

# RECOGNITION OF LESBIAN AND GAY FAMILIES IN AUSTRALIAN LAW – PART TWO: CHILDREN

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## **I INTRODUCTION**

This article discusses the legal regulation of parenting in lesbian and gay families in Australia. This landscape of regulation includes laws that govern such families both before and after they are formed; that is, laws controlling access to potential family formation options in addition to laws that govern the status of parents and children in families that are formed through alternate means. There have been a number of important developments in these areas in recent years, including: challenges to laws that restrict access to fertility services; reforms to adoption laws in three jurisdictions; and deemed parental status for co-mothers in lesbian families formed through assisted reproduction in three jurisdictions. This article will detail how the new parental status reforms interrelate, including difficult questions regarding the recognition of this new parental status in other States and their interaction with federal law.

There is a large and burgeoning literature, mostly generated in the United States ('US') and United Kingdom ('UK'), discussing research findings about the well-being of

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children born into lesbian and gay families.<sup>1</sup> This article does not engage with the 'deficit model in which prospective lesbian or gay parents are assumed to lack the attributes essential for effective parenting.'<sup>2</sup> Nor do I pursue debate as to whether equal legal treatment is deserved. Rather, I proceed on the basis that lesbian and gay families exist, are expanding, and require forms of legal recognition that reflect their lived experiences and needs.

There continues to be little information available on lesbian and gay family forms in Australia generally, although there have been an increasing number of small-to-medium-scale surveys generated by community-based groups in recent years. Moreover there is some limited census data available since same-sex cohabiting couples were included in its questions in 1996. Of the 20 000 same-sex couples who recorded their relationship in the 2001 Australian census, five per cent of gay male couples were living with children, while 19 per cent of lesbian couples were living with children.<sup>3</sup> This data is limited by the fact that it only indicates the number of same-sex couples who declared their relationship and who are living with minor children. Thus it does not include lesbians and gay men raising children as sole parents, nor does it include lesbians and gay men who are non-resident parents – of whom men are likely to make up the larger share. A 2005 Australian health survey of over 5000 lesbian, gay and bisexual respondents, *Private Lives*, found that 3.7 per cent of men and 15.9 per cent of women were living with a child. Again, this information only recorded those currently living with children. Smaller-scale Australian surveys have found that lesbians are around twice as likely as gay men to have children; and suggest that around 20 per cent of lesbians and 10 per cent of gay men have children.<sup>4</sup> This is consistent with survey data from the US.<sup>5</sup>

<sup>1</sup> This literature, and some small scale Australian data, is reviewed in Jenni Millbank, 'From Here to Maternity: A Review of the Research on Lesbian and Gay Families' (2003) 38 *Australian Journal of Social Issues* 541. For more recent research concerning older children see: Jennifer Wainright, Stephen Russell and Charlotte Patterson, 'Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents' (2004) 75 *Child Development* 1886. For a focus on alternate forms of reproduction rather than the sexuality of parents, see: Ruth McNair, *Outcomes for Children Born of ART in a Diverse Range of Families*, Victorian Law Reform Commission Occasional Paper (2004).

<sup>2</sup> Ruth McNair, 'From GP to Political Activist for the New Family' in Heather Grace Jones and Maggie Kirkman (eds), *Sperm Wars: The Rights and Wrongs of Reproduction* (2005) 227, 229.

<sup>3</sup> Australian Bureau of Statistics, *Year Book Australia 2005: Population – Same-Sex Couple Families* (2005).

<sup>4</sup> Marian Pitts, Anthony Smith, Anne Mitchell, Sunil Patel, *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians* (2006). Surveys of readers of a Sydney-based magazine in 1996 and 1999 found around 20 per cent of lesbians respondents had children; a figure in accord with census data: see *Lesbians on the Loose*, March 1996 (reporting on the 1996 survey, which had 732 respondents); Significant Others, 'Australian Lesbians Get Used to Being Called Mum' (Press Release, 30 March 2000) (reporting on the 1999 survey, with 386 respondents). In a 2001 Victorian survey of 670 lesbians, gay men, bisexual and transgender people, 21 per cent of respondents reported that there were children in their family: see Victorian Gay and Lesbian Rights Lobby, *Everyday Experiments: Report of a Survey into Same-sex Domestic Partnerships in Victoria* (2001), 13–14. A 2005 follow-up survey found 18.6 per cent of respondents had children: see Ruth McNair and Nikos Thomacos, *Not Yet Equal: Report of the VGLRL Same Sex Relationships Survey 2005* (2005) 41. This latter

Australian studies of lesbian and gay parents have indicated that of those with children, around half those children were born through previous heterosexual relationships.<sup>6</sup> It is clear that the proportion of children born into same-sex relationships in Australia is increasing, and the use of assisted reproduction is a key aspect of this trend.<sup>7</sup>

Family formation options for those in same-sex relationships include surrogacy or adoption of a child either domestically or through inter-country adoption, although, as we will see, these avenues are effectively rendered moot by several interrelated forms of legal regulation. For lesbians there are additional birth options, not available to gay men, of pregnancy through assisted reproductive technologies such as anonymous donor insemination or the use of a known (though often uninvolved) donor. Finally, lesbians and gay men may form families together using known donor insemination (either at home or through a clinic) with the aim of some form of joint parenting. Access to each of these parenting options will be explored below, before moving on to consider in detail the issue of parental status for families formed through assisted reproduction.

Parental status is an important issue. Legal consequences vary as between children born through sexual and non-sexual means. Certain legal rules or presumptions apply, irrespective of intention, and most legal consequences cannot be derogated from through individual agreements. So, for example, if a lesbian chooses to eschew the difficulties in accessing assisted reproduction to instead become pregnant through sex with a man, he will be a legal father, regardless of the intentions of both parties.<sup>8</sup> When children are born through non-sexual means, the applicable laws deeming parentage

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report is limited by the fact that it does not indicate the respective figures for men and women, nor does it indicate whether the children reside with the couple or whether they were born into the relationship, or into previous relationships.

<sup>5</sup> See Fiona Tasker, 'Lesbian Mothers, Gay Fathers, and Their Children: A Review' (2005) 26 *Journal of Development and Behavioral Pediatrics* 224.

<sup>6</sup> A study of the health care experiences of 92 lesbian and gay families involving 167 children found that 44 per cent of first-born children were conceived in previous heterosexual relationships, while 46 per cent were conceived through donor insemination: Katja Mikhailovich, Sarah Martin and Stephen Lawton, 'Lesbian and Gay Parents: Their Experiences of Children's Health Care in Australia' (2001) 6 *International Journal of Sexuality and Gender Studies* 181. The 'Lesbian and Gay Families Project' surveyed 136 women in Victoria and found that 52 per cent of current parents had children through previous heterosexual relationships, while 36 per cent were through donor insemination and 6 per cent through invitro fertilisation (IVF): Ruth McNair et al, 'Lesbian Parenting: Issues, Strengths and Challenges' (2002) 63 *Family Matters* 40. See also a survey of 84 mothers at the 2000 Sydney Lesbian Parenting Conference which found that 76 per cent had conceived through self-insemination: discussed in Millbank, 'From Here to Maternity', above n 1.

<sup>7</sup> In one recent study among 43 lesbians who were trying to conceive, only 2 per cent used intercourse, while 44 per cent self-inseminated, 33 per cent used clinic-based insemination (and a further 2 per cent used both) while 13 per cent were using IVF: McNair et al, 'Lesbian Parenting', above n 6.

<sup>8</sup> In *ND v BM* (2003) 31 Fam LR 22 ('ND'), a lesbian couple had an express agreement with a man that he was to be a sperm donor with no legal rights or liabilities. The Family Court held that the fact that the pregnancy was achieved through sex rather than assisted conception meant that legal presumption of parental status applied, regardless of the intentions of all concerned to the contrary.

will differ depending upon whether the mother is in a heterosexual relationship, in lesbian relationship, or is single.<sup>9</sup> These issues are complex, and the relevant laws have been interpreted in contradictory ways in State and federal case law, so they will be explored in some detail. Following that discussion, I will examine more recent reforms granting parental status to co-mothers.

## II FAMILY FORMATION

### (i) Adoption of unrelated children

Adoption is a particularly important avenue for gay men as they are unable to bear children and so, without the cooperation of a lesbian mother or mothers who wish to share parenting with them, have few opportunities through which to fulfil their parenting aspirations. Adoption may also be an important option for lesbians who are infertile. It should be noted at the outset however, that eligibility to adopt and adoption are very different things, as there are, in practice, many more adults wishing to adopt than children available for adoption. Legal eligibility for same-sex couples to apply to adopt means only that applicants are able to apply to be assessed on their individual characteristics as potential parents. They are not necessarily eligible to adopt, rather, they are no longer *automatically excluded* from eligibility.

This section concerns only the adoption of children who are not biologically related to either party. The use of adoption to grant parental status to second parents in lesbian and gay families where children have been born through assisted reproduction will be addressed under Part III. This is because there is a difference between adoption as an avenue of family *formation*, and as a form of family *recognition*. This section deals with the former. Although legal barriers to adoption are declining in Australian State and Territory law, the likelihood of a same-sex couple or individual applicant successfully adopting remains very low, for reasons that are outlined below.

In all jurisdictions except Queensland<sup>10</sup> and the Northern Territory,<sup>11</sup> heterosexual de facto couples are eligible to apply to adopt a child, with adoption law generally requiring that the couple have cohabited for a specified period, varying between two and five years.<sup>12</sup> Same-sex couples are ineligible to apply for an adoption placement in all Australian jurisdictions except Western Australia, the ACT and (in limited circumstances) Tasmania.

Western Australia was the first jurisdiction in Australia to extend eligibility to apply for adoption to same-sex couples when it amended its adoption laws as part of a wide package of gay and lesbian relationship reforms.<sup>13</sup> Since June 2003, same-sex

<sup>9</sup> Although such differences have recently been reduced for families in Western Australia, the Northern Territory and the Australian Capital Territory ('ACT') as a result of amendments to the relevant 'status of children' legislation in those jurisdictions, discussed in detail in Part B.

<sup>10</sup> See *Adoption of Children Act 1964* (Qld) ss 12(1), 67.

<sup>11</sup> *Adoption of Children Act 1994* (NT) ss 13(1)(a), 3. Note that partners in an Aboriginal customary marriage are also eligible to apply under s 13(1)(b).

<sup>12</sup> *Adoption Act 1984* (Vic) s 11(1)(c) (2 years); *Adoption Act 1994* (WA) s 39(e)(i) (3 years); *Adoption Act 1993* (ACT) s 18(1)(b) (3 years); *Adoption Act 1988* (Tas) s 20(1)(a) (3 years); *Adoption Act 1988* (SA) s 12(1) (5 years); *Adoption Act 2000* (NSW) s 28(4) (3 years).

<sup>13</sup> *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA).

couples in Western Australia are treated on the same footing as heterosexual couples; they are eligible to apply to adopt if they have been cohabiting for more than three years.<sup>14</sup> However, note that the reforms introduced a new criterion, that of demonstrating 'a desire and ability to provide a suitable family environment'<sup>15</sup> and removed the assessment of the Adoption Applications Committee from the provisions of the *Equal Opportunity Act 1984* (WA) so that the Committee may make discriminatory decisions if they so choose without being subject to legal challenge.<sup>16</sup> Relinquishing parents are able to choose the adoptive parents. Although one same-sex couple has so far been assessed as eligible, to date they have not been chosen to adopt.<sup>17</sup>

In 2004 the ACT followed suit and also amended its adoption law as part of its wider relationship reforms<sup>18</sup> to render eligible all couples who have been in a 'domestic partnership' for more than three years.<sup>19</sup> While the Federal government is reported to have considered using its powers to override this aspect of the ACT reforms, it did not ultimately do so.<sup>20</sup>

A number of State law-reform bodies have recommended that same-sex couples no longer be excluded from eligibility to apply for adoption. The NSW Law Reform Commission recommended in 1997 that same-sex couples be eligible to apply to adopt on the same footing as heterosexual de facto couples, but this recommendation was not acted upon in either the 1999 same-sex relationship reforms or the 2000 adoption reforms in NSW.<sup>21</sup> The Act is under review in 2006, and it is possible that the exclusion of same-sex couples from eligibility will be revisited.<sup>22</sup>

Although the Law Reform Institute of Tasmania recommended in 2003 that eligibility to apply for all kinds of adoption in Tasmania not be limited by any form of relationship status,<sup>23</sup> adoption of unrelated children was not included in the 2003 relationship reforms in that State.<sup>24</sup> Those reforms include a provision permitting people in registered 'significant relationships' (but not other same-sex couples) to apply to adopt, but only if the child is biologically related to one member — thus the

<sup>14</sup> *Adoption Act 1994* (WA) ss 38, 39(1)(e)(i).

<sup>15</sup> *Adoption Act 1994* (WA) s 40(2)(da).

<sup>16</sup> See Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 November 2001, 6969 (Jim McGinty, Attorney-General).

<sup>17</sup> Email from Department of Community Development Western Australia to Jenni Millbank, 17 July 2006.

<sup>18</sup> *Parentage Act 2004* (ACT).

<sup>19</sup> *Adoption Act 1993* (ACT) s 18(1)(b).

<sup>20</sup> See, eg, David McLennan and Scott Hannaford, 'Angry PM Guns for ACT Laws: Gay Adoption, Bill of Rights Under Threat', *The Canberra Times* (Canberra), 9 March 2004; Michelle Grattan, 'Gay Adoption Law to Stay', *The Age* (Melbourne), 27 April 2004.

<sup>21</sup> *Adoption Act 2000* (NSW).

<sup>22</sup> See NSW Department of Community Services, *Review of the Adoption Act 2000*, Issues Paper (2006). Although this is a routine five-yearly review, mandated by the Act itself, it is noteworthy that the review has called for public submissions, and that it included as an issue for consideration, 'Ensuring eligibility criteria for the assessment and selection of adoptive parents reflect contemporary standards and focus on factors that determine parenting capacity': at 4.

<sup>23</sup> Tasmania Law Reform Institute, *Adoption by Same Sex Couples*, Final Report No 2 (2003) 6 (recommendation 1).

<sup>24</sup> *Relationships (Consequential Amendments) Act 2003* (Tas).

provision is a limited form of second-parent adoption rather than a family formation avenue.

In *Position Paper Two* of its inquiry into *Assisted Reproductive Technology, Adoption and Surrogacy*, the Victorian Law Reform Commission ('VLRC') made an interim recommendation that same-sex couples be eligible for adoption orders on the same basis as heterosexual couples.<sup>25</sup> Current adoption regulations in Victoria allow birth parents to express preferences about approved parents and the Position Paper notes that one adoption agency expressed the view that relinquishing parents are likely to continue to choose heterosexual couples over same-sex couples.<sup>26</sup> The VLRC suggested responding to such a possibility of ongoing discrimination in practice through training of adoption agency staff so they are able to address preconceptions. It is not known whether these recommendations will be part of the final report, nor what legislative reforms will follow.

It is possible to apply to adopt as a 'single' applicant in all Australian States. This eligibility remains largely token in nature as most Acts still specify that 'exceptional' or 'special' circumstances<sup>27</sup> must exist (usually meaning that the child is a 'special needs child'<sup>28</sup>) or explicit permission given by the birth parents<sup>29</sup> before a child can be adopted by a single applicant.<sup>30</sup> In 2004–05, of all 585 adoptions that took place around Australia, covering both local and inter-country adoptions, only 4 per cent were to single applicants.<sup>31</sup> The VLRC made an interim recommendation in 2005 that eligibility criteria should be the same for individuals and couples.<sup>32</sup>

It is also notable that the 2003 same-sex relationship reforms in Tasmania inserted a new section into the *Adoption Act* providing that a person whose child is being adopted may express a preference as to the 'sexual orientation' or 'marital status' of the 'prospective adoptive parents' and that 'so far as practicable' this preference will be accommodated.<sup>33</sup> This provision may prove to be a further barrier to lesbians and gay men who are presently able to apply as individual applicants.<sup>34</sup> As in Western

<sup>25</sup> VLRC, *Assisted Reproductive Technology & Adoption, Position Paper Two: Parentage* (2005) 51–2 (interim recommendations 26–7) ('*Position Paper 2*').

<sup>26</sup> *Ibid.*

<sup>27</sup> *Adoption of Children Act 1964* (Qld) s 12(3)(c); *Adoption Act 1984* (Vic) s 11(3); *Adoption of Children Act 1994* (NT) s 14(1)(b); *Adoption Act 1988* (Tas) s 20(4); *Adoption Act 1988* (SA) s 12(3)(b).

<sup>28</sup> This is expressly stated in *Adoption of Children Act 1964* (Qld) s 12(3)(b). It is also common practice: see VLRC, ('*Position Paper Two*'), above n 25, [6.14].

<sup>29</sup> *Adoption Act 1993* (ACT) s 18(3).

<sup>30</sup> Such additional and stringent requirements for single adoptive parents have declined slightly in legislation in recent years. Since 2000 NSW only requires that a single applicant be 'of good repute and a fit and proper person to fulfil the responsibilities of a parent': *Adoption Act 2000* (NSW) s 27(1)(b). Western Australia has also dropped its earlier restrictions on single applicants.

<sup>31</sup> Australian Institute of Health and Welfare, *Adoptions Australia 2004–05* (2005) 18. In the preceding year 2 per cent of adoptions were to single applicants. See Australian Institute of Health and Welfare, *Adoptions Australia 2003–04* (2004) 17.

<sup>32</sup> VLRC, ('*Position Paper Two*'), above n 25, 53 (recommendation 28).

<sup>33</sup> *Adoption Act 1988* (Tas) s 24.

<sup>34</sup> Note there has only been adoption by an individual applicant in the last five years in Tasmania: email from Tasmanian Department of Health and Human Services to Jenni Millbank, 19 September 2005.

Australia, it appears that changes designed to eradicate discrimination were accompanied by others that undermine that goal to some extent.

Inter-country adoptions are now far more common than domestic adoptions in Australia, with three-quarters of adoptions in 2004–05 being inter-country adoptions.<sup>35</sup> Such adoptions must satisfy the requirements of the Hague Adoption Convention,<sup>36</sup> which requires eligibility for adoptive parents to be agreed upon by *both* sending and receiving countries.<sup>37</sup> Lesbians and gay men are not eligible to apply for inter-country adoptions as couples because none of the current sending countries allow same-sex couples to adopt.<sup>38</sup> Moreover, most sending countries do not allow an individual applicant to adopt, and the few countries that do allow applications from individuals apply restrictive conditions.<sup>39</sup> Therefore it is very unlikely that a lesbian or gay man

<sup>35</sup> In that year, 15 per cent of adoptions were of a known child (such as step-parent and carer adoptions), while 85 per cent were placement adoptions. Of placement adoptions, 65 were within Australia and 434 were from children outside Australia: see Australian Institute of Health and Welfare, *Adoptions Australia 2004–05*, above n 31, 3. In Victoria in 2003–04 there were only 10 infant adoptions with 64 adoptions or permanent care placements of children with special needs, while there were 100 inter-country adoptions over the same period: see VLRC, ('*Position Paper Two*'), above n 25, [6.4], [6.6], [6.36].

<sup>36</sup> *Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption*, opened for signature 29 May 1993, [1998] ATS 21 (entered into force 1 May 1995) ('Hague Adoption Convention'). Alternately if the sending country is not a party to the Hague Adoption Convention, it must satisfy a comparable bilateral arrangement, such as those Australia has with China (which ratified the Convention in January 2006), South Korea, Ethiopia and Thailand: see Australian Institute of Health and Welfare, *Adoptions Australia 2004–05*, above n 31, 11–12.

<sup>37</sup> For an overview see *Bills Digest No 155 (2003–04)* 9–10 (on the Marriage Legislation Amendment Bill 2004 (Cth)).

<sup>38</sup> VLRC, ('*Position Paper Two*'), above n 25, [6.35]. See also Australian Institute of Health and Welfare, *Adoptions Australia 2004–05*, above n 31. Note that same-sex couples are eligible to adopt under South African law following the decision of the Constitutional Court in *Du Toit v The Minister for Welfare and Population Development* 2002 (10) BCLR 1006. However South Africa maintained a blanket prohibition on intercountry adoption of children. This ban was overturned following a Constitutional challenge: see *Minister for Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713. South Africa has now ratified the Hague Adoption Convention, but has yet to pass legislation to enable overseas adoptions; it is expected that adoptions from South Africa will not occur until at least 2008: see Department for Families and Communities, Adoption & Family Information Service, 'Intercountry Adoption News' November 2005.

<sup>39</sup> The VLRC states that a single applicant may apply to adopt a child from China, Ethiopia, Hong Kong and the Philippines: see VLRC, ('*Position Paper Two*'), above n 25, [6.35]. In NSW as at July 2006, the Department of Community Services ('DOCS') advises that the following sending countries will not allow single applicants to adopt under any circumstances: Chile, Korea, Sri Lanka, and Taiwan. Single applicants who are women will be considered by Ethiopia (although they must belong to a mainstream religion and have the written support of a religious leader, eg a priest) and Thailand (special needs children). Single applicants of either sex will be considered by Fiji (although waiting times are lengthy for all applicants who are not former nationals of Fiji), Hong Kong (not preferred), India (if an individual agency agrees, and only if 30–35 years old), Philippines (rarely, for special needs children, and no atheists are accepted), Lithuania (rarely, for special needs children), Colombia (some agencies for older and special needs children, one agency will consider women only, some will not consider any single applicant): see NSW DOCS,

would be able to adopt through an inter-country adoption process, and impossible for a same-sex couple to do so. In Western Australia, a number of same-sex couples have been approved to adopt by State authorities since June 2003, but to date none of them have been selected for a placement by a sending country.<sup>40</sup>

Nonetheless, the federal government included provisions in the first Bill to ban same-sex marriage in 2004 that would render unlawful facilitation or provision of an inter-country adoption to a same-sex couple.<sup>41</sup> These provisions were dropped after opposition parties indicated that they would block them in the Senate, but could yet be introduced since the government now controls the Senate.<sup>42</sup>

## (ii) Surrogacy

Surrogacy is particularly relevant for gay men who wish to raise a child from birth as they are unable themselves to give birth and so cannot avail themselves of the comparatively simple and autonomous assisted conception options open to women.<sup>43</sup> It should be noted at the outset that surrogacy is a largely hypothetical option in Australia, as most States prohibit or tightly restrict surrogacy arrangements. Even among States that do not prohibit surrogacy arrangements, restrictive access to assisted reproduction may render surrogacy arrangements difficult or impossible to fulfil. Further, in all Australian jurisdictions, aside from the ACT, legislative parental status presumptions operate to confound parties' intentions by granting legal status to the birth mother (and her male partner if she has one) rather than the commissioning parent(s).

