complicated by the debate over gay parenting, is that a child can be born knowing only half its biological story, and, therefore, half of its emotional and cultural history... the first step toward self-knowledge (Murray-Smith 2000, p. 15).

Bone accentuated how such convictions about the importance of blood ties are being backed up empirically by studies undertaken by geneticists. The significance of biology was also a truth claim based on science in her account; scientific progress was seen as shoring up

rather than challenging folk or commonplace ideas about the significance of biological connections:

Now studies of identical twins reared apart are showing how much comes from our genes: the tendency to be conservative or not, to be religious or not, to be depressed or optimistic, to like certain colours, to be susceptible to some illnesses. Blood's thicker than water, after all (Bone 2000, p. 16)

For Bone, as for Jerums and Murray-Smith, the logical extension of being like, whether through notions of blood ties or genes, was the conviction that a child is entitled to have the possibility of social access to those he or she is intrinsically like.

That the meeting of ovum and sperm constitutes a person's origins, and that the man and woman who produce these gametes are biogenetic parents, who contribute equal measure of biological substance to any offspring, has been made explicit as a key tenet of kinship thinking in two decades of debates in the developed West since the widespread use of ART (Strathern 1992). A cursory search of the national media archives revealed that between 1982 and 1987, peaking in number in 1984, numerous Australian newspaper articles addressed the question of children's right to know in regard to a variety of ART procedures involving donor gametes. A similar debate about origins accompanied the rise of the 1960s–1970s adoption self-help movement (Marshall & McDonald 2001). In this regard, the post McBain versus Victoria debate constituted the continuation of a public conversation about the significance of blood ties to children that has been ongoing in Australia for several decades. It was by no means an issue peculiar to the prospect of lesbians or single heterosexual women having access to ART.

The concept 'genealogical bewilderment' was coined by Wellisch during the 1950s in the context of adoption (Marshall & McDonald 2001) and reappeared in the work of H.J. Sants in 1964 with regard to children born of donor insemination. Sants believed that a genealogically bewildered child could be found in any family where one of the biological parents was unknown. Genealogical bewilderment as a theory is to an extent supported by observable confusion and distress among some people born of anonymous donor insemination. This was evident in a US-based documentary exploring the lives of adults born from anonymous semen donations to the Sperm Bank of California in the early 1980s, and recently shown on the *Four Corners* program (Australian Broadcasting Commission 2003). In this documentary, one man in his 50s told of the 'hidden blood connections that haunt him' every day of his life. His life thus far had been subsumed by the quest to find his biological father. He was also deeply troubled by a persistent feeling that people he met who looked like him could be siblings. This had interfered with his ability to have sexually intimate relationships as he also feared the possibility of entering an incestuous relationship with a biological sister.

However, genealogical bewilderment remains a contested theory when it comes to children born of donor insemination, just as it has been in the case of adopted children (see Marshall & McDonald 2001). Haimes (2002) comments that the bulk of what is known about the donor insemination child's purported right-to-know comes from those policy makers, clinicians and social commentators who believe they are positioned to make claims as to what is in a child's best interests. Emotive search and reconciliation stories appear reasonably regularly in the media and the existence of donor offspring support groups is testimony to the distress caused for some born of the procedure. That said, there is little known about how widespread among donor insemination children the feelings of utter confusion, grief and loss often expressed in public accounts actually are. As Kirkman (2002) notes, it is an axiom among social researchers and clinicians working in the arena of assisted reproduction that

many donor insemination children born to heterosexual couples are not told their social father is not also their biological father and may never know they are donor-conceived.