### (a) Regulation of surrogacy agreements

Queensland, Victoria, South Australia, Tasmania and the ACT all have legislation that regulates surrogacy agreements. The general thrust of such laws is to prohibit commercial surrogacy (including attempts to advertise or procure surrogacy) and to render any surrogacy agreement, whether commercial or non-commercial, void and unenforceable, although there are variations as to the lawfulness of making a non-commercial arrangement.<sup>44</sup>

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Adopting from Overseas: Intercountry Adoption  
<[http://www.community.nsw.gov.au/html/adoption/want\\_intercountry.htm](http://www.community.nsw.gov.au/html/adoption/want_intercountry.htm)> at 17 July 2006. China is a major sending country, and does accept single applicants, although the waiting time in 2005 was three years. In 2006 the DOCS online information on China included the following information not previously present 'No gay or lesbian applicants will be accepted': NSW DOCS, *Intercountry Adoption Program: China* (23 March 2006).

<sup>40</sup> Email from Western Australian Department of Community Services to Jenni Millbank, 16 September 2005.

<sup>41</sup> See Bills Digest, above n 37.

<sup>42</sup> See Nick Butterly, 'Gays Set to Lose Adoption Rights', *The Courier-Mail* (Brisbane), 30 October 2004.

<sup>43</sup> I am mindful of the wide range of criticism of surrogacy as a practice involving gender, class and also racialised power imbalances. This section is included in recognition of the fact that the *prohibition* of surrogacy agreements is a distinct issue and one that may disproportionately affect the parenting aspirations of gay men. Thanks to Aleardo Zanghellini for drawing this point to my attention.

<sup>44</sup> For a more detailed analysis of surrogacy laws in Australia see: John Seymour and Sonia Magri, *ART, Surrogacy and Legal Parentage: A Comparative Legislative Overview*, VLRC



In the ACT, commercial surrogacy agreements are prohibited, as are attempts to advise on or solicit such agreements.<sup>45</sup> Non-commercial agreements are not prohibited, but soliciting or advertising such agreements is an offence.<sup>46</sup> In Queensland both commercial and non-commercial surrogacy arrangements are criminal offences for all parties involved.<sup>47</sup> In Tasmania, advertising, offering payment for, or advising on, surrogacy agreements are offences, whether the agreements are of a commercial or non-commercial nature.<sup>48</sup> The situation in South Australia is largely similar.<sup>49</sup> Victoria prohibits commercial surrogacy (including the payment of medical expenses) but does not specifically proscribe non-commercial surrogacy.<sup>50</sup> Therefore, in the ACT, Tasmania, South Australia and Victoria, a non-commercial surrogacy agreement *could* be lawfully carried out if privately arranged and if all of the parties were in agreement (although it would not be enforceable if any of the parties subsequently disagreed).

However, access to assisted reproduction in both South Australia and Victoria is also regulated by legislation which tightly restricts who may access donor insemination ('DI'), ovum donation, and in vitro fertilisation treatment ('IVF') – any or all of which may be necessary for a surrogacy arrangement to take place. In both South Australia and Victoria, current law requires that the birth parents, rather than the commissioning parents, demonstrate clinical 'infertility' in order to have access to assisted reproduction.<sup>51</sup> (Victoria also currently prohibits home insemination.)<sup>52</sup> Thus fertility regulation also acts as a form of de facto prohibition on surrogacy using donor eggs. In *Position Paper Three: Surrogacy*, the VLRC made an interim recommendation that if altruistic surrogacy remains lawful in Victoria, legislation should be amended to render fertility services accessible for altruistic surrogacy arrangements with no restrictions as to the fertility of the birth parents or relationship status of the commissioning parents.<sup>53</sup>

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Occasional Paper (2004) ch 3. See also Anita Stuhmcke, 'Looking Backwards, Looking Forwards: Judicial and Legislative Trends in the Regulation of Surrogate Motherhood in the UK and Australia' (2004) 18 *Australian Journal of Family Law* 13.

45 *Parentage Act 2004* (ACT) ss 41, 40, 44. Note that this Act replaced the earlier *Substitute Parent Agreement Act 1994* (ACT), which also prohibited commercial surrogacy but contained provision for altruistic surrogacy arrangements and for the commissioning parents to register as parents. On the earlier Act see Meg Wallace, 'Substitute Parent Agreements in the ACT' (1994) 1 *Canberra Law Review* 148.

46 *Parentage Act 2004* (ACT) ss 43, 40.

47 *Surrogate Parenthood Act 1988* (Qld) s 3.

48 *Surrogacy Contracts Act 1993* (Tas) ss 4–7.

49 *Family Relationships Act 1975* (SA) s 10. Although South Australia draws a distinction between 'procurator' contracts and 'surrogacy contracts'.

50 *Infertility Treatment Act 1995* (Vic) s 59.

51 *Reproductive Technology (Clinical Practices) Act 1988* (SA) s 13(3)(b)(i); *Infertility Treatment Act 1995* (Vic) s 8(3).

52 *Infertility Treatment Act 1995* (Vic) s 7. See discussion in VLRC, *Assisted Reproductive Technology & Adoption – Position Paper One: Access* (2005) 27–9 ('Position Paper One').

53 VLRC, *Assisted Reproductive Technology & Adoption, Position Paper Three: Surrogacy* (2006) 29 (interim recommendations 1–3) ('Position Paper Three').

In New South Wales,<sup>54</sup> the Northern Territory and Western Australia there are no laws that specifically regulate surrogacy.<sup>55</sup>

Reproductive technology legislation in Western Australia has been interpreted to exclude the use of IVF to facilitate surrogacy 'in practice'.<sup>56</sup> Given that the Northern Territory has no legislation but follows the South Australian regulations,<sup>57</sup> it is fair to assume it too would exclude those seeking access to fertility services for surrogacy arrangements. This leaves the ACT and NSW<sup>58</sup> as the only locations in which a non-commercial surrogacy arrangement could possibly take place with the assistance of fertility services.<sup>59</sup> In combination, surrogacy and reproductive technology laws effectively render surrogacy arrangements within all other jurisdictions impossible.

A further impediment to family formation through surrogacy is that (apart from the ACT in limited circumstances) in all jurisdictions – whether or not they regulate surrogacy – any child born through a surrogacy arrangement that did not involve intercourse would, for all or most legal purposes, be the legal child of the birth mother and her partner, rather than the commissioning parent(s).

**(b) Parental status following surrogacy**

Parenting presumptions in all States and Territories apply to all assisted reproductive means, severing the link between the biological parent who is a sperm or egg donor and granting automatic parental status to the birth mother regardless of whether the child is genetically related to her.<sup>60</sup> In all jurisdictions parental status is also granted to

<sup>54</sup> Note that the Assisted Reproductive Technology Bill 2003 (NSW) would prohibit commercial surrogacy and advertising for commercial surrogacy, as well as rendering surrogacy agreements void. The Bill is a 'Consultation Draft Bill' and it is not clear that it will be enacted in this or any other form. See NSW Department of Health, *Assisted Reproductive Technology Bill 2003: Information Guide* (2003).

<sup>55</sup> In 1999 a WA Parliamentary Select Committee recommended the introduction of surrogacy legislation to regulate non-commercial surrogacy and alter the legal status of parents, but none has so far been forthcoming. See the findings of the Legislative Assembly of Western Australia, *Select Committee on the Human Reproductive Technology Act 1991* (1999).

<sup>56</sup> See Reproductive Technology Council of Western Australia, *Frequently Asked Questions* (2005) <<http://www.rtc.org.au/faqs/index.html>> at 14 July 2006.

<sup>57</sup> See Seymour and Magri, above n 44, [2.57–2.58].

<sup>58</sup> Note that the Reproductive Technology Council of WA, above n 56, states that 'IVF surrogacy is carried out by some clinics in Canberra and Sydney'.

<sup>59</sup> Note that the current National Health and Medical Research Council ('NHMRC') guideline states that clinics must not facilitate commercial surrogacy (at [13.1]) and may only facilitate non-commercial surrogacy if 'every effort' has been made to ensure that the participants understand the 'ethical, social and legal implications' and the parties undertake counselling to consider 'the social and psychosocial significance for the person born as a result of the arrangements, and for themselves': NHMRC, *Ethical Guidelines on the use of Assisted Reproductive Technology in Clinical Practice and Research* (2004) [13.2].

<sup>60</sup> For provisions severing the parentage of ovum donors, see *Status of Children Act 1996* (NSW) s 14(1), (3); *Parentage Act 2004* (ACT) s 11(2), (3); *Status of Children Act 1978* (Qld) s 17; *Status of Children Act 1974* (Vic) s 10E; *Artificial Conception Act 1985* (WA) s 5; *Status of Children Act 1978* (NT) s 5E; *Status of Children Act 1974* (Tas) s 10C(3), (4); *Family Relationships Act 1975* (SA) s 10C. For provisions severing the parentage of sperm donors, see *Status of Children Act 1996* (NSW) s 14(2); *Parentage Act 2004* (ACT) s 11(5); *Status of Children Act 1978* (Qld) s 18(1); *Status of Children Act 1974* (Vic) s 10F(1); *Artificial Conception*

the husband or male de facto partner of the birth mother.<sup>61</sup> (This status is also now granted to a female de facto partner in Western Australia, the Northern Territory and the ACT.<sup>62</sup>) Thus any child born of a surrogacy arrangement would be presumed to be the child of the birth mother (and partner) rather than the commissioning parent(s), even if the birth mother is not biologically related to the child and the commissioning parent(s) are so related.<sup>63</sup>

In all jurisdictions except the ACT, the only avenue for commissioning parents to attain parental status is through adoption orders or an order of parental responsibility from the Family Court.<sup>64</sup> Joint adoption is only available to heterosexual couples in most Australian jurisdictions (although this has recently changed in Western Australia, the ACT and in limited circumstances in Tasmania: see 'Adoption of unrelated children' above Part II(i)). Moreover, many jurisdictions do not permit privately arranged adoption placements unless one of the adopting parents is a relative of the child.<sup>65</sup> For many commissioning parents, and virtually all same-sex commissioning parents seeking parental status, therefore, the option of parenting orders under the *Family Law Act 1975* (Cth) ('FLA') is the only one available. A parenting order is not the equivalent to full parental status because, for instance, an order ceases once the child reaches 18, and does not necessarily impact upon areas of State law (see Part III 'Parenting orders by consent', below).

Thus far there have been no adoption cases concerning same-sex parents in a surrogacy arrangement, but there has been one case of a gay male couple seeking parenting orders following a surrogacy arrangement. In the 2003 decision of *Re Mark*,<sup>66</sup> the Family Court determined the application of two men living in Victoria (Mr X and Mr Y) for parental responsibility over a child born through a surrogacy arrangement

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*Act 1985* (WA) s 7(2); *Status of Children Act 1978* (NT) s 5F(1); *Status of Children Act 1974* (Tas) s 10C(2); *Family Relationships Act 1975* (SA) s 10E(2).

<sup>61</sup> *Status of Children Act 1996* (NSW) s 14(1), (2); *Parentage Act 2004* (ACT) s 11(4), (5); *Status of Children Act 1978* (Qld) ss 15(2), 16; *Status of Children Act 1974* (Vic) ss 10C(2), 10D(2); *Artificial Conception Act 1985* (WA) s 6; *Status of Children Act 1978* (NT) s 5D; *Status of Children Act 1974* (Tas) s 10C(1); *Family Relationships Act 1975* (SA) s 10D.

<sup>62</sup> *Parentage Act 2004* (ACT) s 11(4); *Artificial Conception Act 1985* (WA) s 6A; *Status of Children Act 1978* (NT) s 5DA.

<sup>63</sup> See, eg, *Re Births, Deaths and Marriages Registration Act 1997* (2000) 26 Fam LR 234, decided prior to the new surrogacy provisions in ACT law. In that case the fertilised embryo of Debra and Shane was borne by Sharon, the wife of Shane's brother Brendan. All four intended that Debra and Shane were to be the child's parents, and applied to the Supreme Court for a birth certificate recording this. The Court held that it was unable to do so, by virtue of the provisions of the *Artificial Conception Act 1985* (ACT) (now repealed) severing the relationship of sperm and ovum donor and according it to birth mother and partner. Thus, Sharon and Brendan were recorded as the child's parents.

<sup>64</sup> See, eg, *PJ v Director General Department of Community Services* [1999] NSWSC 340 for this conclusion regarding a surrogacy case where both commissioning parents were genetic parents but were held not to be legal parents due to the provisions of the *Status of Children Act 1996* (NSW).

<sup>65</sup> See VLRC, ('*Position Paper Three*'), above n 53, [5.10]. Note that the NSW DOCS opposed adoption applications arising out of surrogacy arrangements where the birth mother was the sister of the commissioning mother in the following cases: *Re A and B* (2000) 26 Fam LR 317 and *Re D and E* (2000) 26 Fam LR 310. The Court granted adoptions.

<sup>66</sup> *Re Mark* (2003) 31 Fam LR 162. See also Stuhmcke, above n 44.

that took place in the US. The birth mother (Ms S) was not biologically related to the child, who was conceived with the sperm of one of the commissioning fathers (Mr X) and donor ovum. The child was born in California in 2002 under a surrogacy agreement lawful in that State. A Californian Court ordered the issuance of a birth certificate listing Mr X and Ms S as the child's parents. The Family Court of Australia held that Ms S was a parent under the *Family Law Act 1975* (Cth). However Mr X's status was not as clear.<sup>67</sup> Ultimately, Brown J did not make a determination that Mr X was a parent under s 60H and instead heard Mr X and Mr Y's application jointly as persons concerned with the child's care, welfare and development, rather than as parents. The Court ordered that joint parental responsibility be vested in both men and limited any parental responsibility that had previously vested in Ms S.

The importance of *Re Mark* in the context of surrogacy arrangements rests in the result that, regardless of the law of surrogacy or the laws of parental status in the jurisdiction in which the child was born, or the legal status of the commissioning or birth parents in the jurisdiction in which they live, the Family Court may make an order granting broad parental responsibility to the commissioning parents. Moreover the Court did not hesitate to make such an order when the commissioning parents were a gay rather than a heterosexual couple.

The major exception to the general trend of non-recognition of commissioning parents in Australian law exists in the ACT. In the ACT, commissioning parents can apply to the Supreme Court for a substitute parenting order to vary parental presumptions under Territory law.<sup>68</sup> These provisions only apply to non-commercial surrogacy and only operate if the birth mother is *not* biologically related to the child (and neither is her partner, who may be male or female) and at least one of the commissioning parents is so related. In that case, the Court may make an order substituting the commissioning parents in place of the mother and her partner (the 'birth parents') if it is satisfied that an order is in the best interests of the child and both birth parents fully understand what is involved.<sup>69</sup> This has the same effect as an adoption order, granting full parental status which would be recognised in all other State and federal law, including the *FLA*.<sup>70</sup> In the case of *Re Mark*, had the arrangement taken place in the ACT, the parties could have used this process to apply for the issue of a new birth certificate and the transfer of all parental rights to Mr X and Mr Y.<sup>71</sup>

<sup>67</sup> Brown J suggested that State presumptions of parental status following assisted conception may not necessarily follow through to the *Family Law Act 1975* (Cth) provisions on parental responsibility such that a sperm donor *could* be a parent under the *FLA*. These observations lead to some uncertainty as to the breadth and uniformity of the parenting presumptions, however the remarks were in *obiter* only. For many reasons the discussion of parental status for children born through assisted reproduction in the judgment is very troublesome, and will be analysed in greater detail in Part B because of the broad impact that it could have on lesbian families.

<sup>68</sup> See *Parentage Act 2004* (ACT) div 2.5, in particular s 24. These issues were not dealt with under the *Substitute Parent Agreement Act 1994* (ACT).

<sup>69</sup> *Parentage Act 2004* (ACT) ss 24, 26.

<sup>70</sup> The order would trigger a conclusive presumption of parentage under s 69S of the *FLA*.

<sup>71</sup> An important proviso is that Ms S would have to be pregnant with a donor ovum rather than her own. That was in fact the case, but this scenario would be rare in Australia where there are almost no anonymous donor ova available and any commercial provision is prohibited. See, eg, Repromed, *Donor Information: Guidelines for Donors and Recipients* (2005)

In summary, the combination of surrogacy and fertility regulation means that surrogacy is an exceptionally unlikely possibility for gay men to have children, at least within Australia. Even where privately arranged non-commercial surrogacy can take place with the assistance of fertility services, only in the ACT in limited circumstances are the commissioning parents able to gain parental status.

### (iii) Access to fertility services and reproductive technologies

Increasing numbers of lesbians and gay men are having children outside of the context of heterosexual relationships and sexual reproduction. It is important to note at the outset that while sexual reproduction is seen by the state as 'private' and largely unregulated,<sup>72</sup> non-sexual reproduction is highly regulated by both State and federal governments and medical bodies, all of which – despite different degrees of accessibility – assert an abiding interest in controlling access based on common principles such as the presumed best interests of (unconceived) children<sup>73</sup> and other aspects of the 'public interest' such as promoting 'traditional' family forms through the selective allocation of scarce medical resources.<sup>74</sup>

It is common in discussions about fertility services for widely different types of assisted reproduction – such as donor insemination at home, donor insemination in a clinical setting, and the far more invasive and expensive procedure of in vitro fertilisation – to be bundled together as 'IVF'. It is important at the outset to be clear about what these different procedures entail<sup>75</sup> and why they are sought in order to

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5, 16–21 <[http://www.repromed.com.au/article.php?articleID=77&content=4&page\\_num=0](http://www.repromed.com.au/article.php?articleID=77&content=4&page_num=0)> at 14 July 2006.

<sup>72</sup> Although all States and Territories set an age of consent for sex, and for instance the federal government reduces the price of oral contraceptives through listing them on the pharmaceutical benefit scheme since 1973: Amanda Biggs, *The Pharmaceutical Benefits Scheme – An Overview* (2002, updated 2003) Department of the Parliamentary Library <<http://www.aph.gov.au/library/intguide/SP/pbs.htm>> at 18 July 2006.

<sup>73</sup> See Erica Haimes, 'When Transgressions Become Transparent: Limiting Family Forms in Assisted Conception' (2002) 9 *Journal of Law and Medicine* 438. In Victorian legislation, the interests of the child do not simply have to be taken into account but are said to be paramount, prompting the following criticism in Kerry Petersen, 'The Regulation of Assisted Reproductive Technology: A Comparative Study of Permissive and Prescriptive Laws and Policies' (2002) 9 *Journal of Law and Medicine* 483, 495–6:

First, in real terms and at the time when access decisions about DI and IVF are being made, there is no live child. The gametes which may result in the conception of an embryo are either inside one of the aspiring parents or they are stored in a fridge. However, there is a human being who desires to have a child and it seems puzzling that the purported and speculative interest of eggs and sperm should take priority over the actual, verifiable interests of a living human being and, if appropriate, her live partner.

<sup>74</sup> See, eg, Helen Szoke, the Chief Executive Officer of the Infertility Treatment Authority in Victoria, arguing that (unlawfully discriminatory) legislation such as that in Victoria protects the public interest: 'Nanny State or Responsible Government?' (2002) 9 *Journal of Law and Medicine* 470. For a contrary view, using a traditional utilitarian harm analysis, see Kristen Walker, 'Should There be Limits on Who May Access Assisted Reproductive Services?' (2002) 6 *Flinders Journal of Law Reform* 67.

<sup>75</sup> For a good plain language overview see Canberra Fertility Centre, *Patient Information Booklet* (2005) <[http://www.canberrafertilitycenter.com.au/images/pdfs/CFC\\_Info\\_Book\\_05.pdf](http://www.canberrafertilitycenter.com.au/images/pdfs/CFC_Info_Book_05.pdf)> at 14 July 2006.

avoid unhelpful and misleading generalisations about 'lesbians wanting IVF'. This is especially so as the rhetorical dichotomy between 'fertile' lesbians and 'infertile' heterosexual couples obscures the extent to which fertility is a legally and medically constructed category,<sup>76</sup> and one that can in any case change for many women as they try to conceive.

Donor insemination is a relatively inexpensive and non-technical process, simply involving timed ovulation and release of sperm. At the least medical end of the spectrum this can be done with tracking of the ovulation cycle through temperature changes or urine tests and the use of fresh sperm and a syringe at home, while at the most invasive end of the spectrum it can involve the tracking of ovulation through blood tests and ultrasounds, the use of tested frozen and washed sperm and inter-uterine insemination using a catheter in a clinical setting (and could be undertaken in conjunction with the use of ovulation-stimulating drugs). Even at the 'high end' of technical donor insemination, the present cost is \$1600-\$1800 per cycle through a private clinic, and less through public hospitals.<sup>77</sup>

IVF involves the collection of ova from a woman's ovaries through a surgical procedure, fertilisation of the eggs outside the body with (tested, washed and frozen) sperm, the implantation of a fertilised embryo(s) and possible freezing of additional viable embryos. The use of ovulation stimulating drugs is typical in this process in order to maximise the number of available ova as well as to pinpoint the timing of ovulation. The present cost of an IVF cycle through a private clinic is around \$8000-\$10 000.<sup>78</sup> Another form of IVF used by heterosexual couples where the man has impaired fertility but the couple do not wish to use donor sperm is Intracytoplasmic Sperm Injection ('ICSI'), where a single sperm is inserted directly into an egg.

Lesbians may want to access clinical donor insemination services rather than home insemination for a number of reasons, including difficulty in conceiving, difficulty in finding a known donor, access to safer sperm, or because of the different legal consequences of using anonymous versus known donor insemination. So, for example, a lesbian who has been home-inseminating with a known donor without success for some time may seek assistance from a clinical service in order to see if she or the donor has a fertility problem and/or to increase her chances of pregnancy through more accurate timing of insemination or through the more invasive process of IVF. Alternately, if a known donor lives some distance away (or moves, or travels), a lesbian may choose a clinical setting in order simply to store sperm. Other possibilities include that a woman may be unable to find a known donor and so need access to anonymous donor sperm in order to try to get pregnant, or she may prefer an anonymous donor because of concern about potential conflict about contact or parental responsibility with a known donor in later years.

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<sup>76</sup> For a thorough discussion of these debates see: Maurice Rickard, 'Is it Medically Legitimate to Provide Assisted Reproductive Treatments to Fertile Lesbians and Single Women' (2001) *Parliament of Australia Research Paper 23*. However note that he too assumes lesbians' clinical fertility.

<sup>77</sup> See, eg, costing listed on the website of a major private provider in NSW and the ACT: Sydney IVF, *Our Current Fees* (2006) <<http://www.sydneyivf.com/page.cfm?id=36&clinic=metro#fees>> at 14 July 2006.

<sup>78</sup> *Ibid.* Medicare covers approximately 80 per cent of this cost at present.

Some small-scale survey data indicates that a significant proportion of lesbians are having babies with known donors in non-clinical settings.<sup>79</sup> For some women, the choice of a known donor is preferable because of the opportunity for their child(ren) to know their biological father.<sup>80</sup> It may also reflect a preference for a process that is not medicalised or externally regulated. However, the extent to which the use of known donors by prospective lesbian mothers is a freely taken choice in Australia, rather than a consequence of longstanding barriers imposed by legal regulation and medical practice, remains unclear.

Legislative restrictions are only one aspect of the regulation of access to fertility services, and lesbians and gay men continue to face a multitude of other barriers to equality of access. These barriers are the result of the intersection of State legislation, federal health funding, and policy and practice – including guidelines mandated by federal health and fertility regulatory bodies, as well as individual 'ethics' rules at hospital and clinic level.

All providers of assisted reproductive technologies must be licensed by the Reproductive Technology Accreditation Committee ('RTAC').<sup>81</sup> RTAC is a part of the Fertility Society of Australia, the national non-government organisation representing fertility service providers.<sup>82</sup> A condition of RTAC accreditation is compliance with ethical guidelines promulgated by the NHMRC, a federal government agency.<sup>83</sup> Only through accreditation can service providers access federal health funds through Medicare rebates on procedures and the subsidisation of medications through the Pharmaceutical Benefits Scheme.

In 1982 the NHMRC issued guidelines which stated that the 'clinical indications' for reproductive technology was infertility of those in 'accepted family relationships'.<sup>84</sup> These guidelines were replaced in 1996, and the 'accepted family' wording was omitted. However, the 1996 guidelines noted that only Western Australia, Victoria and South Australia had legislation on assisted reproductive technology ('ART') and 'strongly and unanimously' recommended complementary legislation in all States.<sup>85</sup> At that time laws in the three regulated States explicitly discriminated on the basis of

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<sup>79</sup> See McNair et al, 'Lesbian Parenting', above n 6. See also qualitative interview data with 20 women in the UK reported in Kathryn Almack, 'Seeking Sperm: Accounts of Lesbian Couples' Reproductive Decision-Making and Understanding of the Needs of the Child' (2006) 20 *International Journal of Law, Policy and the Family* 1.

<sup>80</sup> Note that although Australian jurisdictions are increasingly moving towards donor registers, this information becomes available only after the child reaches 18, and only if their parents inform them that they are donor-conceived.

<sup>81</sup> RTAC also has its own Code of Practice. The Fertility Society of Australia, Reproductive Technology Accreditation Committee, *Code of Practice for Centres Using Assisted Reproductive Technology* (2002) made no reference to eligibility for treatment. The current 2005 RTAC Code of Practice is not publicly available. But note that the 2005 Code is reported to have made adherence to the 2004 NHMRC ART Guidelines mandatory: see Legislative Review Committee Reports, Part A (2005) 11.

<sup>82</sup> See Fertility Society of Australia, *About FSA – Introduction* (2006) <<http://www.fsa.au.com/about/>> at 18 July 2006.

<sup>83</sup> See Don Chalmers, 'Professional Self-regulation and Guidelines in Assisted Reproduction' (2002) 9 *Journal of Law and Medicine* 414 for an overview of the regulatory landscape.

<sup>84</sup> NHMRC, *Supplementary Note 4* (1982) [2].

<sup>85</sup> NHMRC, *Ethical Guidelines Assisted Reproductive Technology* (1996) [1.2].

marital status, such that any 'complementary' legislation elsewhere would have necessarily increased the exclusion of unmarried women from fertility services. Noting that existing State restrictions 'may be' in conflict with the *Sex Discrimination Act 1984* (Cth) ('SDA'), the 1996 guidelines suggested that ART programs seek exemption from the Act; implicitly endorsing continued discrimination.<sup>86</sup>

In September 2004 the current set of NHMRC guidelines came into force.<sup>87</sup> Like the 1996 guidelines, the 2004 version does not explicitly address the question of who may access assisted reproduction services, but contains implicit endorsements of exclusionary practice as well as notable silences. The omission of any reference to non-discrimination, either as a guiding principle,<sup>88</sup> or as a legislative requirement, is striking particularly in light of the controversy generated by the *McBain* case.<sup>89</sup> The section of the 2004 guidelines entitled 'regulatory framework' states that clinical practice must comply with 'relevant national legislation', and 'relevant state and territory legislation', specifically referencing privacy laws but with no mention of the SDA or State anti-discrimination laws. In the period between the publication of the 1996 and 2004 guidelines there were three successful claims of marital status discrimination<sup>90</sup> and one unsuccessful claim of sexual orientation discrimination<sup>91</sup> regarding access to fertility services in Australia — so this omission seems strange to say the least. This failure is even more marked when it is noted that the guidelines refer on two occasions to donors directing their gametes to an 'ethnic or social

<sup>86</sup> Ibid.

<sup>87</sup> NHMRC, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2004).

<sup>88</sup> 'In framing these guidelines, AHEC has recognised that the welfare of people who may be born as a result of the use of ART is paramount': *ibid* [2.5].

The Council takes into account the following at [2.6]:

- 'The autonomy and long-term welfare of individuals (both men and women) who take part in ART;
- The need for informed decision making; and
- The importance of an ethical framework for the use of gametes and embryos.'

Contrast VLRC, (*Position Paper One*), above n 52, [2.27] proposing the following guiding principles for Victorian law:

- 'the health and wellbeing of children born as a result of the use of ART must be given priority in decisions concerning the use of such technologies;
- at no time should the use of reproductive technologies be for the purpose of exploiting (in trade or otherwise) either the reproductive capabilities of men and women or the resulting children;
- all children born as a result of the use of donated gametes have a right to information about their genetic parents;
- the health and wellbeing of people undergoing ART procedures must be protected at all times; and
- people seeking to undergo assisted reproductive procedures must not be discriminated against on the basis of their sexual orientation, marital status, race or religion.'

<sup>89</sup> *McBain v Victoria* (2000) 99 FCR 116; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

<sup>90</sup> *Pearce v South Australian Health Commission* (1996) 66 SASR 486 ('*Pearce*'); *MW, DD, TA and AB v The Royal Women's Hospital* [1997] HREOCA 6 ('*MW*'); *McBain v Victoria* (2000) 99 FCR 116.

<sup>91</sup> *JM v QFG* [1997] QADT 5; *QFG & GK v JM* [1997] QSC 206; *JM v QFG* [2000] 1 Qd R 373.



group'.<sup>92</sup> Here the issue of discrimination is mentioned. The guidelines note that facilitating such directed donations would be unlawful conduct by service providers in some jurisdictions (without stating which jurisdictions and what the basis of discrimination is, although the reference to ethnic group is suggestive of race discrimination). When not unlawful conduct on the part of the service provider by virtue of exemptions for fertility services, the guidelines recommend that donor wishes dictate which classes of people should receive their donation. While it is not necessarily clear what 'social group' means in this context, it is likely that it encompasses the apparently common practice of allowing sperm donors to direct whether 'unmarried women' can receive their sperm.<sup>93</sup> Thus, the guidelines appear to endorse discrimination in the language of 'respecting' donor choice.

Clearly, much is left unsaid in policy and ethics guidelines, and much is left to the discretion of individual service providers. The analysis that follows will address the legislation in place but also discusses how it has been interpreted and applied using information drawn from anecdotal reports<sup>94</sup> regarding a range of differential treatment experienced by lesbian and gay users of fertility services.

#### (a) Statutory regulation of access

Only three jurisdictions, Western Australia, South Australia and Victoria, have legislation regulating the provision of assisted reproduction,<sup>95</sup> since 2002 only South Australia and Victoria continue to do so in a restrictive manner.<sup>96</sup>

Through the 1980s and 1990s, these legislatively regulated States restricted access to all fertility services by reference to a marital status requirement. While Western Australia and South Australia included long-term heterosexual de facto couples, Victoria limited access to legally married couples until 1997. This requirement was only dropped following a challenge by three heterosexual de facto couples, MW et al, who claimed damages for marital status discrimination under the SDA.<sup>97</sup> Thereafter, all three jurisdictions applied a marital status requirement that included heterosexual de facto couples (in South Australia this required a minimum cohabitation period of five years for all treatments, in Western Australia five years cohabitation was required for access to IVF).<sup>98</sup> This expanded marital status requirement was dropped in South

<sup>92</sup> NHMRC, *Ethical Guidelines 2004*, above n 87, 19, 24.

<sup>93</sup> See Diane Sisley, 'Discriminating Donors and the Victorian Equal Opportunity Commission' in Heather Grace Jones and Maggie Kirkman (eds), *Sperm Wars: The Rights and Wrongs of Reproduction* (2005), 121.

<sup>94</sup> Where other sources are not referred to, much of the anecdotal information in this section is drawn from reports of women who attended consultations I conducted with lesbian and gay parents and prospective parents in 2002 and 2003: see Jenni Millbank, *And Then the Brides Changed Nappies* (2003).

<sup>95</sup> *Infertility Treatment Act 1995* (Vic), *Human Reproductive Technology Act 1991* (WA); *Reproductive Technology (Clinical Practices) Act 1988* (SA).

<sup>96</sup> Note also that the VLRC may soon recommend open access: see VLRC, ('*Position Paper One*'), above n 52. For an explanation of how self-regulation interacts with Victorian law: see HW Gordon Baker, 'Problems with the Regulation of Assisted Reproductive Technology: A Clinician's Perspective' (2002) 9 *Journal of Law and Medicine* 457.

<sup>97</sup> MW [1997] HREOCA 6.

<sup>98</sup> *Infertility Treatment Act 1995* (Vic) s 8(1); *Human Reproductive Technology Act 1991* (WA) s 23(c); *Reproductive Technology (Clinical Practices) Act 1988* (SA) s 13(3)(b). Note that a

Australia following the decision of the Full Court of the Supreme Court of South Australia in *Pearce* in 1996 that the provision was invalid under s 109 of the *Constitution* by reason of inconsistency with the prohibition of marital status discrimination contained in s 22(1) of the *SDA*.<sup>99</sup> The Federal Court declared similar provisions invalid in Victoria for the same reason four years later in *McBain v Victoria*.<sup>100</sup>

Unlike the earlier case of *Pearce*, a huge amount of media and political attention was paid to the decision in *McBain*, despite their virtually identical facts and results.<sup>101</sup> It is possible that this was in part because the State of Victoria did not oppose the application in *McBain*, and as a result the Federal Court granted leave to the Australian Catholic Bishops Conference to put a contrary view as *amicus curiae*.<sup>102</sup> In subsequent years the federal government tried twice to amend the *SDA* to overturn the effect of the ruling.<sup>103</sup> On two occasions this was blocked by the Senate (however this legislation may yet be reintroduced following the government gaining control of the Senate on 1 July 2005, the implications of which will be discussed below). The Federal Attorney-General also made an extraordinary grant of his fiat to the Australian Catholic Bishops Conference in order that they might seek judicial review of the decision in the High Court (which was ultimately unsuccessful because the Court held by majority that they did not have standing in the matter).<sup>104</sup> Despite the fact that the patient in *McBain*, Leesa Meldrum, was herself heterosexual and clinically infertile, public discussion coalesced around (implicitly clinically fertile) 'lesbians and single women'.<sup>105</sup>

Regardless of decisions on similar provisions in other States, Western Australia continued to restrict access to fertility services on the basis of marital status until

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successful complaint was then brought by a single woman denied access to the same hospital in Victoria as that involved in *MW*, prior to the decision in *McBain v Victoria* (2000) 99 FCR 116, see: *W v D* (2000) EOC ¶93-045.

<sup>99</sup> *Pearce* (1996) 66 SASR 486. By extension marital status requirements in the Northern Territory should have been invalidated by that decision as the sole provider of ART in the Northern Territory operates under the South Australian regulations.

<sup>100</sup> *McBain v Victoria* (2000) 99 FCR 116.

<sup>101</sup> See Jennifer Lynne Smith, "'Suitable Mothers': Lesbian and Single Women and the 'Unborn' in Australian Parliamentary Discourse" (2003) 23 *Critical Social Policy* 63.

<sup>102</sup> Discussed in Kristen Walker, '1950s Family Values vs Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria' (2000) 11 *Public Law Review* 292.

<sup>103</sup> For a discussion of the political process see: Carol Johnson, 'Heteronormative Citizenship: The Howard Government's Views on Gay and Lesbian Issues' (2003) 38 *Australian Journal of Political Science* 45. For detail of the amending provisions see Belinda Bennett, 'Reproductive Technology, Public Policy and Single Motherhood' (2000) 22 *Sydney Law Review* 625.

<sup>104</sup> See Kristen Walker, 'The Bishops, the Doctor, his Patient and the Attorney-General: The Conclusion of the *McBain* Litigation' (2002) 30 *Federal Law Review* 507.

<sup>105</sup> Kirby J alludes to the fact that the Australian Family Association ('AFA'), granted leave to make submissions as *amicus curiae* in the High Court, was primarily motivated by hostility to lesbian parenting: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 432 [147]. See also remarks of Kirby and McHugh JJ about what McHugh J terms a 'gratuitous and irrelevant attack on homosexuals' contained in the AFA materials: Transcript of Proceedings, *Re Sundberg; Ex parte Australian Catholic Bishops Conference* (High Court of Australia, McHugh J, 5 September 2001).

2002.<sup>106</sup> This was possible because the legislation of each State was not invalid in the absence of a declaration.<sup>107</sup> In 2002 Western Australia amended its legislation to remove any marital status requirement.<sup>108</sup> In practice this means that all women are eligible to use assisted insemination and all clinically infertile women are eligible to use IVF.<sup>109</sup> Women in relationships, whether heterosexual or lesbian, must have the consent of a partner to be treated.<sup>110</sup>

The response of the regulatory authorities in South Australia and Victoria to date has been to continue to exclude the majority of lesbians and single women from assisted insemination, no longer on the impugned section of the statute, but based on a narrow definition of 'infertility' that limits eligibility to those who are 'clinically infertile'.<sup>111</sup> There has been extensive and compelling criticism of the socially constructed nature of the apparently neutral category of 'clinical infertility'.<sup>112</sup> It is notable that around 20 per cent of heterosexual couples treated have no known medical cause of their failure to conceive, and lesbians and single women have been denied treatment with no investigation into whether or not they in fact do have clinically impaired fertility.<sup>113</sup> Further, the location of infertility in the *couple* rather than the *individual* allows doctors to treat fertile women who have infertile male partners. This underlying decision about who the patient(s) is (or are) reflects a social, not medical, judgment that fertility treatments are a proper way of preserving marital monogamy.<sup>114</sup> Moreover, the decision to exclude unmarried women from fertility

<sup>106</sup> See Stella Tarrant, 'Western Australia's Persistent Enforcement of an Invalid Law: Section 23(c) of the Human Reproductive Technology Act 1991 (WA)' (2000) 8 *Journal of Law and Medicine* 92.

<sup>107</sup> Another notable example is the fact that Western Australian law continued to criminalise gay sex under the age of 21 until 2002, despite the *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4(1) providing that '[s]exual conduct involving only consenting adults in private is not to be subject, by or under any law of the Commonwealth, a State or Territory, to any arbitrary interference with privacy ...'. Section 4(2) defines an adult as someone 18 years old or more.

<sup>108</sup> *Human Reproductive Technology Act 1991* (WA) s 23.

<sup>109</sup> *Human Reproductive Technology Act 1991* (WA) s 23(a)(ia). See also Western Australian Reproductive Technology Council, *Questions and Answers about the Donation of Human Reproductive Material* (2005) 13 <<http://www.rtc.org.au/publications/docs/Q&A.pdf>> at 14 July 2006.

<sup>110</sup> *Human Reproductive Technology Act 1991* (WA) s 23(b).

<sup>111</sup> See discussion in Advia Sifris, 'Dismantling Discriminatory Barriers: Access to Assisted Reproductive Services for Single Women and Lesbian Couples' (2004) 30 *Monash University Law Review* 229, 239–42; see also Walker, above n 102.

<sup>112</sup> Bronwyn Stratham, '(Re)producing Lesbian Infertility: Discrimination in Access to Assisted Reproductive Technology' (2000) 9 *Griffith Law Review* 112, 137–8.

<sup>113</sup> As was the case in *Yfantidis v Jones* (1996) 61 SASR 458, discussed by Statham *ibid.* See ACCESS, *About Infertility* <[http://www.access.org.au/about\\_infertility](http://www.access.org.au/about_infertility)> at 7 August 2006.

<sup>114</sup> See Aleardo Zanghellini, *Lesbians, Gay Men and the Right to be a Parent* (PhD Thesis, University of Sydney, 2005). Zanghellini also notes that IVF often allows a fertile woman to conceive using sperm from a sub-fertile male partner so that the couple can have a child to whom both are biologically related, but that the desire of a fertile lesbian to gestate her partner's egg so that both women have a biological relationship with their child would not be supported under the definition of 'clinical infertility'. Zanghellini argues that 'the women's desire is one and the same: to use IVF in order to be able to gestate their partner's genes and give birth to the resulting child. However, the law is prepared to satisfy that

services does not take into account the potential health risks to both mother and child of untested semen when such health risk *is* used in other circumstances to define clinical need.<sup>115</sup>

In practice, the 'clinically infertile' definition is often applied as a requirement that a woman have engaged in heterosexual sex (or, more recently, self-insemination) for 12 months without conceiving prior to approaching a fertility clinic.<sup>116</sup> Adiva Sifris notes that in both *McBain* and *Pearce* the patients involved were single heterosexual women with impaired fertility seeking access not to donor insemination but to IVF services.<sup>117</sup> This, she argues, made it easy for treatment authorities to limit their response to the decisions by only allowing access to that particular category: 'single clinically infertile women'.<sup>118</sup> In fact there is no such requirement in the Victorian Act which, since the marital status provisions were removed, simply require that a woman is 'unlikely to become pregnant' other than through treatment.<sup>119</sup> Sifris, Kris Walker and others have noted that this existing definition is equally applicable to lesbians, single heterosexual women and women in relationships with infertile male partners.<sup>120</sup>

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desire only so long as it originates from a heterosexual couple. This suggests that there is nothing neutral in the adoption of the requirement of infertility in the context of IVF. The effect of adopting that criterion is to incite a woman's self-definition in relation to a man (and his genes) as opposed to another woman': ch 2 at 7.

115 This point was noted by the Tribunal Member in the original decision in *JM v QFG* [1997] QADT 5. The Member referred to the draft guidelines that had been drawn up by the Australian Health Ethics Committee on assisted reproductive technology published in April 1996 which included the following provision:

2.2 However, donor insemination (DI) may be used when the woman is not infertile or there is not a serious risk of transmission of a grave hereditary disease or disability and:

(a) when conditions exist for ensuring the well being of any child born of ART; and

(b) only when the woman or the child born of ART may otherwise be exposed to significant risk through her pursuit of pregnancy.

The Tribunal Member concluded that '... because of the risk of HIV from an informal donor who has not been through a proper screening process, [JM] would also fall within clause 2': at 7-8.

116 See, eg, South Australian Council on Reproductive Technology, *Reproductive Information for Students* (2006) South Australian Department of Health <<http://www.dh.sa.gov.au/reproductive-technology/student.asp>> at 29 July 2006. Sifris notes reports that some clinics in Victoria now only require four self-insemination attempts before deeming women eligible: above n 111, 241.

117 Statham, above n 112, 115, contends from her analysis of the Australian case law that 'the less a complainant's circumstances appear to conform to the norm of the heterosexual nuclear family form, the less likely it is that exclusion from access to reproductive assistance will be considered to be discriminatory'.