Other scholars see in notions of genealogical bewilderment or 'right to know', not the facts about children's rights or needs but evidence of a certain 'genes R us' manner of thinking, that is becoming increasingly difficult to ignore. Genes are increasingly attributed enormous power: for instance, the ability to predict an individual's future health and disease trajectory. Finkler (2000) declares contemporary Western cultures are characterised by the hegemony of the gene which is leading to a strong propensity to overly medicalise kin relationships. Her statement is to some extent supported by preoccupations evident in the published narratives of donor insemination children:

At the optician or general practitioner, I am asked about my family history, yet I know only half of it. ... in my more paranoid moments I ruminate over those rare familial conditions I might have inherited. Am I safe taking the pill? Should I have my cholesterol measured? Should I be screened for colonic polyps? (Anonymous 2002, p. 2)

Finkler (2000) also observes that to a considerable extent, this geneticisation or medicalisation of kinship sits somewhat uneasily with the equally strong contemporary notion that families are increasingly based on principles of affinity or choice rather than biogenetics. As scientists continue to propose and provide the public with evidence that genetic histories hold the key to predicting future health and well-being, it becomes harder to ignore that a child's biogenetic makeup is inevitably linked to the future in terms of who that child will become. However, as the various threads in this media debate exemplify, older ideas of biological connectedness that emphasise the notion of 'bloodline' rather than genetics still prove equally compelling.

## Conclusion

In Australia at this historical moment social definitions of legitimate family forms, as well as the question of who is fit to reproduce with state assistance, are hotly contested and emotive issues. This makes it important to unpack the various assumptions and fears about family relationships that people mobilise when expressing their views about eligibility criteria for ART. For instance, understanding the contemporary tensions in heterosexual parenting relationships enables us to recognise how debates about lesbian parenting may engage displaced fears about divorced men's legitimate roles in their non-custodial children's lives. Recognising this allows us to relocate discussion of those fears to heterosexual rather than lesbian-parented or single mother families. Similarly, unpacking the shifting view of nature in discussions of ART exposes the concept of nature as itself culturally constructed. This exposes purported violations of nature as dubious and rather unstable ground on which to base blanket opposition to newer family forms.

Nonetheless, it would be dismissive and ungenerous to relegate all the reservations expressed in this debate to unsubstantiated beliefs in the fixity of natural relationships or displaced fears about heterosexual parenthood post-divorce. The post-McBain deliberations revealed also the extent to which popular understandings about biological connections between parents and children have immense emotional resonance. Foremost, the question of how biological connections between parents and children are recognised socially revealed the extent of cultural beliefs that children only realise their full potential as individuals when firmly embedded in a history, a culture and a strong nexus of kin. Interestingly enough, single heterosexual women and lesbian couples often express a preference for known rather than

anonymous sperm donors for precisely this reason. Research conducted thus far with these groups also indicates that lesbian and single heterosexual parents have fewer reservations about telling their children they were donor-conceived than heterosexual couples, given the absence of a social father. They often prefer to utilise sperm banks that require donors to register their identity, in order that the child can have the option of finding out information or seeking contact on reaching adulthood (see Hertz 2002; Dempsey 2005).

It seems important to point out here that the assisted reproduction legislation in Victoria was drafted in accordance with the principle 'children's right to know' and proposed changes to the Victorian legislation continue to support that premise. Since the *Infertility Treatment Act 1995* (Vic) was proclaimed in January 1998, donors of semen or ova to Victorian reproductive medicine clinics have been obliged to enter their name, address, health and other personal information about themselves into a central register kept by the ITA. Although parents are not mandated to disclose to their children they are donor conceived, information about the donor is available on request to any child born of the procedures once they reach the age of 18. There is also a voluntary register, which allows pre-1998 donors and people born of donated gametes to make their contact details available to each other. This means that children born to lesbian and single heterosexual parents, as well as heterosexual couples, will be able to find out details about their donors should they wish to.