118 See Sifris, above n 111, 238.

119 *Infertility Treatment Act 1995* (Vic) s 8(3). Statham, above n 112, 116, argues 'the further one moves away from a discursive and doctrinal framework constructing the issues in terms of a legal 'right' to access assisted reproduction, towards a medical paradigm framing the issues in terms of a 'medical need' for fertility treatment, the less likely it is that exclusionary eligibility criteria will be considered to be discriminatory'.

120 Sifris, above n 111, 241-2, Walker, above n 102.

There has, however been some change in Victoria as a result of the dropping of express marital status requirements.<sup>121</sup> Lesbians who have been home-inseminating without conceiving for the set period and meet the 'infertility' criteria are now eligible for access to donor insemination and IVF, whereas previously they would have been excluded regardless of any clinical infertility. Further, in Victoria, clinics will now test and store the sperm of known donors for (presumptively) 'clinically fertile' women who self-inseminate.<sup>122</sup> (The provisions rendering home insemination a criminal offence subject to severe penalties are, however, still in place.<sup>123</sup> Such provisions do not target lesbians specifically, but have a disproportionate impact upon them.)

The VLRC in *Position Paper One* of its inquiry into ART, *Surrogacy and Adoption* made the interim recommendation that the legislation be amended to remove the requirement of marital relationship status<sup>124</sup> and clarify that the meaning of 'unlikely to become pregnant' includes the situation of not having a male partner.<sup>125</sup> If enacted, these recommendations would make clinics fully accessible to all prospective lesbian parents in Victoria. However the recommendations as a whole do not entirely support lesbian self-determination in family formation. In particular, the Commission made an interim recommendation to prohibit storage and testing of sperm for women who self-inseminate,<sup>126</sup> as well as recommending the introduction of other disincentives to prevent home-based insemination.<sup>127</sup> While there are clear benefits to making clinics accessible, particularly health benefits, I would argue that there are also benefits to self-

<sup>121</sup> In South Australia, lesbians are able to attend non-licensed providers who register with the Minister of Health and agree to abide by the Code of Ethical Clinical Practice, but non-licensed doctors can only provide donor insemination and not IVF, and they do not have access to anonymous donor sperm. Note that no practitioners have registered under these provisions to date: see South Australia Council on Reproductive Technology, *Reproductive Technology Information for Students* (2006) <<http://www.dh.sa.gov.au/reproductive-technology/student.asp>> at 29 July 2006; *Reproductive Technology Legislation and Regulation in SA Fact Sheet*: <<http://www.dh.sa.gov.au/reproductive-technology/documents/eligibility-fact-sheet.pdf>> at 29 July 2006.

<sup>122</sup> VLRC, (*Position Paper Number One*), above n 52, [3.3]–[5]. Note that this is subject to women and donors undergoing counselling and all the other requirements imposed normally on those who are eligible for treatment, and also requires mothers to notify the authority of donor identity and birth details: see Infertility Treatment Authority, *Storage of Sperm by Women Using Known Donors for the Purpose of Self-Insemination: Interim Conditions Imposed under Section 106 – Infertility Treatment Act 1995* (2004) <[http://www.ita.org.au/\\_documents/policies/guidelines-nov04.pdf](http://www.ita.org.au/_documents/policies/guidelines-nov04.pdf)> at 23 September 2005. Note that this document has since been removed. No direct reference to availability of this service is currently made on the ITA website, however mention is made of it in the *ITA Annual Report 2005*, available at <<http://www.ita.org.au/secure/downloadfile.asp?fileid=1001430>> at 29 July 2006. The report notes at 11: 'In late 2004, Melbourne IVF at the Royal Women's Hospital applied for a variation in its licence for the storage of sperm by women using known donors for the purposes of self-insemination. This was granted with the incorporation of a review and reporting process by the end of 2005.'

<sup>123</sup> *Infertility Treatment Act 1995* (Vic) s 7.

<sup>124</sup> VLRC, (*Position Paper Number One*), above n 52, 20 (interim recommendations 11–13).

<sup>125</sup> *Ibid* 22 (interim recommendations 14–15).

<sup>126</sup> *Ibid* 27 (interim recommendation 17); see also discussion at [3.6]–[3.8].

<sup>127</sup> For example, in *Position Paper Two* the VLRC links legal recognition of the non-birth mother exclusively to the use of Victorian clinics to conceive: above n 25, 20.

insemination and women should be able to freely choose either avenue based upon their own needs and circumstances, without facing economic or legal penalties.

It is possible that the federal government could still reintroduce legislation to amend the *SDA* in order to overturn the effects of the *Pearce* and *McBain* decisions now that it has control of the Senate.<sup>128</sup> Such amendments would effectively prevent the federal prohibition on marital status discrimination from overriding State legislation that restricts who may access reproductive technology. The principal relevance of any such change is thus in the three States that have regulatory legislation, Western Australia, South Australia and Victoria. Given that Western Australia has now abandoned marital status requirements and Victoria appears poised to do the same in the near future, it is likely that it is only in South Australia that the major impact would be felt if marital status requirements were reactivated.<sup>129</sup> If that did occur, clinically infertile 'single' women, both heterosexual and lesbian, who are currently eligible under the 'infertility' test would no longer be so.

In other States, access to fertility services is not governed by legislation, therefore in NSW, the ACT and Tasmania discriminatory eligibility criteria may be challenged as discrimination in the provision of 'goods and services' under State anti-discrimination law as either sexual orientation discrimination or marital status discrimination without needing to resort to federal marital status provisions. In Queensland (since 2002)<sup>130</sup> and the Northern Territory<sup>131</sup> fertility services have a formal exemption from State anti-discrimination laws, so amendments to the *SDA* would in fact remove the only avenue for lesbians to make a complaint of discrimination if they were excluded from access in those States. However it should be noted that the opportunity to seek redress under the *SDA* is already limited by the inability of the Human Rights and Equal Opportunity Commission to impose a remedy,<sup>132</sup> and by the fact that discriminatory service providers now couch exclusions in terms of 'infertility' criteria rather than formal marital status requirements (see discussion above, and of the case brought by JM, below).

<sup>128</sup> See Matt Price and Clara Pirani, 'Demand for IVF Ban on Lesbians', *The Australian* (Sydney), 2 July 2005.

<sup>129</sup> The sole provider of fertility services in the Northern Territory is a South Australian company, acting under South Australian laws and guidelines, thus the impact should logically extend to the Territory. However there are reports that the Northern Territory has continued to (unlawfully) restrict access to heterosexual married and de facto couples under a contractual arrangement between the provider and the Territory government: see Seymour and Magri, above n 44, 23–4, and Darwin Community Legal Service, *Equality Before the Law: Gay and Lesbian Law Reform in the NT* (2002). While this is not in breach of Territory law (due to the operation of s 4(8) of the *Anti-Discrimination Act 1992* (NT); see note 131 below) it is clearly inconsistent with the *SDA*, thus a change to the *SDA* would merely regularise existing unlawful practice.

<sup>130</sup> *Discrimination Law Amendment Act 2002* (Qld) s 19 inserting s 45A into *Anti-Discrimination Act 1991* (Qld).

<sup>131</sup> *Anti-Discrimination Act 1992* (NT) s 4(8).

<sup>132</sup> *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245; see also Andrea Durbach, 'Fixing the Brandy Prohibition' (1995) 20 *Alternative Law Journal* 137. Remedies may still be sought through the Federal Court.

**(b) Non-statutory regulation of access**

New South Wales, the ACT, Tasmania and Queensland do not have legislative regulation of reproductive technologies (while the sole provider in the Northern Territory is a company that operates under South Australian law).<sup>133</sup> Access in these jurisdictions is therefore governed by a mix of policy and practice.<sup>134</sup>

Queensland is the only State without legislation on reproductive technologies where a complaint of discrimination has been brought against a service provider. The case of *JM v QFG* is also exceptional as it is the only claim to date brought by a lesbian, and brought specifically under the sexual orientation ground in State legislation rather than under federal marital status provisions. Jennifer Morgan was denied access to donor insemination by a private fertility clinic when she refused to provide a consent form signed by a husband or male partner and subsequently identified herself as lesbian in the process. The Queensland Anti-Discrimination Tribunal held that JM had suffered both direct and indirect discrimination<sup>135</sup> on the basis of 'lawful sexual activity' (which was then the ground covering sexual orientation)<sup>136</sup> and awarded her modest damages. The Supreme Court of Queensland overturned the finding of direct discrimination and remitted the claim of indirect discrimination to the Tribunal for further consideration.<sup>137</sup> An appeal to the Court of Appeal of Queensland by JM was unsuccessful<sup>138</sup> as was an application for special leave to appeal to the High Court.<sup>139</sup> The decision has been extensively critiqued by others, so only a few points will be made here.<sup>140</sup>

A notable feature of the case was that the discrimination in question was part of an 'unwritten agreement between QFG and the Queensland government that only heterosexual or married women were eligible for access to these services, and that funding (or perhaps licensing) would be withdrawn from these services if they ignored

<sup>133</sup> Reproductive services in the Northern Territory are provided by the South Australian Company Repromed.

<sup>134</sup> NSW has never legislated on this area, but has been considering doing so since 1997. A draft government Bill exists, a public version of which has been available since 2003, but it is unclear whether or when this will be introduced into Parliament. The Bill does not include any eligibility criteria. The Bill would establish a disclosure regime for donors and regulation of the storage and use of gametes: NSW Parliamentary Counsel's Office, *Consultation Draft Bill: Assisted Reproductive Technology Bill 2003* (2003) <<http://www.pco.nsw.gov.au/pdf/exposure/b03-015-d12.pdf>> at 29 July 2006.

<sup>135</sup> *JM v QFG* [1997] QADT 5.

<sup>136</sup> Note that since the 2002 amendments 'lawful sexual activity' is now the ground that covers transgender people and sex workers, while sexual orientation is now covered by the ground 'sexuality': *Anti-Discrimination Act 1991* (Qld) s 7.

<sup>137</sup> *QFG v JM* [1997] QSC 206.

<sup>138</sup> *JM v QFG* [2000] 1 Qd R 373.

<sup>139</sup> Transcript of Proceedings, *JM v GK* (High Court of Australia, Gleeson CJ and Callinan J, 24 June 1999). On remittal the Tribunal found no indirect discrimination: *Morgan v GK* [2001] QADT 10.

<sup>140</sup> 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; Statham, above n 112; Reid Mortensen, 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland' (2003) 3 *Queensland University of Technology Law and Justice Journal* 320.

this agreement'.<sup>141</sup> The evidence of the doctor defending the claim was that this 'unwritten agreement' was in place because of the 'difficulties in introducing legislation based on the 1984 Demack Report'.<sup>142</sup> Thus discrimination on the basis of sexual orientation and marital status in the provision of fertility services, despite being proscribed by anti-discrimination laws, was compelled – or at the least very strongly encouraged – by the then State government, through a policy that was never made public. One result of *JM v QFG* was the insertion in 2002 of an exemption in Queensland anti-discrimination law for providers of fertility services.<sup>143</sup> However note that, unlike the provisions in South Australia and Victoria prior to challenge, this only means that providers *may*, rather than *must*, discriminate.

The basis of the Supreme Court decision in *JM v QFG* was two-fold; first JM had not suffered as a result of any 'activity', and secondly, she was lawfully excluded because she was not infertile. Ambrose J held that 'lawful sexual activity' was not the ground of exclusion from the service; rather, it was because JM was 'heterosexually inactive'. There is little to be gained from analysis of this part of the decision because it is so plainly wrong<sup>144</sup> and in any case redundant, as the terminology of 'lawful sexual activity' in Queensland and elsewhere has since been replaced by categories that reflect sexual orientation more definitively as an identity rather than an act.<sup>145</sup> The second aspect of the ruling, that fertility services may use their own definitions of infertility (in that case, 12 months of 'normal' intercourse without conceiving), has had a more lasting impact. As noted above (in the section 'Statutory Regulation of Access'), such definitions are arbitrary as they do not consider social infertility at all, and also overlook the possibility of clinical infertility in lesbians. It is clearly still open to providers in Queensland to adopt less restrictive definitions of infertility if they so choose.

Anecdotal evidence suggests that there are a number of fertility services in NSW and the ACT (and indeed at least one in Queensland)<sup>146</sup> that do not exclude lesbians. It should be noted however, that there are in practice a variety of other barriers to lesbian and gay access to fertility services beyond formal eligibility policies. First, there is very little donor sperm available in Australia (in part a result of restrictions on the importation of sperm and in part because increasing openness about donor identity has discouraged many men from donating).<sup>147</sup> As a result, only a small (and

<sup>141</sup> *JM v QFG & The State of Queensland* [1997] QADT 5, at typescript page 3. See also later discussion on page 4 under the heading 'The Role of Queensland Health'.

<sup>142</sup> *Ibid* 5. Parliament of Queensland, *Report of the Special Committee Appointed by the Queensland Government to Enquire into the Laws Relating to Artificial Insemination, In Vitro Fertilization and Other Related Matters* (1984) ('Demack Report').

<sup>143</sup> *Discrimination Law Amendment Act 2002* (Qld) s 19 inserting s 45A into *Anti-Discrimination Act 1991* (Qld).

<sup>144</sup> For instance it would be absurd to suggest that protections on the basis of 'union activity' did not cover workers who refused to join unions; see Mortensen, above n 140.

<sup>145</sup> The *Anti-Discrimination Act 1991* (Qld) was amended in 2002 to include the protected ground 'sexuality': s 7(n). This is defined in the Dictionary to include 'heterosexuality, homosexuality or bisexuality'.

<sup>146</sup> After being refused access to QFG, JM attended another clinic outside Brisbane.

<sup>147</sup> Although note that there are other factors at work also, such as increasingly rigorous health checks for donors, including mental health history screening: see Cath Dwyer, 'Selling Sperm: The International Trade in Sperm' in Heather Grace Jones and Maggie Kirkman



decreasing) minority of fertility clinics even provide assisted insemination with donor sperm any longer. For public hospitals this means lengthy waiting lists for all women seeking to use donor sperm: at one major Sydney hospital there is currently a nine-month wait to even be taken on as a patient and at another it is 6-12 months.<sup>148</sup> At private clinics this may mean limited donor choice as well as other constraints, such as clinics limiting the number of DI cycles provided with donor sperm.<sup>149</sup>

Of those clinics that do utilise donor sperm, it appears to be common practice in all jurisdictions to offer donors a choice as to whether or not their donation is made available to 'single' women,<sup>150</sup> resulting in even fewer donors available to lesbians in the context of an overall donor sperm shortage.<sup>151</sup> This is almost certainly unlawfully discriminatory conduct by the service provider under State law (in States where such services are not exempt) and under federal sex discrimination law.<sup>152</sup> The unique nature of sperm (and ovum) donation is claimed as a moral basis for such discrimination; that is, unlike blood and organs, where one cannot direct donations to recipients that one feels are the most deserving (for example to non-smokers, or non-drinkers) this kind of donation does not simply save but actually *creates* a life.<sup>153</sup> Yet it

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(eds), *Sperm Wars: The Rights and Wrongs of Reproduction* (2005) 18. Note also that the proposed NSW Bill, if passed, would considerably limit the use that can be made of a donor's sperm, inevitably leading to a worsening of the shortage. Currently, providers use sperm to create up to 10 families. The Bill would limit this to children born to five women, including any current and previous partners of the donor: Assisted Reproductive Technology Bill 2003 (NSW) div 3, cl 30 available at <<http://www.pco.nsw.gov.au/pdf/exposure/b03-015-d12.pdf>> at 29 July 2006.

148 Telephone conversations with Royal Price Alfred Hospital and Westmead Hospital, 12 October 2005.

149 In one Sydney clinic this is set at three cycles: thereafter women must find their own donor or undertake IVF in order to continue with the clinic.

150 See, eg, Reproductive Technology Council (WA), above n 109, 9, noting that donors 'may place conditions on any donation' and recipients may be 'named by the donors or chosen in ways they specify'. See also the statement of a counsellor at Melbourne IVF that donors may state their preferences and 'this system works well': Penny Pitt, (paper presented at The Missing Link: Private Rights and Public Interest in Donor Treatment Procedures, Melbourne, 29 October 2003) 20. Repromed, a major provider of fertility services in SA, Victoria and the only provider in the NT, prompts this in its public information: 'Consent may be given subject to such conditions as the donor specifies on the consent forms or subsequently by notice in writing ... Conditions might include: Who will or will not be the recipients of the gamete donation (married couples, de facto couples, single women, lesbian couples, etc)': above n 71, 7.

151 See, eg, the experience of a lesbian prospective mother who had only one donor to choose from: Mary Hogan, 'No one but Himself' in Heather Grace Jones and Maggie Kirkman (eds), *Sperm Wars: The Rights and Wrongs of Reproduction* (2005), 218.

152 Di Sisley, Victorian Equal Opportunity Commissioner, notes the effect of donor choice on a 'single' woman thus: 'while she is not refused a service her use of a service is subject to discriminatory terms and conditions. She is receiving a less beneficial service. She may have a longer waiting period for the required service, and this may mean she has a decreased likelihood of pregnancy as a result of her diminished fertility over time': Pitt, above n 150, 18.

153 See Andrew McLean, 'Who Can be Parents of our Embryos?' in Heather Grace Jones and Maggie Kirkman (eds), *Sperm Wars: The Rights and Wrongs of Reproduction* (2005) 112. This

is notable that clinics do not appear to offer donors a choice as to other social attributes of recipients, such as their race, age, class or religion. My own view is that distinctions between different kinds of donation are indefensible. Donors are not themselves founding a family, they are making a donation to allow someone *else* to do so, and the ultimate choice about whether and how to become a parent, and what family form to do so within, must remain with the prospective parent(s) themselves. The VLRC has an interim recommendation in *Position Paper One* against the practice of allowing directed anonymous donation,<sup>154</sup> yet the 2003 NSW Draft Legislation points in the opposite direction by including for the first time express provisions to allow such practice to continue in NSW lawfully.<sup>155</sup> For some lesbians in NSW, the extremely limited choice of donors that this (presently unlawful) practice has entailed has raised the prospect that several children in the local lesbian community are likely to be born from the same biological father, and ultimately led some prospective mothers to reject the use of clinical services.<sup>156</sup>

Donors are required to complete 'lifestyle declarations' that include information about risk activities, including male-male sex. In South Australia, NSW and Victoria this is prescribed by statute and regulation (and compliance with these regulations grants service providers an immunity from suit if patients do contract any illness through donated material).<sup>157</sup> Even where not mandated by law, these declarations are required by the policy of the RTAC. Non-compliance with RTAC policy can lead to providers losing accreditation (accreditation is necessary, among other things, to access Medicare funding).

The effect of a positive declaration of male-male sex varies; in some jurisdictions there is a mandated and absolute bar on using such sperm,<sup>158</sup> while in others there is a discretionary bar,<sup>159</sup> or longer waiting periods in order to enable additional testing. While such provisions were originally motivated by concern about transmission of HIV, particularly through blood donation, at the outset of the AIDS pandemic, they are arguably no longer necessary given universal precautions in testing and the proven health benefits of freezing and washing sperm. Clearly, these prohibitions pose a major barrier to gay men's parenting aspirations if they are used to exclude all gay sperm donors regardless of their health status. They also impact negatively on lesbians in two ways, first they indirectly reduce the already limited pool of available anonymous donor sperm (and also reduce the pool of donors who would be less likely to

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argument is also made by Helen Szoke, Chief Executive Officer of the Victorian Infertility Treatment Authority: see Pitt, above n 150, 2.

154 VLRC, (*Position Paper One*), above n 52, 33 (interim recommendation 19).

155 This is justified on the basis that 'directed donations [are] in accordance with the principle that individuals have the right to determine the circumstances in which their genetic material can be used': NSW Department of Health, above n 54, [4.9].

156 This information is drawn from reports of parents in the consultation process for, *And Then the Brides Changed Nappies*, above n 94.

157 See *Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995* (SA) reg 12; *Human Tissue Act 1983* (NSW) ss 20D, 20G; *Human Tissue Regulations 2005* (NSW) sch 1 (containing the requisite questions); *Health Act 1958* (Vic) s 133; *Health (Infectious Diseases) Regulations 2001* (Vic) reg 19, sch 8. The Victorian provisions are discussed in Walker, above n 102, 305.

158 As in South Australia and the Northern Territory: see Repromed, above n 71, 4.

159 *Ibid*, noting that this is 'a clinical decision' in Victoria.

discriminate against lesbians in directing donations), and secondly they directly prevent lesbians from using clinical services with a known donor if he is gay. As with the facially neutral 'medical' definition of infertility, it is apparent on reflection that these are not simply medical decisions; they involve key questions of social policy and value judgment. Notably, in NSW the 'lifestyle declaration' is not required from a male partner of a woman undergoing assisted insemination or IVF with his sperm,<sup>160</sup> and yet does apply to other women who have a known donor.<sup>161</sup>

Another limit on access is the cost of fertility treatment. There is no definition of 'infertility' in the Health Insurance Regulations 1975 (Cth) nor in the current *Medicare Benefits Schedule Book* (1 November 2005, including 1 May 2006 *Supplement*). It appears that providers are operating under an informal directive that services that aren't 'medically or clinically relevant' cannot be billed to Medicare.<sup>162</sup> This means that each fertility service may exercise its own judgment as to what constitutes 'clinical' infertility. Common practice appears to be that if a woman declares she has been trying to get pregnant for 12 cycles before approaching a fertility service clinic, she is likely to be defined by the provider as 'infertile', and would thus be eligible for Medicare benefits. But a woman classified as 'socially infertile', if accepted by a clinic, would have to pay the full cost of treatment herself. As noted earlier, for a simple cycle of DI this is currently around \$1800. After a number of unsuccessful cycles of DI in a clinical setting, a woman may be re-classified as 'medically infertile' and become eligible for Medicare benefits (which initially cover only a quarter of the cost, but increase to cover the majority of the cost once the Medicare 'Extended Safety Net' is reached.)<sup>163</sup>

In short, lesbians are excluded from fertility services in Victoria and South Australia (and by extension the Northern Territory) unless they can first demonstrate clinical infertility as a rule, and may be excluded on the same grounds on a discretionary basis in Queensland. Elsewhere, particularly in NSW and the ACT, lesbians are likely to be granted access, but are presumed 'fertile' and so must do so at a far higher cost. Only in Western Australia is access equal both in formal and practical terms.