Since *McBain versus Victoria*, restricting ART in Victoria to those who qualify as medically infertile cannot ensure, as the previous guidelines and legislation did, that the state only assists in the formation of heterosexual nuclear families. The question begged now is what larger philosophical, ethical or social purpose is served by perpetuating the status quo distinctions between fertile and infertile lesbians or single heterosexual women? Interim recommendations for changes to eligibility criteria for ART were released by the Victorian Law Reform Commission in June 2005, many of which are favourable to expanding access to donor insemination and other clinical services to lesbians and single heterosexual women in Victoria. This is despite the fact that many submissions to the Commission reiterated the strong beliefs about children's need for fathers and natural families that were aired in the July/August 2000 media debate. The Commission has taken the view that the health and well-being of children born of assisted reproduction is the paramount consideration, in keeping with the first guiding principle of the current *Infertility Treatment Act*. However, the Commission is showing no signs of equating children's health and well-being with the need to have a father or to grow up in a nuclear family. Rather, the emphasis is that strong moral or religious convictions against single or lesbian mothers cannot be backed up by any substantive evidence of harm done to children (VLRC 2005). On the contrary, a voluminous body of research exploring children's development in lesbian-parented or single parent families emphasises it is family processes rather than family structures that have most bearing on children's well-being (see McNair 2004).

However, in Australia, as in other Western jurisdictions, the practices of medicine and law have often converged in assisted reproduction to reinstate the semblance of conventional biologically related nuclear families (see Haimes & Daniels 1998; Agigian 2004), the family form many people believe is natural. Despite the evident state-by-state legal inconsistencies of assisted reproduction eligibility criteria in Australia, and increasing social challenges to the heterosexual nuclear family, the passionate and conservative debate that has so far accompanied eligibility criteria for ART in Australia makes it unlikely the Victorian State Government will actively seek out renewed public attention to this issue in what is, after all, an election year.

## Endnotes

<sup>1</sup> *McBain v the State of Victoria & Ors* (2000) 99 FCR 116.

<sup>2</sup> *Pearce v South Australian Health Commission and Others* (1996), South Australian Supreme Court SASR 486.

<sup>3</sup> Daniels et al. contend donor insemination managed to escape state regulation for a long time because 'unlike more technologically sophisticated procedures it masqueraded as conventional conception' (2000: 40). Donor insemination could be considered a private matter between couples and their doctors.

<sup>4</sup> Although there is scholarly consensus that expectations of fathers are changing, whether or not behaviour is changing is the subject of a particularly vigorous debate among sociologists. Generally speaking, the 'revolving door' theory, that is, the prospect that as women moved into the workplace, men would take up more of the work at home, has not been supported by the empirical evidence (see Bittman & Pixley 1997; McMahan 1999 for comprehensive reviews of this literature.)

<sup>5</sup> The Australian Constitution deems that where there is inconsistency between federal and state laws, the Commonwealth legislation applies.

<sup>6</sup> See Walker 2000 for a detailed legal discussion of the opinion.