It is important to note that while some lesbians have children with a known donor, often a gay man, through choice (for instance because of a desire for their child to know their biological father, to have an extended family, or a wish to avoid the medicalised and often discriminatory atmosphere of fertility services) the difficulties of

<sup>160</sup> *Human Tissue Act 1983* (NSW) s 20D(4).

<sup>161</sup> The rationale that the woman in a heterosexual couple has assumed the risk of infection already could equally be made for a lesbian who gave informed consent to a known gay donor. As with other aspects of ART policy it can be argued that it is not 'health' but the marital unit that is being protected; here through not requiring the male partner in a couple to potentially make embarrassing revelations, such as sex with prostitutes, or with men.

<sup>162</sup> ABC Radio, 'Health Minister Warns Doctors not to Provide Medicare Funded IVF Services to Fertile, Single and Lesbian [sic] Women', *AM*, 4 August 2000 <<http://www.abc.net.au/am/stories/s159416.htm>> at 29 July 2006.

<sup>163</sup> The Medicare schedule provides an item cost of approximately \$500 to DI, but presently refunds 80 per cent of the difference between the scheduled fee and the actual cost once the Medicare extended safety net of annual out of pocket expenses is reached. In 2006 this was \$1000 for both an 'individual' or a 'family'. A lesbian couple cannot claim the joint 'family' threshold, so must each reach the limit separately. Assuming that 6 attempts were made in a calendar year before conception, this would cost over \$7000, more than twice the amount that would be paid by a heterosexual couple.

gaining access outlined above means that for most gay men and for many lesbians, having children with each other is the *only* option available to them. This is very problematic if it is not a genuine choice of the parents concerned and is instead coerced through restrictive access to reproductive assistance and adoption. In my view, this concern is borne out in the *Re Patrick* case<sup>164</sup> (discussed below) where it appeared that both the biological father and the mothers were at complete odds from the very first as to what family structure they wanted, and yet proceeded to form a family together.

### III PARENTAL STATUS OF CHILDREN BORN THROUGH ASSISTED REPRODUCTION

Parental status is relevant across a huge range of State and federal laws. Under the *FLA* each parent has shared parental responsibility, including the duty to provide for the day-to-day and long-term welfare of the child and power to make decisions on behalf of the child. The *FLA* and *Child Support (Assessment) Act 1989* (Cth) (*Child Support Act*) together oblige parents to financially maintain their children. However there are also, as the VLRC notes, '[a] broad range of obligations and entitlements that arise out of the parent-child relationship' created by State law.<sup>165</sup> The Commission gives examples drawn from Victorian law as follows:

- entitlement to compensation under statutory schemes such as workplace or transport accident and victims of crime compensation;
- entitlement to a share of a person's estate if he/she dies without making a will;
- entitlement to distribution of a person's superannuation after his/her death;
- responsibility of a parent for the supervision of a child (eg to be present with the child at certain times, to consent to the child's involvement in a dangerous activity, not to permit a child under 15 to engage in employment);
- obligation to cause the child to attend school;
- obligation to provide an immunisation status certificate to the child's primary school;
- power to consent to the removal of tissue from a child's body (while living or upon death) or to a blood transfusion;
- power to appoint a person to be the guardian of one's child after one's death;
- power to take action on behalf of the child (eg to make a complaint or application about family violence or discrimination, or to consent to an award of damages in favour of a child);
- power to consent to the adoption, permanent care or short-term care of the child;
- entitlement to be consulted and heard on proceedings concerning the care and welfare of the child;
- entitlement to be present when a child is being questioned by the police, or is being drug tested; and
- obligation to disclose existence of a parent-child relationship for the purpose of certain business activities and prohibition or permission of carrying on business activities with prescribed family members.<sup>166</sup>

<sup>164</sup> *Re Patrick* (2002) 28 Fam LR 579.

<sup>165</sup> VLRC, (*Position Paper Two*), above n 25, [2.9].

<sup>166</sup> *Ibid* (citations omitted).

The question of who is a parent in lesbian and gay families formed by assisted conception is a vital one. Lesbian and gay family forms differ from heterosexual families. While some heterosexual families have one parent who is not biologically related to the child, in lesbian and gay families this is the norm rather than the exception.

In some limited circumstances there is recognition of rights and obligations between adults who are *in loco parentis* (in the place of a parent) with a child to whom they have no legal or biological relationship.<sup>167</sup> Same-sex partnership recognition has also extended rights to the partner of a parent in limited circumstances, so that they are included within the definition of parent for particular legislation.<sup>168</sup> However, in these later instances, non-biological parents are recognised by virtue of their relationship with their partner, rather than their relationship with the child, and so such recognition would cease if the parent and partner separated.

### (i) Sperm donors

As noted earlier, all States and Territories have legislation that severs the legal relationship of sperm donors with the resulting child, and accords parental status to the consenting husband or de facto partner of a woman who conceives through donor insemination. These laws differ in their wording, but reflect the decision in 1980 of the Standing Committee of Commonwealth and State Attorneys-General on uniform legislation on the status of children born as a result of 'artificial insemination'. The Standing Committee agreed that the legislation should provide that:

a husband who consents to his wife being artificially inseminated with donor sperm shall be deemed to be the father of any child born as a result of the insemination;  
the sperm donor shall have no rights or liabilities in respect of the use of the semen; and  
any child born as a result of AID (artificial insemination by donor) shall have no rights or liabilities in respect of the sperm donor.<sup>169</sup>

This recommendation was reaffirmed by the Standing Committee in 1981, 1982 and 1983 and passed into law in the various States and Territories in 1984 and 1985.<sup>170</sup> Although the wording of the different State and Territory Acts vary, they have been described as 'identical for relevant purposes'.<sup>171</sup> There is some contention about the

<sup>167</sup> See, eg, *Workers Compensation Act 1987* (NSW) ss 25(5), 37(7) where a child includes a person to whom the worker stands in the place of a parent; and similar provisions in the *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 4.

<sup>168</sup> See examples discussed in VLRC, ('*Position Paper Two*'), above n 25, [2.22]-[2.27].

<sup>169</sup> Cited in *Re B and J* (1996) 21 Fam LR 186, 192.

<sup>170</sup> *Artificial Conception Act 1984* (NSW) ss 3, 6 (since replaced with *Status of Children Act 1996* (NSW) s 14); *Status of Children Act 1978* (Qld) s 18; *Family Relationships Act 1975* (SA) s 10(a), (e); *Artificial Conception Act 1985* (WA) ss 3, 7; *Status of Children Act 1974* (Tas) s 10C; *Artificial Conception Act 1985* (ACT) ss 3, 7 (since replaced with *Parentage Act 2004* (ACT) s 11); *Status of Children Act 1978* (NT) ss 5A, 5F.

<sup>171</sup> *Re B and J* (1996) 21 Fam LR 186, 192. In fact Western Australia had a major difference in that the severing provisions originally only applied to married and heterosexual de facto couples and did not apply to single women: *Artificial Conception Act 1985* (WA) s 7. See Western Australia, *Parliamentary Debates*, Legislative Council, 21 February 1985, 173 (JM Berinson, Attorney-General). This was amended finally in 2002 to include unmarried women also (with retrospective effect): see Western Australian Reproductive Technology Council, above n 109, 9, 26.

totality of the provisions severing parental status of the donor when the mother has no male partner; these vary slightly from State to State, and will be discussed below.

In 1987, a new provision was inserted into the *FLA* to ascribe parental status to the male partner of a birth mother and to reflect in part the State presumptions just passed for children born through assisted reproduction.<sup>172</sup> Unfortunately, this section of the *FLA* does not completely mirror the State and Territory Acts. Nor does it clearly pick up, through prescription in the *Family Law Regulations 1984* (Cth), all of the relevant provisions of State law, although two sections of the *FLA* refer to prescribed laws as the *only* source of parental status. This ambiguity is further compounded by the fact that the *FLA*, unlike the matrix of State and Territory laws that sever the link from donors and accord parental status to the birth parent and her partner, only includes the *according* of status to the unrelated parent. Significantly, it does not include mirror provisions *severing* the relationship with the biological parent. This has led to debate as to whether, for the purposes of parental responsibility under the *FLA*, the Court is limited to the s 60H definitions. If not, there is the question whether State presumptions of parental status are incorporated (or ought to be reflected through interpretation) into the *FLA*, or alternately, whether the Court can resort to its own ('natural' or 'ordinary') interpretation of parent for the purposes of the *FLA*.

It seems clear that the drafters did not contemplate the complexity of gay and lesbian family forms when framing the provisions. The following discussion outlines the views taken in various cases. Once courts move beyond the precise words of s 60H, as they are forced to do by absurd wording and results, there are major policy questions. Does the *FLA* reflect the presumptions set up in favour of social rather than genetic parents in State law for the past 20 years, or can the court establish a separate system of parental status under which it may (but may not) recognise known donors and commissioning parents as legal parents? If so, what criteria does it use to do this?

The *FLA* provides that both parents share parental responsibility,<sup>173</sup> and from July 2006 includes a raft of new provisions strengthening the ideal of on-going shared parenting between biological parents through, among other things, a presumption that parental responsibility remain equally shared, the elevation to a 'primary factor' of the benefit of contact with both parents, and consideration of equal time or 'substantial and significant' time with both parents.<sup>174</sup> In this context, a finding that a sperm donor is a parent under the *FLA* has implications not only for contact but also for the mother's (or mothers') ability to make decisions about a wide variety of matters including medical issues. Such a finding would also have a major impact on lesbian couples seeking parenting orders by consent from the Court, if donors were taken to be a 'parent' whose consent had to be provided. Further, finding that a donor is a parent under the Act could conflict with new State and Territory laws granting parental status to the co-mother, raising the possibility of s 109 inconsistency under the *Constitution*.

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<sup>172</sup> By virtue of the *Family Law Amendment Act 1987* (Cth) s 24.

<sup>173</sup> *Family Law Act 1975* (Cth) ss 61B, 61C.

<sup>174</sup> See *Family Law Act 1975* (Cth) ss 60CC, 61DA, 65DAC, 65DAE, new s 60B inserted by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

Section 60H (originally numbered 60B) contains three distinct provisions.<sup>175</sup> The first subsection provides that where a child is born to a woman as a result of an 'artificial conception procedure' carried out while she was married (including, by virtue of sub-ss (4) and (5), a woman in a heterosexual de facto relationship) then whether or not the child is biologically a child 'of the woman and of the man, the child is their child' on either of two bases. The first basis is that the procedure was carried out with their consent and the second is that under the prescribed law of the Commonwealth or of a State or Territory the child is theirs. The prescribed laws under sub-s (1), listed in the *Family Law Regulations 1984* (Cth), presently include the relevant status of children legislation from all the States and Territories except Queensland.<sup>176</sup> The effect of this provision is thus to establish a *dual* basis by which the male partner of a woman who has a child through assisted conception is ascribed parental status, directly through consent, or indirectly through the parenting presumptions of the various States. This subsection is unambiguous and in accord with State law, so has given rise to little difficulty.

The second and third subsections do not specify marital status and apply instead to women and men respectively. It is these two subsections that have given rise to great difficulty, which has been experienced mostly by lesbian and gay parents. Subsection 2 provides that where a child is born to a woman through assisted conception then 'whether or not the child is biologically a child of the woman, the child is her child' if under a prescribed law of the Commonwealth or of a State or Territory the child is the

<sup>175</sup> *Family Law Act 1975* (Cth) s 60H, which reads:

Children born as a result of artificial conception procedures

(1) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to a man; and

(b) either of the following paragraphs apply:

(i) the procedure was carried out with their consent;

(ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the man;

then, whether or not the child is biologically a child of the woman and of the man, the child is their child for the purposes of this Act.

(2) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

(3) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

(4) If a person lives with another person as the husband or wife of the first-mentioned person on a genuine domestic basis although not legally married to that person, subsection (1) applies in relation to them as if:

(a) they were married to each other; and

(b) neither person were married to any other person.

<sup>176</sup> *Family Law Regulations 1984* (Cth) reg 12C, sch 6.

child of the woman. The prescribed laws under sub-s (2) only include those of South Australia, the Northern Territory and the ACT (of these, the last has actually been superseded),<sup>177</sup> and the regulation does not list the relevant laws of the remaining five jurisdictions. The effect of this section is to provide only one basis for determining maternity, that of State law, but through prescribing only some laws with a definition of parent it does not answer the question whether a woman in all the five unlisted States is the mother of her child if born through assisted conception. On a 'restrictive' reading that s 60H governs the application of the whole *FLA* to children born through assisted conception, this section could mean that any lesbian (or single heterosexual woman) who gave birth to a child, either through donor insemination or IVF, whether or not of her own ovum, was not the child's mother for the purposes of the *FLA* if the child were born otherwise than in the three prescribed jurisdictions. Such child would have no parent at all for the purpose of the *FLA*.<sup>178</sup> A logical response to this absurd conclusion is to take an 'enlarging' approach, going beyond the terms of s 60H.

Subsection (3) makes provision for a man, such that 'whether or not the child is biologically a child of the man, the child is his child' if a prescribed law so provides. Under sub-s (3) there are no prescribed laws whatsoever. A restrictive reading of this section is less problematic, because an unmarried man in such situation would generally be a sperm donor, so an interpretation of this section that deprives him of parental status is consistent with parenting presumptions in State law, while a social father requiring the ascription of parental status will generally be married or in a de facto relationship and so covered by sub-s (1). Unlike the sub-s (2) maternity provisions, a restrictive reading of the paternity provision is logical and consistent with State law. However, in two cases involving known donors in lesbian families, even though one of the donors never intended, and never in fact did have, an ongoing relationship with the child, the Family Court has been reluctant to take this approach.<sup>179</sup>

The first two cases concerning s 60H, *W v G* (1996) and *Re B and J* (1996), both revolved around the question of liability of known donors for child support of children born through donor insemination into lesbian families. In both cases the donor was not intended to be a parent figure, and was at all times uninvolved with the children, who were raised by their mothers.<sup>180</sup> As the *Child Support Act* adopts the definitions in s 60H, the difficulty in interpretation has also flowed on to that Act.

<sup>177</sup> *Family Law Regulations 1984* (Cth) reg 12C, sch 6. Presently this lists the *Artificial Conception Act 1985* (ACT) which has in fact been replaced by the *Parentage Act 2004* (ACT).

<sup>178</sup> *Re Mark* (2004) 31 Fam LR 162, 167-8, referring to Fogarty J in *Re B and J* (1996) 21 Fam LR 186, 198.

<sup>179</sup> A restrictive reading of this section is more problematic, as we will see, if the man is a commissioning parent in a surrogacy arrangement as he was in *Re Mark* (2004) 31 Fam LR 162 – the case that has given rise to the broadest 'enlarging' interpretation of s 60H.

<sup>180</sup> In *W v G* (1996) 20 Fam LR 49, the donor does not appear to have been listed on the children's birth certificates, while in *Re B and J* (1996) 21 Fam LR 186 he was listed. In *W v G* this led to an adverse finding on the birth mother's credit because she lied to the Department of Social Security about the donor's identity in order to claim a supporting parent's benefit (to which she was in fact legally entitled). In *Re B and J* the Department of Social Security incorrectly denied the mother supporting parent's benefit and made her commence a claim for support against the donor, leading to the determination by the Family Court. This does seem like a lose-lose situation for lesbian mothers.



In *W v G* the biological mother was seeking support from the co-mother through a promissory estoppel claim. The co-mother's defence in part was to argue that the known sperm donor was liable instead. Unlike the later cases discussed, this claim was heard by the NSW Supreme Court which considered both the provisions of the *Artificial Conception Act 1984* (NSW) and the *FLA* to determine that the sperm donor was not liable. The Court held that s 6 of the *Artificial Conception Act 1984* (NSW) applied to exclude liability of the donor, rejecting public policy arguments made by the defendant that such provisions ought not apply where donors were known or where the mother was unmarried, so as to deprive the child of a father.<sup>181</sup> The Court then examined the provisions of the *FLA* and held that s 60H simply had no application to the case.<sup>182</sup>

In *W v G*, the Court considered the possibility that a sperm donor could still be a 'parent' under the *FLA*, ie the 'enlarging' approach to s 60H, citing sections of the *FLA* which provide that parents have the primary responsibility to maintain children. Notably the *FLA* contains no general definition of parent. This option was precluded, in Hodgson J's reasoning, by the fact that s 7 of the *Child Support Act* states that unless a contrary intention appears, the *Child Support Act* and the *FLA* are to have the same respective meanings. Section 5 of the *Child Support Act* does contain a definition of parent, one which references s 60H of the *FLA*. Taken together, and in conjunction with the exhaustive rather than inclusive wording of the definition of parent in s 5 ('means' rather than 'includes'), Hodgson J held that a sperm donor could not be a parent under the *Child Support Act* unless caught by s 60H(1), ie a man married to the woman to whom he donated his sperm.<sup>183</sup> Importantly, Hodgson J also stated that he did not see an intention for the parental responsibility provisions of the *FLA* (that do not contain a definition of parent), to override the effects of the State parenting presumptions.<sup>184</sup> Implicitly, then, Hodgson J read the *FLA* in light of the NSW presumption.

In *Re B and J*, the biological mother, living in Victoria, was compelled by the Department of Social Security to pursue the donor of her two children for child support. The donor applied to the Family Court for a declaration that he was not liable under the *Child Support Act*. In that case, Fogarty J held, as Hodgson had, that in the absence of prescription, the State Act operated to release the donor from liability, and went further to suggest that the absence of prescription of State law in the *FLA* was

<sup>181</sup> I have argued elsewhere that it is regrettable that a lesbian herself should advance public policy arguments such as these. In *W v G* (1996) 20 Fam LR 49 the defendant, a lesbian co-mother, argued that 'the formation of stable families is a socially desirable necessary aim and to visit legal obligations upon non-parents to support a child in a homosexual or lesbian relationship is contrary to public policy in that: it will encourage the conception of children by artificial insemination in the absence of a father; will present as "normal" a relationship which is not recognised by the child maintenance legislation; it will encourage the evasion of provisions of the *Human Tissue Act* and will encourage the bringing into the world of children without a father': *W v G* (1996) 20 Fam LR 49, 65. See also Jenni Millbank, 'An Implied Promise to Parent: Lesbian Families, Litigation and *W v G*' (1996) 20 Fam LR 49 (1996) 10 *Australian Journal of Family Law* 112.

<sup>182</sup> *W v G* (1996) 20 Fam LR 49, 63-4. The co-mother was found liable to pay lump sum maintenance for the two children to cover the costs of raising them to the age of 18.

<sup>183</sup> *Ibid* 64-5.

<sup>184</sup> *Ibid* 65.

precisely *because* the State Act covered the field.<sup>185</sup> Fogarty J saw no difference in the operation of the NSW State Act and that of Victoria or between the legal status of known and anonymous donors.<sup>186</sup>

However Fogarty J departed from Hodgson J's analysis by suggesting in *obiter* that other provisions of the *FLA* might not be restricted by s 60H, such that a sperm donor who had no liability under the *Child Support Act* could still be found to have a maintenance obligation under the *FLA*.<sup>187</sup> In Fogarty J's view, s 60H 'enlarged' rather than reduced the range of people who could be considered by the Court to be parents, leaving the Court with considerable discretion to determine who a parent may be. This decision has been criticised on many grounds as illogical,<sup>188</sup> especially given that the Court had already accepted that the policy regime in place under State law was intended to provide a harmonious national regime relieving sperm donors of any rights or liabilities<sup>189</sup> and that the definition of parent under the *Child Support Act* and *FLA* had been explicitly linked.<sup>190</sup>

*Re Patrick* (2002) concerned a contact dispute between a known gay male sperm donor and two lesbian parents. Like *Re B and J*, the case was heard in Victoria and so concerned the terms of the same State 'status of children' legislation in addition to s 60H. Unlike *W v G* and *Re B and J*, the donor in *Re Patrick* had always intended to have a role in the child's life. On his evidence this was to be one to two days per week of contact, while on the mothers' evidence it would only entail a few visits each year. The

<sup>185</sup> *Re B and J* (1996) 21 Fam LR 186, 194–5.

<sup>186</sup> *Ibid* 192, 194–5.

<sup>187</sup> *Ibid* 196–7.

<sup>188</sup> For a detailed critique of this decision see Danny Sandor, 'Children Born from Sperm Donation: Financial Support and Other Responsibilities in the Context of Discrimination' (1997) 4 *Australian Journal of Human Rights* 175 and Dorothy Kovacs, 'The AID Child and the Alternative Family: Who Pays? (or Mater Sempa Certa Est – That's Easy for You to Say!)' (1997) 11 *Australian Journal of Family Law* 141.

<sup>189</sup> Kovacs, above n 184. Moreover, Kovacs notes that the policy objective of children having, where possible, two parents to financially support them, could be met by a claim against the co-mother, as established in *W v G* (1996) 20 Fam LR 49, 159–61.

<sup>190</sup> Sifris, above n 111, notes:

if Parliament intended 'parent' to 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 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. 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 a person may be regarded as a parent under 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 of 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 a parent for the purposes of the *Family Law Act*: at 255–6 (citations omitted).

Kovacs, above n 188, also notes that there is nothing in the extrinsic materials at the time to suggest that 'the Commonwealth intended to remove the donor's state law exemption from the obligation to pay child maintenance': at 152.