## References

- Australian Broadcasting Commission (2003) Who am I? [screened 8.30pm, Monday March 3 [http://www.abc.net.au/4corners/content/2003/20030303\\_who\\_am\\_i/default.htm](http://www.abc.net.au/4corners/content/2003/20030303_who_am_i/default.htm) Date accessed August 4 2004.
- ABS (Australian Bureau of Statistics) (2001) *Marriages and Divorces Australia 2000*. Catalogue No. 3310.0, ABS, Canberra.
- Agigian, A. (2004) *Baby Steps: How Lesbian Alternative Insemination is Changing the World*. Wesleyan University Press, Middletown, Connecticut.
- Anonymous (2002) How it feels to be a child of donor insemination. *British Medical Journal*, 324(7340), data supplement.
- Baskett, S. (2000) Finding the time for being a dad. *Herald Sun*, August 9, p.17.
- Beck, U. (1992) *Risk Society: Towards a New Modernity*. Sage, London.
- Beck, U. & Beck-Gernsheim, E. (1995) *The Normal Chaos of Love*. Polity Press, Cambridge.
- Bittman, M. & Pixley, J. (1997) *The Double Life of the Family*. Allen and Unwin, Sydney.
- Bone, P. (2000) The loneliness of a fatherless child. *The Age*, August 17, p.12.
- Brearley, D. & Niesche, C. (2000) Wait till father gets home. *The Weekend Australian*, August 5-6, p. 27.
- Cannold, L. (2002) DNA tests, paternity 'fraud' and moral panic about single women and lesbians forming families with donor sperm. *Journal of Professional and Applied Ethics*, 4(2), 19-33.
- Caruana, C. (2005). Family law update: Changes to Federal family law and State domestic violence legislation. *Family Matters*, 70, Autumn, 66-67.
- Daniels, K., Blyth, E., Hall, D., and Hanson, K.M. (2000) The best interests of the child in assisted human reproduction: the interplay between the state, professionals and parents. *Politics and the Life Sciences*, 19(1), 33-44.
- del Villar, K. (2000) *Research Note 03 2000/2001 McBain v State of Victoria: Access to IVF for All Women*, Commonwealth Parliamentary Library, Canberra, <<http://www.aph.gov.au/library/pubs/rn/2000-01/01RN03.htm> Date Accessed August 30 2000.
- Dempsey, D. (2005) Lesbians' right to choose, children's right to know. In Jones, H.G. and Kirkman, M. (eds.), *Sperm Wars*. ABC Books, Sydney.
- Donovan, C. (2000) 'Who needs a father? Negotiating biological fatherhood in British lesbian families using self-insemination', *Sexualities*, vol. 3, no. 2, pp. 149-64.
- Doucet, A (1995) Gender equality and gender differences in household work and parenting. *Women's Studies International Forum*, 18(3), 271-84.
- Edgar, D. (2000) Modern men win by playing at home. *The Australian*, August 22, p. 13.
- Edwards, J. (1999) Explicit connections: ethnographic enquiry in north-west England. In J Edwards, S Franklin, E Hirsch, F Price & M Strathern (eds), *Technologies of Procreation: Kinship in the Era of Assisted Conception*, 2nd edn. Routledge, London, pp.60-90.

- Finkler, K. (2000) *Experiencing the New Genetics: Family and Kinship on the Medical Frontier*. University of Pennsylvania Press, Philadelphia
- Franklin, S. (1993) Essentialism: which essentialism? Some implications of reproductive and genetic techno-science. *Journal of Homosexuality*, 24(3-4), 27-40.
- Franklin, S. & McKinnon, S. (eds) (2001) *Relative Values: Reconfiguring Kinship Studies*. Duke University Press, Durham and London.
- Gerson, K. (1993) *No Man's Land: Men's Changing Commitments to Family and Work*. Basic Books, New York.
- Gilding, M. (1997) *Australian Families: A Comparative Perspective*. Sydney, Longman.
- Government of Victoria (1983) *Report on Donor Gametes in IVF*. Committee to Consider the Social, Ethical and Legal Issues Arising from *In Vitro* Fertilisation (Waller Committee), Melbourne.
- Gray, P (2000) Here's why fathers are important in helping to raise balanced kids. *Herald-Sun*, August 9, p.18.
- Grose, M. (2000) Dads make a difference. *The Age*, August 4, p.15.
- Haimes, E. (2002) When transgressions become transparent: limiting family forms in assisted conception. *Journal of Law and Medicine*, 9(4), 438-448.
- Haimes, E. & Daniels, K. (1998) Introduction. In E Haimes & K Daniels (eds), *Donor insemination: International Social Science Perspectives*, Cambridge University Press, Cambridge.
- Haimes, E. & Weiner, K. (2000) "Everybody's got a dad"...issues for lesbian families in the management of donor insemination. *Sociology of Health & Illness*, 22(4), 477-99.
- Hertz, R. (2002) The father as an idea. *Symbolic Interaction*, 25(1), 1-31.
- Infertility Treatment Act 1995* (Vic), Version no. 012, <http://www.dms.dpc.vic.gov.au> Date Accessed December 12 2002.
- ITA (Infertility Treatment Authority) (1999) *Legal Opinion – Access to Fertility Treatment*. Internal Policy Document, ITA. <http://www.ita.org.au/default.asp?siteaction=policy> Date accessed April 24 2006.
- Jerums, G. (2000) Blood ties. *Melbourne Weekly Magazine*, August 6-12, pp.11-12.
- Kirkman, M. (2002) Donor-assisted conception and narrative identity. Paper presented to the *Life Writing and the Generations Conference*, Melbourne, 15-19 July.
- Koutsoukis, J., Hawthorne, M. & Gosch, E. (2000) Row over stance on "socially infertile". *The Age*, August 5, p.3.
- Kovacs, G.T. (2003) Panel discussion. *ITA Missing Link Symposium* Melbourne, October 29.
- Lupton, D. (2000) "A love/hate relationship": the ideals and experiences of first-time mothers. *Journal of Sociology*, 36(1), 50-63.
- Lupton, D. & Barclay, L. (1997) *Constructing Fatherhood: Discourses and Experiences*. Sage, London.
- Marshall, A. & McDonald, M. (2001) *The Many-Sided Triangle: Adoption in Australia*. Melbourne University Press, Melbourne.