Court accepted the biological father's account.<sup>191</sup> On neither view was the donor to be responsible for any financial support of the child. The question to be addressed was whether the known donor's claim for contact could be heard as a 'parent' under the *FLA* or as a 'person concerned with the care, welfare and development' of the child. In a sense, the distinction was unimportant under the *FLA* as it then stood, as either way the biological father had standing to seek orders. However, a finding that he was a parent would have raised the principle that the child had a right to know and have contact with him, unless shown to be contrary to the child's best interests.

In deciding that the biological father was not a parent, Guest J expressly rejected the 'enlarging' approach of Fogarty J in *Re B and J*, stating:

In my view, such a conclusion could have serious and unintended implications for sperm donors. If the state and territory presumptions had no effect and a known sperm donor was a parent under the Act, it is difficult to see why that would not be the case for unknown donors in similar circumstances. Contrary to agreement and intention, both known and unknown donors may find themselves with significant responsibilities as well as rights. ...

This conclusion would be an alarming one for most participants in donor insemination arrangements. It also highlights the substantial difficulties of attempting to incorporate same-sex families into global definitions of parenthood premised on a heterosexual model.<sup>192</sup>

Guest J agreed with commentator Danny Sandor in concluding that, in the absence of prescription, the *FLA* should be 'read in light of' Australia-wide State and Territory presumptions thereby excluding ovum and sperm donors from parental status.<sup>193</sup> Further, Guest J noted decisions of State courts concerning heterosexual couples in surrogacy arrangements where the act of assisted conception was held to absolutely sever the parental status of biological parents.<sup>194</sup>

In the surrogacy case of *Re Mark* (2004), discussed earlier, Brown J returned to the 'enlarging' approach taken in *Re B and J*, suggesting that State parenting presumptions do not necessarily govern who was a 'parent' under the *FLA*. Brown J suggested that the *FLA* should be broadly read to give effect to the 'ordinary meaning' of parent to encompass commissioning parents such as Mr X who are biologically connected and 'intend to parent' a child born through assisted conception. (This approach, by extension, would include other known donors such as the man in *Re Patrick* who had 'intended to parent' as a non-resident father). While this approach is appealing as giving effect to the intention of the parties concerned in *Re Mark*, it must be noted that

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<sup>191</sup> See *Re Patrick* (2002) 28 Fam LR 579, 595.

<sup>192</sup> *Ibid* 645.

<sup>193</sup> *Ibid* referring to the article by Sandor, above n 188. Sifris, above n 111 agrees with this view: at 246. Also note that Guest J's later suggestion of legislative reform to recognise known donors who intend to have a parenting role points to the State Acts as the primary source of authority, with later prescription of the State Acts under s 60H to flow through to the *Family Law Act 1975* (Cth).

<sup>194</sup> *Re Births Deaths and Marriages Registration Act 1997* (2000) 26 Fam LR 234. However it is notable that Guest J went on to grant extensive contact to the father and in many respects appeared to regard him as if he were a non-resident parent from a separated couple rather than an additional figure in an intact family. See a thoughtful and detailed critique in 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.

intention has *not* been the guiding approach to interpreting parenting presumptions generally. The presumptions are founded on imputed not actual intention and have elsewhere been held to be non-derogable – sexual reproduction imputes parental status, while non-sexual reproduction imputes the reverse for the donor. So in cases when heterosexual couples have had children through surrogacy arrangements, intention has not altered the fact that the commissioning parents, regardless of genetic connection, were declared by law not to be parents, while the surrogate and her partner were held to be the legal parents.<sup>195</sup> Conversely when a lesbian couple had a child with a sperm donor with whom they conceived through intercourse rather than assisted conception, the intention of all that he would have no rights and no liabilities with respect to the child was not held to be relevant by the Family Court.<sup>196</sup>

Brown J also went further than the obiter in *Re B and J* in that she distinguished the wording of the Victorian status of children provisions from those in place elsewhere in Australia,<sup>197</sup> thus potentially setting up a situation where the decision of who is a parent under the *FLA* differs from State to State. In NSW the legislation states that 'that man is presumed not to be the father'<sup>198</sup>, the ACT states that the man is 'conclusively presumed not to be the father',<sup>199</sup> Western Australia<sup>200</sup> and South Australia state that he 'is not the father',<sup>201</sup> while Tasmania states that he shall 'for the purposes of the law of the State, be treated as if he were not the father'.<sup>202</sup> In Victoria, Queensland and the Northern Territory the terminology of 'not the father' is used in provisions that relate to married women,<sup>203</sup> but the wording of separate provisions relating to unmarried women is that 'the man who produced the semen has no rights and incurs no liabilities in respect of a child born' unless he becomes the husband of the child's mother.<sup>204</sup> In

<sup>195</sup> See, eg, *Re Births Deaths and Marriages Registration Act 1997* (2000) 26 Fam LR 234 and *PJ v Director General Department of Community Services* [1999] NSWSC 340.

<sup>196</sup> *ND* (2003) 31 Fam LR 22.

<sup>197</sup> *Re Mark* (2003) 31 Fam LR 162, 172.

<sup>198</sup> The *Artificial Conception Act 1984* (NSW) s 6(1), which preceded the present Act, used the term 'be presumed not to have caused the pregnancy and not to be the father of any child born as a result of the pregnancy'. The current provision is *Status of Children Act 1996* (NSW) s 14(2).

<sup>199</sup> *Parentage Act 2004* (ACT) s 11(5). This Act was preceded by the *Artificial Conception Act 1985* (ACT) ss 3, 7 of which also provided that the donor is conclusively presumed not to be the father.

<sup>200</sup> The 1985 provisions only applied to donations to women who were married or in a heterosexual de facto relationship: see *Artificial Conception Act 1985* (WA) s 6. In 2002, amendments extended the presumption to donations to single women: see *Acts Amendment (Gay and Lesbian Law Reform) Act 2002* (WA) s 27. The Act also ascribed parental status to consenting co-mothers: s 26. Both changes were retrospective in effect. Note that the s 60H issue does not arise in Western Australia as it does not have such a provision in the *Family Court Act 1997* (WA). Further s 190 of the *Family Court Act 1997* (WA) provides that the registration of a birth (which both mothers can do as parents since 2002) raises the presumption of parentage.

<sup>201</sup> *Family Relationships Act 1975* (SA) s 10e(2).

<sup>202</sup> *Status of Children Act 1974* (Tas) s 10C(2).

<sup>203</sup> *Status of Children Act 1974* (Vic) s 10D(2)(b); *Status of Children Act 1978* (Qld) s 16(2)(b); *Status of Children Act 1978* (NT) s 5D(1)(b).

<sup>204</sup> *Status of Children Act 1974* (Vic) s 10F(1); *Status of Children Act 1978* (Qld) s 18(1); *Status of Children Act 1978* (NT) s 5F(1). Note that the NT provisions, like the Victoria provisions analysed by Brown J, provide that a donor has 'no rights and incurs no liabilities'. Yet if one

Brown J's view, the Victorian provisions relating to unmarried women 'create no presumptions', do not provide that 'a sperm donor is not a parent' and 'merely remove... the rights and obligations which the law attaches to fatherhood.'<sup>205</sup>

While it is conceivable that this difference in wording was intended to leave residual parental rights in place for sperm donors,<sup>206</sup> a far more likely rationale is that the insemination of unmarried women was at the time considered to be highly undesirable, and indeed, in Victoria, was criminal conduct. In that context, governments were reluctant to be seen as intentionally creating fatherless families. At the same time there was a clear intention, as part of the national regime, to sever all legal connection between donors and children. In the second reading speech of the 1984 Victorian legislation, the Minister for Health stated that:

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 a single woman — that is, one who does not have an established legal or de facto relationship — or in an AID procedure where a married woman does not have the consent of her husband. Both of these procedures will be rendered unlawful by the Infertility (Medical Procedures) Bill.

The Government does not condone the practice of artificial insemination of single women by donor. Nonetheless, it recognizes 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. I commend the Bill to the House.<sup>207</sup>

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assumed that this left the donor to an unmarried woman with residual parental responsibility, how would that sit with s 5DA of the same Act? Section 5DA provides:

- (1) Where a woman who is the de facto partner of another woman undergoes, with the consent of the other woman, a fertilization procedure as a result of which she becomes pregnant, the other woman is, for all purposes of the law of the Northern Territory, to be presumed to be a parent of —
  - (a) the unborn child; and
  - (b) a child born as a result of the pregnancy.
- (2) A presumption of law that arises by virtue of subsection (1) is irrebuttable.
- (3) In a proceeding in which the operation of subsection (1) is relevant, a woman's consent to the carrying out of a fertilisation procedure in respect of her de facto partner is to be presumed, but that presumption is rebuttable.

<sup>205</sup> *Re Mark* (2003) 31 Fam LR 162, 172.

<sup>206</sup> Kovacs, above n 188, 142 appears to suggest this:

The New South Wales model unfortunately creates a legal oxymoron, in the absence of a consenting father, husband — a child who in law does not have a father. The Victorian Status of Children (Amendment) Act 1984 avoids that conclusion ...

However she later argues at 150 that the Victorian regime has the same legal effect as that in NSW and elsewhere:

The Victorian provision avoids the New South Wales proposition that the donor is not the father of the child and prefers instead to ensure that the donor is excluded from rights to the child and is exempt from the legal obligations of a parent. However, the two legislative approaches are intended to have the same effect in law.

<sup>207</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 18 April 1984, 3969–70 (Trevor Roper, Minister for Health) (emphasis added).

Nothing in this speech indicates that donors in Victoria were to have a different legal position depending upon whether or not the recipient was married or unmarried.<sup>208</sup> There is only one reference in the second reading speech to the Victorian Act having a different operation to that of NSW (which was the first to implement the intended national regime) and this reference is not to a difference in status for sperm donors but rather a note that NSW (at the time) did not cover ovum donors, while Victoria did.<sup>209</sup> It is notable that while some States prohibited unmarried women from using ART, and some Ministers expressed disapproval of such prospect in their second reading speeches, unlike some jurisdictions overseas none of the Australian laws made the legal status of children dependent upon whether the mother had used a licensed facility or complied with regulatory legislation.<sup>210</sup> Given these considerations, it seems absurd, based on a slight difference in wording, to treat donors in Victoria differently to those elsewhere in Australia, given the clear evidence of the intention to create a national regime for children born from assisted conception.

A further issue with Fogarty and Brown JJ's approach to who is a parent under the *FLA*, as Guest J noted in *Re Patrick*, is that it could lead to anonymous as well as known donors being 'parents' under the *FLA* and thus, in the absence of a court order, having full parental responsibility under s 61C.<sup>211</sup> Such a result was clearly not intended. It would also lead to the uncertainty and inequity of (some or all) donors being parents for the purposes of family law, but likely not for any State law (eg inheritance, workers' compensation) or other federal laws (notably child support<sup>212</sup>).

Faced with such possibilities, Brown J stated:

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<sup>208</sup> See also the second reading speech in Queensland, which similarly used the formula of 'has no rights and incurs no liabilities' rather than 'is not a parent'. In that speech the Attorney-General concluded that the Bill 'ensures that the anonymous donors of genetic material will in no circumstances be regarded in law as fathers or mothers and the ensuing rights and liabilities that such would entail': Queensland, *Parliamentary Debates*, Legislative Assembly, 23 March 1988, 5548 (Paul Clauson, Minister for Justice and Attorney-General). While the second reading speech of the NT Attorney-General suggests that 'the link between the semen donor and the child is preserved in terms of proposed section 5(f)', he then goes on to say that the Bill is in line with Victoria, South Australia and NSW and the only difference noted is that NSW does not cover donor ovum: Northern Territory, *Parliamentary Debates*, Legislative Assembly, 23 April 1985, 773 (Marshall Perron, Attorney-General). Finally note also that virtually identical wording to the Victorian speech is used in the speech of the Attorney-General of Tasmania, even though Tasmania used the 'not a parent' formula: Tasmania, *Parliamentary Debates*, House of Assembly, 17 October 1985, 3734-5 (Geoffrey Pearsall, Attorney-General).

<sup>209</sup> Victoria, *Parliamentary Debates*, above n 207, 3969.

<sup>210</sup> See a discussion of US cases in Kovacs, above n 188, 160-2 and a more recent analysis of US cases in Nancy Polikoff, 'Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors Are Not Fathers' (2000) 2 *Georgetown Journal of Gender and the Law* 57. Note also the position in the UK, where a donor's status depends upon compliance with the *Human Fertilisation and Embryology Act 1990* (UK) c 37. In the UK a further distinction among legal fathers is made based upon whether they are married to the child's mother, with unmarried fathers of children conceived through all means *not* granted automatic parental responsibility.

<sup>211</sup> Guest J notes this in *Re Patrick* (2002) 28 Fam LR 579, 645.

<sup>212</sup> See *Re B and J* (1996) 21 Fam LR 186, 194-5.

[t]he imposition of responsibilities or entitlements on a class or classes of people who previously considered themselves immune ... would not be a reason [to prevent] ... an otherwise logical conclusion. However, I am mindful of the fact that there is no respondent or contradictor in this case.<sup>213</sup>

Thus, after many suggestions to the contrary, Brown J in fact did not find that Mr X was a parent under the *FLA*,<sup>214</sup> and instead heard his and Mr Y's application as persons concerned with the child's care, welfare and development under s 65C.

In terms of clarity on the question of s 60H we are presently left with obiter from two single judges of the Family Court suggesting that a known donor could be a parent for the purposes of the *FLA*<sup>215</sup> and ratio from one single judge of the Family Court and one judge of the NSW Supreme Court to the opposite effect.<sup>216</sup>

What was not considered in any of the above cases was the effect on lesbian families of the 'enlarging' approach to s 60H. It would mean that for all lesbian families with children born of known (or anonymous-but-identifiable donors), the mothers would be faced with a situation whereby in the absence of a court order the donor had the right to make important decisions regarding the child and would have to consent, for example, to the issue of a passport. Potential contact applications by donors would be guided by the principle that the child would have the right to know and be cared for by the donor, as well as a right to the benefit of a 'meaningful relationship' with him under s 60B(2)(a) and (b) and s 60CC, while the same principle would not apply to a co-mother, regardless of the duration in which she had been a, or the, primary caregiver. It is noteworthy that in a recent application for parenting orders by consent for a lesbian couple with infant twins, the Magistrate expressed a preference for the *Re Mark* approach in obiter and regarded it as 'obvious' that a known donor, 'whether or not he might be regarded as a "parent"' should be notified and given an opportunity to oppose a consent application for residence and parental responsibility for the co-mother.<sup>217</sup>

As a matter of policy, the belated 'finding' of fathers in lesbian families formed through assisted conception is highly objectionable as it flies in the face of the widely understood legal status quo at the time such families were formed.<sup>218</sup> In a great many

<sup>213</sup> *Re Mark* (2003) 31 Fam LR 162, 174.

<sup>214</sup> Note that the VLRC is incorrect on this point: VLRC, ('*Position Paper Three*'), above n 53, [5.8].

<sup>215</sup> *Re B and J* (1996) 21 Fam LR 186; *Re Mark* (2003) 31 Fam LR 162.

<sup>216</sup> *Re Patrick* (2002) 28 Fam LR 579; *W v G* (1996) 20 Fam LR 49.

<sup>217</sup> *Re J and M* (2004) 32 Fam LR 668, 671 I am aware of two cases in 2006 involving registries of the Family Court and Federal Magistrates Court in Sydney and Parramatta refusing to grant parenting orders by consent to lesbian couples with children born through ART unless the known donor was served with the application and listed as the respondent. One of these decisions is currently under appeal, so hopefully some clarity will ensue.

<sup>218</sup> Susan Boyd, Carol Smart and other feminist commentators have argued persuasively that this is the result of a trend towards an increased focus on and valorisation of the role of fathers generally, which has intersected with the expansion of, and growing legal scrutiny of, lesbian-led families: see Susan Boyd, 'Gendering Legal Parenthood: Genetics, Intentionality and Responsibility' (forthcoming); Carol Smart and Bren Neale, *Family Fragments* (1999); Fiona Kelly, 'Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and their Children into Canadian Family Law' (2004) 21 *Canadian Journal of Family Law* 133.

instances, known donors agreed to participate in the formation of lesbian families on the understanding of all parties that they were not legal parents and would have no rights or liabilities.<sup>219</sup> It also contradicts the *function and form* of such families, which generally revolve around two full-time parents who have residence with and equal responsibility for the care and welfare of the child – the mothers.

It is notable that judges in *Re B and J*, *Re Patrick* and *Re Mark* called for legislative amendment to recognise the position of the known donor/biological father.<sup>220</sup> This is particularly troubling in the two cases involving co-mothers who were primary caregivers, as in those cases the co-mothers had absolutely no legal recognition as parents yet were pointedly *not* the subject of any call for recognition reforms by the judges.<sup>221</sup>

If calls for recognition of donors were pursued under State law as suggested by Guest J,<sup>222</sup> or if Brown J's interpretation of s 60H were followed,<sup>223</sup> there is the very real potential that this would clash with current reforms designed to grant recognition to co-mothers. It is only possible to have two parents under State and Territory law<sup>224</sup> (and likely also under the *FLA*, although this has not been tested). In Western Australia, the ACT and Northern Territory the consenting co-mother is granted parental status under the relevant State law. Furthermore, in these three jurisdictions, both mothers can be listed on the birth register and certificate and can be declared parents by a superior court. Section 69R of the *FLA* presumes that the people registered as parents are parents for the purposes of the Act, while s 69S presumes that a State or Territory declaration of parentage is binding on the Family Court, raising the possibility of the Court determining between the co-mother being a presumed parent under s 69R or s 69S versus the donor as a found father under an expansive reading of s 60H.<sup>225</sup>

<sup>219</sup> As in *W v G* (1996) 20 Fam LR 49; *Re B and J* (1996) 21 Fam LR 186. Further, many lesbians chose known donors in states such as Victoria as a direct result of being excluded from access to anonymous donors through fertility services. Such a finding therefore compounds the effects of discrimination in denying women choices about their family form.

<sup>220</sup> In *Re B and J* (1996) 21 Fam LR 186, this is most extraordinary as it is contrary to the intentions of all parties and the family form involved, while in *Re Patrick* (2002) 28 Fam LR 579 it is contrary to the wishes of the mothers (and in my view contrary to the family form in which the child was being raised). In *Re Mark* (2003) 31 Fam LR 162 at least such recognition would be in keeping with both intention and family form.

<sup>221</sup> Indeed, in *Re Patrick* (2002) 28 Fam LR 579, 647, Guest J misleadingly refers to the co-mother as if she has legal recognition (by virtue of expert reports that state she is a parent) and goes on to contrast the biological father's lack of recognition as if he has lesser rights.

<sup>222</sup> *Ibid* 649–50.

<sup>223</sup> Though note it would not affect Western Australia as it has its own Family Court and recognition of co-mothers in its *Family Court Act 1997* (WA).

<sup>224</sup> Note that the new ACT provisions expressly provide this: *Parentage Act 2004* (ACT) s 14.

<sup>225</sup> Note that the co-mother is presently excluded from the provisions of s 60H of the *Family Law Act 1975* (Cth) both by the gendered wording of sub-s (1) and the lack of prescription under sub-s (2) (the prescription currently refers only to repealed ACT legislation, it also includes the Northern Territory Act but only the earlier provisions on male partners, not the new provision on co-mothers). Prescription of *all* of the relevant State provisions would be an easy way of creating a harmonious regime and of allowing for the staged recognition of co-mothers in federal law as and when they are granted status in State law.



In my view, for all of the reasons outlined above, it is absolutely inappropriate to ascribe parental status to known donors. This is not to suggest that men who are known to and involved with children (whether biological parents or otherwise) should have no form of legal recognition. Rather, any form of recognition must be alive to two vital facts that are amply demonstrated by the sociological research on lesbian and gay families: first, that for most families it is the mothers who form the core family unit, and second, that known donors engage in a range of roles from limited or casual acquaintance with the child, to occasional or frequent avuncular or warm 'family-friend' contact, to regular 'Sunday-Dad' contact.<sup>226</sup> In much rarer instances, there are also shared parenting arrangements where father(s) live close by and share residence or have extensive contact with the child and some degree of parental responsibility.

There can be no 'one size fits all' ascription of parental status to known donors who occupy a wide range of roles. Recognition of known donors must be flexible and adapted to the individual circumstances of the family involved.<sup>227</sup> Elsewhere I have proposed that such recognition include more appropriately tailored provisions for Family Court consent orders (or registrable parenting plans) that include multiple parties who need not be parents under the Act, and also the possibility of multi-party adoption for families where the father(s) are intended to be parents.<sup>228</sup> In *Position Paper Two*, the VLRC made recommendations along similar lines. First, it responded to the ambiguity<sup>229</sup> surrounding the status of donors in that State when the mother has no male partner by recommending that the wording of the *Status of Children Act 1974* (Vic) be amended to reflect the wording of legislation elsewhere that he 'is presumed for all purposes not to be a father'.<sup>230</sup> The paper then recommended flexible opt-in recognition measures for donors, including amending the *Adoption Act 1984* (Vic) to allow more than two people to be recognised as parents.<sup>231</sup> The proposal is that a donor could become an additional parent (without extinguishing the legal status of the birth mother and her partner if she has one) if both the birth mother and her partner

<sup>226</sup> See Millbank, above n 1.

<sup>227</sup> Guest J did recognise this to some extent when he focused on the importance of agreements: *Re Patrick* (2002) 28 Fam LR 579, 648. Adiva Sifris supports the use of written agreements to displace clear presumptions of parentage: see 'Known Semen Donors: To Be or Not To Be a Parent' (2005) 13 *Journal of Law and Medicine* 230, 242-3. See also the thoughtful discussion of the different meaning of 'parent' in lesbian and gay families formed through assisted conception, and the creation of a limited, largely symbolic parental status for a known sperm donor in a recent UK case: *Re D (Contact and PR: Lesbian Mothers and Known Father) No 2* [2006] EWHC 2. Note that in that case the child was the result of a donor agreement but conceived through intercourse. This was irrelevant to the case as, in contrast to Australia, the UK does not grant automatic parental responsibility to fathers if they are not married to or living with the child's mother.

<sup>228</sup> Millbank, above n 94.

<sup>229</sup> The Commission notes, for example that the Victorian Registry of Births, Deaths and Marriages has insisted that women without male partners inform them of the name of donors in order to record it on the birth register (although not the birth certificate) because it does not regard the donor's rights as fully extinguished: VLRC, (*Position Paper Two*), above n 22, [4.9].

<sup>230</sup> VLRC, (*Position Paper Two*), above n 25, 31 (recommendation 13). See discussion [4.19-4.30].

<sup>231</sup> *Ibid* 31 (recommendation 13-14).

consent to the application and all parties go through appropriate counselling and legal advice.<sup>232</sup>

## (ii) Co-mothers

Many lesbians having children through assisted conception do so within a long-term relationship in which the non-birth mother is equally involved in planning and caring for the child or children. It is also relatively common for women who have more than one child to exchange roles as biological and non-biological mother.<sup>233</sup> Recognition of the legal relationship between the non-birth mother and child is therefore important not just for mother and child but may also be important in order to recognise the relationship between siblings.<sup>234</sup> I argue that it is both possible and appropriate to use an ascribed parental status for co-mothers as the sociological literature makes it clear that for consenting co-mothers, unlike donors, one size does actually fit all. This section considers possible options for legal recognition of co-mothers, both present and proposed, in Australia.

### (a) Parenting orders by consent

It is currently possible for lesbian and gay families of any constellation to approach the Family Court to apply for consent orders concerning parental responsibility, residence and contact. This is because any person with an interest in the 'care, welfare or development' of a child can approach the Court<sup>235</sup> and the Court can make orders in favour of any person<sup>236</sup> – thus unlike many other jurisdictions,<sup>237</sup> there is no need of a biological or legal relationship to have standing. Parenting orders can cover where a child lives and who they have contact with, as well as defining general or specific areas of parental authority (such as decisions concerning medical care or education).

In recent years lesbian mothers have sought parenting orders to establish a status quo which would then protect the co-mother, if for example, the birth mother died and

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<sup>232</sup> Ibid (recommendation 15–16).

<sup>233</sup> See Millbank, above n 1.

<sup>234</sup> Note that the NSW Registry of Births, Deaths and Marriages has repeatedly refused to list siblings on the birth certificate of a new child where both children are born to the same mother and the same donor through assisted conception: communication with Andrea Wilson, 8 September 2005.

<sup>235</sup> *Family Law Act 1975* (Cth) s 65C. See, eg, a case where a woman, Ms M, had extensive care and contact with a child born to a woman with whom she had a brief lesbian relationship in the context of a much longer close friendship between the two. The mother lived briefly and intermittently with the father, and he also had contact with the child when they separated. The mother and Ms M never lived together but she had been at the birth of the child and maintained a close relationship. The mother denied that Ms M was a person with standing to bring a contact application, but the Family Court held otherwise: *KAM v MJR* (1998) 24 Fam LR 656.

<sup>236</sup> *Family Law Act 1975* (Cth) s 65D(1).

<sup>237</sup> In several US jurisdictions, co-mothers have been denied standing to bring contact claims: see Nancy Polikoff, 'Lesbian and Gay Parenting: The Last Thirty Years' (2005) 66 *Montana Law Review* 51. However note that in a number of recent cases, courts have 'read-in' female partners to gendered family law statutes in order to grant parental status: see, eg, *Elisa B v Emily B*, 37 Cal 4th 108 (2005); *KM v EG*, 37 Cal 4th 130 (2005); *Kristine H v Lisa R*, 37 Cal 4th 156 (2005).

her family sought to remove the child from the co-mother.<sup>238</sup> Such orders also give co-mothers a form of official documentation that can be used to assert parental authority to institutions such as schools and hospitals.

A further consideration is that parenting orders evince that both partners saw themselves as equal parents, and provide a status quo from which any later dispute about residence or contact between the mothers would have to be negotiated or altered by court orders. This is an important consideration for co-mothers, particularly as, in times of conflict, birth mothers may be more likely to revert to claims of superior status as the 'real' mother.<sup>239</sup> Equally, lesbians and gay men intending to form families together may use such orders early in the child's life to provide all parents with a sense of stability, for example by providing for shared care between the parents, or setting out contact arrangements.

More recently, the Family Court has also been prepared to grant shared 'parental responsibility' to lesbian and gay non-biological parents through consent orders under the *FLA*. In *Re Mark* (discussed above) this grant to a gay male couple (one of whom was the biological father) entailed making an order restricting the parental responsibility of the birth mother. In two other recent cases, orders of joint parental responsibility have been made by the Federal Magistrates Court to lesbian parents of twin babies born through IVF<sup>240</sup> and to the male de facto partner of a man with three children born into a former marriage.<sup>241</sup> In both cases there was no other legal or

<sup>238</sup> This was a commonly expressed fear of mothers in consultations held for *And then the Brides Changed Nappies*, above n 94.

<sup>239</sup> I say 'revert' because this reflects hegemonic notions of biological parenting as 'authentic'. Lesbian parents must actively resist these notions in creating their families, but this resistance may weaken in times of conflict when self-interest induces a claim for any societal or legal privilege available: see Shelley Gavigan, 'A Parent(ly) Knot: Can Heather Have Two Mommies?' in Didi Herman and Carl Stychin (eds), *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (1995) 102. However, courts may be less willing than previously to accept such a position, see, eg, the disapproval expressed about a birth-mother's claim that the co-mother is no longer a parent in the British Columbia: *T(KG) v D(P)* [2005] BCSC 1659. Even more strikingly, when a birth mother sought to exclude the co-mother in a recent UK case, the Court of Appeal responded by granting joint residence orders (the only possible form of order that would grant shared parental responsibility to both mothers) for the two children, aged 6 and 4 to the co-mother, Miss W. The Court of Appeal in *Re G (Residence: Same-Sex Partner)* [2005] 2 FLR 957, [2005] EWCA Civ 462, [27] unanimously held that:

the children required firm measures to safeguard them from diminution in, or loss of, a vital side of family life — not only their relationship with Miss W, but also with her son .... The judge's finding [that the mother had been developing plans to marginalise Miss W] required a clear and strong message to the mother that she could not achieve the elimination of Miss W, or even the reduction of Miss W from the other parent into some undefined family connection.

When the birth mother subsequently disobeyed the court order and secretly relocated to another part of the country to thwart the co-mother's contact, the Court of Appeal unanimously upheld a decision to grant residence to the co-mother: *Re G* [2006] EWCA Civ 372. The decision was reversed on appeal to the House of Lords, but the order of joint residence (shared parental responsibility) remains in force: *Re G* [2006] UKHL 43.

<sup>240</sup> *Re J and M* (2004) 32 Fam LR 668.

<sup>241</sup> *Re F and D* (2005) 33 Fam LR 568.

biological parent.<sup>242</sup> In cases where there is another legal or biological parent, orders may still be granted if that person's consent is sought and obtained. However, it is noteworthy that the Court's willingness to see a known donor to an intact lesbian family as a 'father' and award him significant contact (comparable to that of a separated father) in the disputed case of *Re Patrick*, means that many lesbians with known donors may be wary of approaching either the donor or the Court to seek consent orders if they are not completely confident that they and the donor are (and will remain) in agreement about his role.

There are serious formal limitations to the effectiveness of parenting orders as a mechanism for granting parental rights; they do not give the universal or durable status accorded by adoption. First, the orders cease when the child reaches 18. Second, they do not flow through to other areas of law, and so for example leave unaffected the question of who is a 'parent' under intestacy or compensation law at State level, and indeed would not have any impact upon the interpretation of 'parent' or 'child' in other federal legislation in areas such as superannuation or taxation, whereas adoption under State law would do so. These limitations must be set against the advantages that parenting orders offer to diverse and non-traditional family forms, in particular their ability to be tailored in a flexible fashion to suit the needs of multi-parent families (in contrast to adoption and deemed parental status, which to date have replicated the two parent all-or-nothing model).

**(b) Second parent adoption**

A common method of according legal recognition to co-mothers in foreign jurisdictions,<sup>243</sup> particularly the US,<sup>244</sup> has been through second parent adoptions. This has not been possible in Australia because the wording of adoption laws has until very recently been gendered in every jurisdiction, and remains so currently in NSW, Victoria, Queensland, South Australia and the Northern Territory.<sup>245</sup> Recent changes in Western Australia and the ACT now allow same-sex couples to apply for adoption orders (in Tasmania this is so *only* if one partner is the parent or relative of the child and the couple have a registered partnership).

<sup>242</sup> As noted earlier (above n 240), in *Re J and M* (2004) 32 Fam LR 668, the donor was anonymous and the Magistrate (in my view, incorrectly) alluded to a known donor as someone whose consent would be needed. In *Re F and D* (2005) 33 Fam LR 568, the mother had died some years earlier.

<sup>243</sup> See, eg, a discussion of adoption in European countries (in the context of relationship recognition) in Kees Waaldijk, 'Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries' (2004) 38 *New England Law Review* 569.

<sup>244</sup> See Polikoff, above n 237; Julie Shapiro, 'A Lesbian-Centered Critique of Second-Parent Adoptions' (1999) 14 *Berkeley Women's Law Journal* 17.

<sup>245</sup> Note however that as part of the 2003 reforms the Northern Territory introduced a change to redefine the child born to one party in a de facto relationship as a 'step-child' as a presumptive status in the same way that the child of a party to a legal marriage would be: see *Interpretation Act 1978* (NT) s 19A(4). This amendment affects a small but significant range of Acts, including inheritance and guardianship, reflecting the limited number of pre-existing laws in which the relationship of step-child was given legal status: see *Compensation (Fatal Injuries) Act 1974* (NT); *Crimes (Victims Assistance) Act 1982* (NT); *Family Provision Act 1970* (NT); *Legislative Assembly Members' Superannuation Act 1979* (NT); *Stamp Duty Act 1978* (NT); *Taxation (Administration) Act 1978* (NT).

However 'step-parent' adoption provisions in Australia, even when gender-inclusive, as they are in Western Australia and the ACT<sup>246</sup> are not the equivalent of second-parent adoption provisions elsewhere. Almost all State adoption laws contain a presumption against 'step-parent' adoption and instruct the Court to consider whether Family Court parenting orders are preferable.<sup>247</sup> Such provisions are based upon the assumption that an adoption order will sever the legal relationship with the child's separated biological parent, and award it to the custodial parent's new partner. A preference for the more limited and flexible mechanism of parenting orders makes sense in such a context. There may well be lesbian and gay families who find themselves in such a situation, entering into a permanent relationship with a partner after their child has been born into an earlier relationship. If so, there is every reason that blended gay and lesbian families be able to access the existing step-parent regime.

Yet for the great majority of lesbian families having children and in need of legal recognition, a step-parent model is not appropriate. As discussed earlier, in lesbian families formed through assisted conception, the non-recognised mother is usually involved from conception onward. She should therefore not be placed in the same legal position as a new partner whose relationship with the child is contingent upon their relationship with the partner or whose recognition entails another legal parent being displaced. The unique position of families formed through assisted reproduction calls for separate second-parent adoption provisions, which could for example contain a presumption in favour of orders where there is no other legal parent<sup>248</sup> and the couple applying meet certain other conditions (such as being together for a set period, or the child being born into the relationship).

The primary benefit of adoption as a recognition mechanism is its portability. All Australian States and Territories have provisions in their adoption legislation to recognise adoptions granted in other States, so the status granted by one State would transfer to all.<sup>249</sup> This benefit would also accrue to most federal legislation which refers to adoptive parents,<sup>250</sup> and would specifically translate into parental responsibility under the *FLA* by virtue of s 60D – thus potentially sidestepping some of the difficulties created by s 60H (discussed above). It is also possible, although untested, that legal status through adoption would transfer to overseas

<sup>246</sup> As they would be for example in WA where provisions include a de facto partner of a parent: *Adoption Act 1994* (WA) s 68(2)(i).

<sup>247</sup> *Adoption Act 1994* (WA) s 68(1)(fa); *Adoption Act 1993* (ACT) s 18(2); *Adoption Act 2000* (NSW) s 30; *Adoption of Children Act 1964* (Qld) s 12(3); *Adoption Act 1984* (Vic) s 11(5), (6); *Adoption of Children Act 1994* (NT) s 15; *Adoption Act 1988* (SA) s 12(3), (4). The Tasmanian provisions for registered significant relationships do not appear to be subject to this qualification: *Adoption Act 1988* (Tas) s 20.

<sup>248</sup> Or where that legal parent is consenting, for example the situation in *ND v BM* (2003) 31 Fam LR 22.

<sup>249</sup> See, eg, *Adoption Act 2000* (NSW) ss 3, 102; *Adoption Act 1984* (Vic) ss 53, 66; *Adoption Act 1994* (WA) ss 75, 136; *Adoption Act 1993* (ACT) ss 43, 54; *Adoption Act 1988* (Tas) ss 50, 59; *Adoption Act 1988* (SA) ss 9, 20; *Adoption of Children Act 1964* (Qld) ss 28, 37; *Adoption of Children Act 1994* (NT) ss 45, 49.

<sup>250</sup> See, eg, *Income Tax Assessment Act 1936* (Cth) s 6, defining 'child' as including an adopted child and defining 'adopted child' as a child adopted under a State or Territory law governing adoption.

jurisdictions.<sup>251</sup> In short, second-parent adoption offers a one-stop comprehensive mechanism for recognition.

A major disadvantage of adoption as a recognition mechanism is that it is formal, 'opt-in', slow and costly. It requires that parents are aware of it as a possibility, are prepared to hire a lawyer and approach a court, and can afford to do so. Conversely, adoption as the prime or sole recognition mechanism entails no recognition for those who don't or can't apply. It also places a heavier burden on lesbian families formed through assisted conception compared to heterosexual families, who have legal recognition accorded to the non-biological parent automatically from birth.

The VLRC, in *Position Paper Two*, proposed a new category of 'deemed adoption'. The interim recommendations propose that a woman who consents to her partner conceiving through assisted conception is 'deemed' to have adopted the child providing that both women are cohabiting as a couple, the conception takes place in a licensed clinic in Victoria and the women have received counselling as part of that process.<sup>252</sup> A primary aim of this mechanism is 'enduring, comprehensive and operative' recognition under federal legislation.<sup>253</sup> There are a number of difficulties with this proposal. First, it is not at all certain that other jurisdictions would indeed recognise 'deemed adoption' as adoption. More importantly, recognition is limited to only those children born in Victoria and only to those children conceived in clinics. The assumption that most lesbians will (or should) use clinics to conceive<sup>254</sup> is not well founded.<sup>255</sup> Further, recognition would not operate retrospectively. This proposal thus would exclude rather than assist the vast majority of lesbian-led families in the jurisdiction. It remains to be seen whether this recommendation will be pursued in the Final Report.

### *(c) Status of children presumptions*

Parental status through 'status of children' presumptions in State and Territory law is ascribed to the consenting<sup>256</sup> male partner of a woman who undergoes an 'artificial fertilisation procedure'. This status operates from birth and occurs automatically. It also allows the non-biological father to be listed on the birth registry and certificate

<sup>251</sup> So for example, adoption orders made in Australia would be recognised by *Adoption Act 1955* (NZ) s 17.

<sup>252</sup> VLRC, (*Position Paper Two*), above n 25, 20 (recommendation 2).

<sup>253</sup> *Ibid* [3.26].

<sup>254</sup> The Commission 'envisages that a significant majority of women in same-sex relationships who choose to have children will avail themselves of services offered by licensed clinics': *ibid* [3.33]. Further the Commission posits that the 'automatic operation [of deemed adoption] is designed to be an incentive for women to utilise the services of a clinic': at [3.38].

<sup>255</sup> Self-insemination is a more common form of conception for lesbian mothers in Australia (see McNair et al, above n 6, and Millbank, above n 1), and is likely to remain so for many reasons, including the desire for the child to have knowledge of and contact with their biological father, a desire to have a gay man as the donor, a decision to conceive in a relaxed and non-medical environment where they are in control of the process, the high cost of clinical services, and a tradition of discrimination in particular within Victorian services.

<sup>256</sup> The consent of a partner to the conception is presumed, but such consent can be rebutted on the balance of probabilities by contrary evidence.

without undertaking any distinct application procedure (and without declaring that he is not in fact the biological father).<sup>257</sup> It is the fact of consent to the process leading to conception that triggers responsibility; a non-consenting partner is not ascribed parental status. It has never been a requirement in Australian law that conception occur within a clinical setting in order to meet the definition of 'artificial procedure' – even in those States that have regulated the use of reproductive technology to the extent of criminalising home insemination.<sup>258</sup> In all States and Territories bar Tasmania, the parenting presumption is expressed as a conclusive or irrebuttable presumption.<sup>259</sup>

A simple way of achieving parental status for lesbian families formed through assisted conception is through rendering existing presumptions gender neutral, or by including an additional provision specifically covering a female de facto partner. In this way, a consenting female partner is treated in the same fashion as a similarly situated male partner.<sup>260</sup>

Western Australia (in 2002),<sup>261</sup> the Northern Territory (2003)<sup>262</sup> and the ACT (2004)<sup>263</sup> all included such provisions as part of their same-sex relationship reforms. While Western Australia and the Northern Territory introduced specific new sections for female partners,<sup>264</sup> the ACT used a new gender-neutral category.<sup>265</sup> Consequential

<sup>257</sup> The VLRC notes a Victorian study of heterosexual families in which children were donor-conceived: only 37 per cent of the respondent families had told their children of this fact: (*Position Paper Two*), above n 25, [5.19]. See also McNair, above n 1.

<sup>258</sup> See, eg, *Artificial Conception Act 1985* (WA) s 3, drawing on the definition in *Human Reproductive Technology Act 1991* (WA) s 3:

'artificial fertilisation procedure' means any –  
 (a) artificial insemination procedure; or  
 (b) in vitro fertilisation procedure;

'artificial insemination procedure' means a procedure where human sperm are introduced, by a non-coital method, into the reproductive system of a woman but which is not, and is not an integral part of, an in vitro fertilisation procedure.

<sup>259</sup> *Status of Children Act 1996* (NSW) s 14(4); *Parentage Act 2004* (ACT) s 11(4); *Status of Children Act 1978* (Qld) s 15(3); *Status of Children Act 1974* (Vic) s 10C(3); *Artificial Conception Act 1985* (WA) s 6(1); *Status of Children Act 1978* (NT) s 5D(2); *Family Relationships Act 1975* (SA) s 10D(1). Tasmanian legislation does not state if the presumption is conclusive or irrebuttable: *Status of Children Act 1974* (Tas) s 10C(1).

<sup>260</sup> Danny Sandor and I came up with this idea together in late 1997 or early 1998 over a vodka and tonic (him) and beer (me), or two, at the Lizard Lounge in Sydney. This proposal did not make it through to the final version of the Democrats' De Facto Relationships Amendment Bill 1998 (NSW) but was recommended by the Ministerial Committee on Gay and Lesbian Law Reform, Parliament of Western Australia, *Lesbian and Gay Law Reform: Report of the Ministerial Committee* (2001).

<sup>261</sup> *Acts Amendment (Gay and Lesbian Law Reform) Act 2002* (WA) s 26 introduced section 6A into the *Artificial Conception Act 1985* (WA). This section came into force on 21 September 2002.

<sup>262</sup> *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT) s 41 inserted section 5DA into the *Status of Children Act 1978* (NT). This section commenced on 17 March 2004.

<sup>263</sup> *Parentage Act 2004* (ACT) repealed the *Birth (Equality of Status) Act 1988* (ACT). The *Parentage Act 2004* (ACT) came into effect on 22 March 2004.

<sup>264</sup> The process of passing these reform packages is discussed in Jenni Millbank, 'The Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples' (2006) 34 *Federal Law Review* 1.

amendments to gendered language in other State law, and to the definition of 'parent' in *Interpretation Acts* ensured that the amendments flow through to all areas of law within each jurisdiction. It was expected that NSW would enact similar measures in 2006, but this has not yet occurred.<sup>266</sup> This kind of recognition for co-mothers has also taken place in South Africa<sup>267</sup> as a consequence of Constitutional equality litigation, and in the US states of California<sup>268</sup> and New Jersey<sup>269</sup> as a matter of statutory interpretation. In New Zealand equivalent measures were introduced through legislative reform.<sup>270</sup>

A common feature of status of children presumptions in the Australian jurisdictions that have enacted reforms granting parental status to co-mothers ('the recognition States') is that they operate whether or not the child was conceived or born within the jurisdiction.<sup>271</sup> Further they operate whether the child was born before or after the commencement of the Act, so are fully retrospective in operation.<sup>272</sup> This reflects the structure of the various Acts when they were originally introduced, as they aimed to regularise the legal status of the many existing heterosexual families formed through assisted conception.

The effect of these reforms is that all children born to lesbian couples through assisted conception now have a second legal parent if they are living in Western Australia, the Northern Territory or the ACT. Such children do not have to have been conceived through clinic processes;<sup>273</sup> the presumptions also apply to self insemination.<sup>274</sup> This recognition covers all aspects of State or Territory law, such as

<sup>265</sup> *Parentage Act 2004* (ACT) s 8(4).

<sup>266</sup> Catharine Munro, 'Gay Parents' Rights to Take a Front Seat in Parliament', *The Sun-Herald* (Sydney), 18 September 2005, 4.

<sup>267</sup> *J v Director-General, Department of Home Affairs* (2003) 5 BCLR 463.