- McBain, J. (2000) Untitled paper presented to The Great IVF Debate, Royal Children's Hospital, Melbourne, August 14.
- McMahon, A. (1999) *Taking Care of Men*. Cambridge University Press, Cambridge.
- McNair, R. (2004) *Outcomes for Children Born of ART in a Diverse Range of Families*. Victorian Law Reform Commission, Melbourne.
- McNair, R., Dempsey, D., Wise, S. & Perlesz, A. (2002) Lesbian parenting: issues, strengths and challenges. *Family Matters*, 63, pp.40-49.
- Murray-Smith, J. (2000) Sound and fury obscure IVF's deeper issues. *The Age*, August 6, p.15.
- Rabsch, M. (2002) The fallout from McBain: IVF, standing, international law and human rights. *Law Society Journal*, 40(6), 54-57.
- Sants, H.J. (1964) Genealogical bewilderment in children with substitute parents. *Journal of Medical Psychology*, 37, pp.133-141.
- Skene, L. (2000) *Access to Assisted Reproduction Technology (ART) by Single and Gay Women in Victoria*. Paper presented to The Great IVF Debate, Royal Children's Hospital, Melbourne, August 14.
- Stacey, J. (1996) *In the Name of the Family: Rethinking Family Values in the Post-Modern Age*. Beacon Press, Boston.
- Stapleton, J. (2000) An ordinary, decent father can make a world of difference. *The Weekend Australian*, August 5-6, p.27.
- Strathern, M. (1992) *Reproducing the Future*. Routledge, New York.
- Szoke, H. (2000) ITA policy decision in the case of McBain v Victoria. Paper presented to *The Great IVF Debate*. Royal Children's Hospital, Melbourne, August 14.
- Taylor, T. & Probyn, A. (2000) The big split. *Herald Sun*, August 3, p.1.
- VLRC (Victorian Law Reform Commission) (2004) *Assisted Reproductive Technology and Adoption: Should the Current Eligibility Criteria in Victoria be Changed?* VLRC, Melbourne.
- VLRC (2005) *Assisted Reproductive Technology and Adoption, Position Paper One: Access*. VLRC, Melbourne.
- Walker, K.L. (2000) 1950s family values vs. human rights: *In vitro* fertilisation, donor insemination and sexuality in Victoria. *Public Law Review*, 11, p.292.
- Waller, L. (2000) Introduction and welcome. Welfare and Interests of Persons Born as a Result of Assisted Reproduction. *Proceedings of Seminar*, July 12, ITA, Melbourne.
- Whelan, J. (2000) Medicare threat on "socially infertile". *The Age*, August 4, p.2.
- Wynhausen, E. (2000) Life with my two mothers. *The Weekend Australian*, August 5-6, p.27.

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