<sup>268</sup> See *Elisa B v Emily B*, 37 Cal 4th 108 (2005) and other recent California cases, above n 237.

<sup>269</sup> See American Civil Liberties Union of New Jersey, *Birth Certificate Victory for Same-Sex Couple* (2005) <<http://www.aclu-nj.org/pressroom/birthcertificatevictoryfor.htm>> at 23 September 2005.

<sup>270</sup> *Status of Children Act 1969* (NZ) s 18. Yet despite these national and international trends, and overwhelming support for this model from submissions, the VLRC did not make an interim recommendation to introduce similar changes in Victoria (preferring instead the 'deemed adoption' process discussed above).

<sup>271</sup> *Artificial Conception Act 1985* (WA) s 4(1); *Status of Children Act 1978* (NT) s 5B(1); *Parentage Act 2004* (ACT) s 11(7). Indeed the Northern Territory provisions go further to state that they apply whether or not the parents have ever resided in the jurisdiction: *Status of Children Act 1978* (NT) s 2A.

<sup>272</sup> *Artificial Conception Act 1985* (WA) s 4(1); *Status of Children Act 1978* (NT) s 5B(1); *Parentage Act 2004* (ACT) s 8(2).

<sup>273</sup> Although this is helpful for evidentiary purposes.

<sup>274</sup> Note that the ACT was careful to be especially clear in its wording to this effect: see *Parentage Act 2004* (ACT) s 11(9) which defines 'procedure' as:

- (a) artificial insemination; or
- (b) the procedure of transferring into the uterus of a woman an embryo derived from an ovum fertilised outside her body; or
- (c) any other way (whether medically assisted or not) by which a woman can become pregnant other than by having sexual intercourse with a man.

Western Australia does not differentiate between clinical and private insemination and registers all children born to lesbian couples regardless of the method of insemination:



automatic inheritance, family provision, and workers and accident compensation. Thus recognition is portable in one direction – children born outside the recognition states automatically receive recognition under any applicable law within it. In this sense the question of where the child was born is not relevant. It is, however, extremely relevant for the question of portability in the other direction: that is, whether the status granted by the recognition States will travel to non-recognition States.

**(d) Birth certificates and portability in State law**

All States and Territories have their own regulations governing the issuance of birth certificates, and most also include provisions for the recognition of births registered elsewhere.<sup>275</sup> No jurisdiction permits more than two parents to be registered. A child may only be registered in the jurisdiction in which they were born, and only that registry is empowered to issue, or correct and re-issue, a birth certificate. Babies born to lesbian families may now have both mothers listed as parents on their birth certificates if they are born in the recognition States.<sup>276</sup> To do so they must simply fill out a birth registration form.<sup>277</sup> Further, mothers can apply to have existing birth certificates re-issued for children born before the amendment if those children were born in the recognition States.

In Western Australia, the ability to alter the birth register to record a co-mother has been available since 21 September 2002. If there is only one parent on the register, amendment is a simple administrative process, requiring both women to fill in a form adding the co-mother. This is submitted directly to the registry. If a donor is listed on the register as the father, the registry has indicated that it will accept a declaration from both mothers *and* the donor stating the method of conception and confirming the consent of all three parties to replacing the donor's name with the co-mother's. If a listed donor cannot be found, or does not consent to being removed, or if the Registry is not satisfied with the evidence presented to justify an amendment, an order of parentage can be sought from the Supreme Court.<sup>278</sup>

In the ACT the birth register can be altered for children born before the amendments through a simple administrative application to the registry if there is only one parent listed.<sup>279</sup> This has been possible since 1 May 2004. The Registry has indicated that the more complex procedure of court declaration<sup>280</sup> would be necessary

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Email from Western Australian Department of Birth, Deaths and Marriages to Jenni Millbank, 9 September 2005.

<sup>275</sup> *Status of Children Act 1996* (NSW) s 11(1); *Parentage Act 2004* (ACT) s 9; *Status of Children Act 1978* (Qld) s 18B; *Interpretation Act 1984* (WA) s 5; *Status of Children Act 1978* (NT) s 9; *Status of Children Act 1974* (Tas) s 8A.

<sup>276</sup> In Western Australia the mothers can choose to be listed as 'Mother and Parent' or 'Mother and Mother' or 'Parent and Parent'. In the ACT mothers can choose to be listed as 'Mother and Parent' or 'Parent and Parent'. In the Northern Territory the birth mother can be listed as 'Natural Mother' or 'First Parent' while the co-mother is listed as the 'Other/Second Parent'.

<sup>277</sup> In Western Australia and the Northern Territory there are separate forms for lesbian mothers. In both jurisdictions, the separate forms must be obtained from the Registry and are not available online as other registration forms are.

<sup>278</sup> *Births, Deaths and Marriages Registration Act 1998* (WA) ss 20, 21.

<sup>279</sup> *Births, Deaths and Marriages Registration Act 1997* (ACT) s 16.

<sup>280</sup> *Parentage Act 2004* (ACT) ss 15, 19.

if the donor had been listed as a father and his removal was necessary to list the co-mother.<sup>281</sup> The same considerations apply in the Northern Territory,<sup>282</sup> where it has been possible to apply for a reissued birth certificate since 17 March 2004.

The status of these new birth certificates has yet to be tested, but laws in each State and Territory presume that the person listed as a parent on the register of another jurisdiction is indeed a parent. So a co-mother with a birth certificate from a recognition State would presumptively be a parent of her child under the laws of non-recognition States also if she were to move there. Presumptions based on birth certificates (unlike those under status of children laws themselves) can be rebutted on the balance of probabilities, so are of weaker effect and open to challenge. However birth certificate presumptions grant co-mothers – for the first time in Australian law – the benefit of a portable legal status quo (unlike the status of children presumptions which of themselves are not portable to non-recognition States). So a co-mother listed on the birth certificate is presumed to be a parent all around Australia unless and until someone else proves otherwise. For example, if a lesbian couple had children born in the ACT, and the family then moved to NSW the child could produce his or her ACT birth certificate to a NSW court to make a claim under NSW intestacy provisions or other NSW laws. It would be up to the party denying recognition to convince the court that there was a good reason not to recognise the ACT birth registration as authoritative.

*(e) Portability in Federal law – parental responsibility and child support*

Another important question is the extent to which status in the recognition States would flow through to federal law, and in particular to the *FLA*. Federal legislation that did not explicitly define parent in an inconsistent manner<sup>283</sup> would presumably be the same as law from non-recognition States, a rebuttable presumption would arise by virtue of the birth register. Almost all federal laws contain either no definition of 'child' or an inclusive definition that lists, for example, step-children or adoptive children. Apart from the *FLA*, federal law does not specifically distinguish children born through ART.<sup>284</sup>

Both Western Australia and the Northern Territory express their parenting presumptions as applying 'for the purposes of the law of the state/territory',<sup>285</sup> in contrast to the ACT which does not mention any limit to the effect of the presumption, simply stating that the partner is 'a parent'.<sup>286</sup> It is possible that this wording could be interpreted so that presumptions of Western Australia and the Northern Territory were seen as limited in effect to their own jurisdiction. However it should be noted that the parenting presumptions for fathers are identically worded in the Western

<sup>281</sup> Email from ACT Births, Deaths and Marriages Registry to Jenni Millbank, 5 September 2005.

<sup>282</sup> *Births, Deaths and Marriages Registration Act 1996* (NT) s 19; Email from Northern Territory Department of Justice to Jenni Millbank, 2 September 2005.

<sup>283</sup> See, eg, the *Social Security Act 1991* (Cth) s 5(1) which uses the undefined expression 'natural parent'.

<sup>284</sup> See Jenni Millbank, 'Areas of Federal Law that Exclude Same Sex Couples' (Research Report for the Human Rights and Equal Opportunity Commission, 2006, forthcoming).

<sup>285</sup> *Status of Children Act 1978* (NT) s 5DA(1); *Artificial Conception Act 1985* (WA) s 6A(1).

<sup>286</sup> *Parentage Act 2004* (ACT) s 8(1).

Australian Act, and it seems unlikely that a federal court would deny parental status to a non-biological father in any area of federal law as a result of such wording.<sup>287</sup>

Whether the parental status granted by the new status of children presumptions flows into the *FLA* is a distinct question. As noted earlier in discussion of the vexed s 60H, the *FLA* includes specific provisions under s 60H(1) to reflect the policy of State and Territory status of children presumptions by providing that a child born through assisted conception is the child of both the birth mother and her male partner regardless of their biological relationship to the child. It also provides a direct mirror provision, stating that the child will be their child if prescribed State and Territory laws so provide. The prescribed laws listed include every State and Territory except Queensland.<sup>288</sup> There are two significant barriers to co-mothers in these provisions. First, s 60H is expressed in gendered language, referring to a 'woman ... married to a man'. Even though the provision does in fact include de facto couples the language is similarly marital and gendered, defined as living 'with another person as the husband or wife of the first-mentioned person on a genuine domestic basis although not legally married to that person'.<sup>289</sup> It is extremely unlikely that an Australian court would interpret a same-sex couple as coming within these terms.<sup>290</sup> Secondly, the reference to prescribed laws (also gendered) does *not* include the new provisions from the recognition States. The regulation lists the prescribed Acts by section and does not list the new subsections in the Western Australian and Northern Territory Acts including a female partner. At present it still lists the repealed ACT legislation rather than the 2004 Act.<sup>291</sup>

The lack of fit with s 60H means that co-mothers from recognition States are definitely not liable for child support under the *Child Support Act*. This is because, as discussed above, s 5 of the Act says that parent 'means' a person who is a parent under s 60H (so that even judges who have favoured the 'enlarging' approach to s 60H of the *FLA* have regarded this aspect as restrictive).<sup>292</sup> However, if on separation the child resided with the co-mother, she would be able to use the *Child Support Act* to seek support from the birth mother, because the birth mother is liable as a parent under the Act and resident carers are entitled to use the Act to claim support.<sup>293</sup>

In Western Australia, birth mothers may use the Family Court of Western Australia to seek child support, as both mothers are parents under the *Family Court Act 1997*

<sup>287</sup> However there is a difference in the wording of the Northern Territory where the provision on male partners is not limited, while that on female partners is: *Status of Children Act 1978* (NT) s 5D.

<sup>288</sup> Family Law Regulations 1984 (Cth) sch 6, reg 12C.

<sup>289</sup> *Family Law Act 1975* (Cth) s 60H(4).

<sup>290</sup> See, eg, *Re Brown and Commissioner for Superannuation* (1995) 38 ALD 344; *Commonwealth v Human Rights and Equal Opportunity Commission* (1998) 52 ALD 507. Note that in the UK (with the assistance of the *Human Rights Act 1998* (UK) c 42) the House of Lords recently found that a gay couple did meet the definition 'living as a spouse': *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

<sup>291</sup> Family Law Regulations 1984 (Cth) sch 6, reg 12CA. Presently this lists the *Artificial Conception Act 1985* (ACT) which has in fact been replaced by the *Parentage Act 2004* (ACT).

<sup>292</sup> Note that birth mothers in the situation may use promissory estoppel to make a claim for lump sum support: see *W v G* (1996) 20 Fam LR 49.

<sup>293</sup> See *Child Support (Assessment) Act 1989* (Cth) s 7.

(WA) and are equally liable.<sup>294</sup> This is because Western Australia has its own Family Court and so was able to amend this legislation simultaneously with other same-sex partnership reforms. Mothers from other recognition States are left with the unamended federal *FLA*.

However, other pre-existing provisions of the *FLA*, if applicable, could be of some assistance to families from the recognition States where both mothers have been entered on the birth register. Section 69R of the *FLA* provides that a person listed on the birth register will be presumed to be a parent.<sup>295</sup> As with State law, this is a rebuttable presumption.<sup>296</sup> In addition, s 69S provides that if a federal, State or Territory court has expressly found that a person is the parent of a child then they are conclusively presumed to be so. This is not a rebuttable presumption.<sup>297</sup> Thus there is the possibility that the Family Court *could* accept registration of a birth as the basis on which to determine a co-mother is a parent under the Act, and that it *must* accept any previous declaration of parentage arising from a State or Territory court, or from a previous application to the Family Court itself. If the Family Court did accept that the co-mother was a parent under the *FLA*, then it could order her to pay child maintenance, as the Court still has power to do so if the provisions of the *Child Support Act* are inapplicable.<sup>298</sup>

However, it is also possible that the Court could hold that none of these provisions are applicable to children born through ART, which leads back to s 60H as the sole determinant of parental status under the *FLA* for such children.<sup>299</sup>

#### (f) *Retrospectivity*

A further issue that requires attention is the extent of the retrospectivity of operation within the recognition States. I have argued elsewhere that retrospectivity of operation in status of children presumptions is vital to ensure that the large majority of lesbian families benefit from reform.<sup>300</sup> All 'status of children' legislation in Australia is retrospective, and so for recognition States the new provisions apply to children born at *any* time previously. The provisions are limited by the fact that they do not apply to alter previously vested property interests,<sup>301</sup> but they do alter relationships for the

<sup>294</sup> Under the *Family Court Act 1997* (WA) s 77, a parenting plan may also include child support provisions where a plan cannot be made under the *Child Support (Assessment) Act 1989* (Cth). Under s 133 of the *Family Court Act 1997* (WA), 'a person who is the parent of a child under section 6A of the *Artificial Conception Act 1985*' is liable to contribute towards child bearing expenses. Thus mothers who have a child together using assisted conception are equally liable for child raising costs under the regime, although only the birth mother would need to use the *Family Court Act 1997* (WA).

<sup>295</sup> I am indebted to Mel Gangemi for this insight.

<sup>296</sup> *Family Law Act 1975* (Cth) s 69U.

<sup>297</sup> *Family Law Act 1975* (Cth) s 69U(3).

<sup>298</sup> *Family Law Act 1975* (Cth) s 66E. Conversely it could not make a child maintenance order against a biological mother for the reason that she is already liable under the *Child Support (Assessment) Act 1989* (Cth).

<sup>299</sup> I am indebted to Advia Sifris for pointing out this possibility.

<sup>300</sup> Millbank, above n 94, 18.

<sup>301</sup> *Artificial Conception Act 1985* (WA) s 4(2); *Status of Children Act 1978* (NT) s 5B(2); *Parentage Act 2004* (ACT) s 8(11).

purposes of other property rights.<sup>302</sup> Such retrospectivity may present some difficulties in my view, especially if applied to long separated couples. Take for example a situation where the children remained with the birth mother, who may have denied further contact to the co-mother on the basis that she isn't 'really' (legally) a parent. This has been a not uncommon situation in Australia, despite the ability of the Family Court to make orders for and on the application of, anyone concerned with the care, welfare and development of a child.<sup>303</sup>

It seems a harsh and unpredictable result if after 10 or 20 years (or more), there is suddenly a legal relationship between an erstwhile co-mother and children she may not have seen in the interim. I am not proposing that a legal relationship should depend upon on-going contact; rather I suggest that it may take some time to establish a new status quo in which lesbian families have a clear idea of their rights and entitlements, especially given a long history of complete lack of legal recognition. For this reason, I argue that retrospectivity should be limited in operation, for example by not applying to children who have reached majority as at the date of amendment, or to children from couples who separated a number of years prior to that date.<sup>304</sup> This difference in treatment acknowledges that in some respects co-mothers are not similarly situated to infertile men in heterosexual couples where children were born through donor insemination. For example, men in this situation always listed themselves as fathers on birth certificates, presented themselves and were accepted widely as 'the father' and indeed often did not reveal to the child their lack of biological relationship. Women co-parenting in lesbian families have never been able to present themselves as a legal parent or gain any formal recognition of their role until now. This is a very significant transition in terms of actual legal rights as well as internalised conceptions of such rights and broader social assumptions about who is a parent. My argument is not to delay or deny recognition, but simply to be mindful of a period of transition as these reforms take effect.

One other question of potential over-inclusiveness arises in the ACT provisions. Unlike Western Australia and the Northern Territory, the ACT amended pre-existing presumptions of paternity that apply to a woman's male partner to presume that he is the father of any child born. Such presumptions exist in all State law as well as the *FLA*, and are rebuttable. They are based on the assumption that the most likely father of any child is the man living with the mother at the time she fell pregnant. However, the ACT presumption of parental status enacted in 2004 is gender neutral and applies to all domestic partners.<sup>305</sup> It is also retrospective in operation. It is unclear how this provision will operate with respect to lesbian families, as they are also covered by the presumptions of parentage arising from assisted conception. Presumably if they had a child through assisted reproduction, the much stronger irrefutable presumption under that section would apply instead.<sup>306</sup> But if the birth mother conceived through

<sup>302</sup> Although note that in the Northern Territory there are 'no duty to inquire' provisions: *Status of Children Act 1978* (NT) s 7(1).

<sup>303</sup> Take, for example, the facts from *W v G* (1996) 20 Fam LR 49: the mothers separated in 1994, and at the time of hearing in 1996 the co-mother had not had any contact with the children (although note that case is complicated by allegations of violence).

<sup>304</sup> Millbank, above n 94, 18.

<sup>305</sup> *Parentage Act 2004* (ACT) s 8.

<sup>306</sup> Presumptions arising from procedure prevail over any other presumption except a presumption arising from a court order: *Parentage Act 2004* (ACT) s 13(3).

intercourse it is difficult to know how this provision could, or should, apply. For instance if conception was with a female partner's consent (as it was in the *ND* case), then it would be an appropriate result to grant parental status to the consenting co-mother. But given that the biological father is a legal father by virtue of intercourse,<sup>307</sup> and there can be only two legal parents under the Act,<sup>308</sup> it seems unlikely that a court faced with competing presumptions in such instance would choose the co-mother as the second parent (although in my view with facts such as the written agreement in *ND*, it should). Furthermore, and to my mind more troubling, unlike the assisted conception presumptions, there is no requirement for consent in the general partner-based presumptions. So a woman whose partner was unfaithful to her with a man who is unable to be identified may find herself presumed to be a parent if she does not leave the relationship more than 20 weeks before the birth of the child. And, by virtue of the retrospective operation, she may find this out many years after it happened.

In sum, the developments in recognition States are very positive, according a wide range of parental rights upon lesbian co-mothers for the purposes of State and Territory law, with the potential of portability into other Australian jurisdictions. It remains to be seen whether other States will follow to create a new harmonious regime for all children born through assisted conception.

#### IV CONCLUSION

In considering lesbian and gay parenting in Australia today, two major issues present themselves. First, what role does, and should, law play in controlling access to non-traditional family formation. This occurs primarily through direct State regulation of access to fertility services as well as indirect regulation through federal policy and the applicability (or not) of anti-discrimination laws to such services. Family formation is also regulated through laws on access to eligibility to apply for adoption orders and the regulation of surrogacy arrangements. These latter laws, although still in many instances directly discriminatory, may have a lesser impact due to the far smaller numbers of families formed through such means compared to those formed through ART.

Fertility services have become increasingly accessible to non-traditional families in recent years. Federal rulings on marital status discrimination have meant that lesbians who can demonstrate infertility within current clinical definitions are able to access services in South Australia and Victoria, two of the three States to legislatively control access — although mooted amendments to the federal *SDA* could rescind these changes. In Western Australia, the other State with legislative controls on access to reproductive services, access to assisted insemination has been open to lesbians (and IVF to infertile lesbians) since 2002. Similar changes are recommended in Victoria but have not been passed at the time of writing. Policy and practice play a significant role in governing access in non-legislated States, and there have been both positive and negative developments in these areas. Notably, gay men's parenting aspirations remain blocked by regulation and policy in all jurisdictions discriminating against sperm donors who declare having had male–male sex.

<sup>307</sup> *ND* (2003) 31 Fam LR 22.

<sup>308</sup> *Parentage Act 2004* (ACT) s 14.

Secondly, law plays a key role in recognising the status of parents in families with children born through assisted conception. There have been significant developments in Western Australia, the Northern Territory and the ACT granting automatic parental status to consenting co-mothers of children born through assisted conception. These changes also involve the issuing of birth certificates for new babies with both mothers' names listed as parents and the ability to have birth certificates for earlier children reissued. While the irrebuttable presumption of parentage based on consent operates only within the recognition States themselves, rebuttable presumptions of parentage also arise from the birth certificates. The portability of recognition based on the new birth certificates has yet to be tested, but could potentially flow through to other State and federal law.

In Tasmania registered couples can obtain parental status via second parent adoption, while in the ACT and Western Australia the option of adoption is available to all same-sex de facto couples, and is additional to presumed parental status for co-mothers. It is probable that such adoption orders are fully portable to other States and federal law, all of which expressly recognise adoptive parents.

In case law to date concerning the role and rights of known donors there has been a distinct trend to see the donor as the second 'real', if not legal, parent; implicitly at the expense of the co-mother. In contrast, legislative change in the recognition States accords the co-mother the legal status that has previously been granted to consenting male partners (and as a result severed from the donor). These trends suggest an either/or choice in terms of legal recognition of co-mothers and involved donor-dads which is premised on the biological heterosexual family model in which there are only two parents. Indeed, the ACT reforms go so far as to specifically mandate in the legislation that a child may only have a maximum of two parents.<sup>309</sup> Yet this may not in fact reflect the lived reality of multi-parent gay and lesbian families. While most families are lesbian-led with two mothers equally sharing care and responsibility, and a status quo presumption that reflects this is a proper and equitable development, this model does not cover everyone. Provisions for multiple-parent families, where they exist, can and should also be made.

Family forms and the means of family formation are changing. Australian law must develop responsively in order to adequately serve the needs of gay and lesbian families. Much has occurred in Australian law in recent years, and it is hoped that the changes outlined here will continue to develop in a cohesive and equitable manner in the near future.

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<sup>309</sup> *Parentage Act 2004 (ACT)* s 14.