

Submission  
No 8

**INQUIRY INTO INQUIRY INTO LEGISLATION ON  
ALTRUISTIC SURROGACY IN NSW**

**Organisation:** Australian Human Rights Commission

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**Position:** Human Rights Commissioner

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**Australian  
Human Rights  
Commission**

*everyone, everywhere, everyday*

24 September 2008

The Committee Chair  
Standing Committee on Law and Justice  
Parliament House  
Macquarie St  
Sydney NSW 2000

Dear The Hon Christine Robertson MLC,

### **Inquiry into legislation on altruistic surrogacy in NSW**

Thank you for the opportunity to make a submission to the inquiry into legislation on altruistic surrogacy in NSW.

*Same-Sex: Same Entitlements*, the report of the Australian Human Rights Commission's National Inquiry into Discrimination Against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits, canvassed issues relevant to surrogacy. In particular, I refer you to Chapter 5 of our report, 'Recognising Children of Same-Sex Couples'. A CD copy of the report is included.

The report highlights that various entitlements flow from legal recognition of a child-parent relationship. While the Inquiry did not specifically consider NSW law, some of our observations may be relevant to your inquiry, as outlined below.

#### **Same-sex couples, surrogacy and adoption**

Altruistic surrogacy is one way that gay couples can have a child of their own. In such a situation it is important that the law provide a mechanism for those gay parents to obtain legal parental status, for example, through adoption.

Whilst there are no surrogacy laws in NSW, restrictions on adoption by gay couples in NSW make it unlikely that a gay couple will be legally recognised as the parents of a child who they bring up.

Adoption laws which arbitrarily exclude a couple on the grounds of sexuality fail to consider the best interests of the child. This may result in a breach of the Convention on the Rights of the Child (CRC), which requires that the best interests of the child be the paramount consideration in adoption (article 21). It may also breach the right to non-discrimination in the CRC (article 2) and the International Convention on Civil and Political Rights (articles 2 and 26).

Consequently, I encourage you to consider a mechanism for transfer of parental status, for example, through reform to adoption law, at the same time as you are considering reform to laws governing surrogacy.

Thank you again for the opportunity to make a contribution to your Inquiry.

Yours sincerely

A handwritten signature in black ink, appearing to read 'G. Innes', with a wavy, cursive style.

Graeme Innes AM  
Human Rights Commissioner & Disability Discrimination Commissioner



## CHAPTER 5:

# Recognising Children of Same-Sex Couples

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## 5.1 What is this chapter about?

Protecting the best interests of a child is one of the most important principles of international law and the *Convention on the Rights of the Child* (CRC) in particular. This chapter focuses on whether federal law currently protects the best interests of a child being raised by lesbian or gay parents.

In particular, this chapter examines whether the definitions of ‘child’, ‘dependent child’, ‘dependant’ and other terms describing a family relationship between a parent and child incorporate children being raised in same-sex families.

The way a family is defined by law has enormous impact on the financial and work-related entitlements available to help children and parents. Some entitlements are targeted at parents, to help them financially support their children. Other entitlements are intended to go directly to children themselves – for example when a parent dies. Either way, the primary purpose of these entitlements should be to protect the best interests of the child.

Families headed by same-sex couples already exist in our community. And with the advent of assisted reproductive technology (ART), more and more lesbian and gay couples are having children. While federal laws recognise the relationship between an opposite-sex couple and a child conceived through ART, they do not recognise the relationship between a same-sex couple and a child conceived through ART. In addition, federal laws do not currently contemplate that a lesbian co-mother or gay co-father may well be a child’s primary caregiver despite the absence of biology.

Whether or not same-sex parents or their children can access financial and work-related entitlements under federal law depends on legal presumptions as to who is a person’s child, and their application to legislative definitions of ‘child’, ‘dependent child’, ‘dependant’ and other similar terms.

This chapter gives an overview of the legal presumptions and legislative definitions and considers whether children in same-sex families can enjoy the same financial environment as children in opposite-sex families.

The Inquiry is aware that many people have strong views about whether same-sex couples make appropriate parents. The Inquiry received a number of submissions suggesting that families headed by an opposite-sex couple are the only appropriate form of family.

However, the reality is that same-sex families do exist. And the Inquiry does not accept that one set of parents should have to struggle harder than another set of parents to protect the best interests of their child, purely on the basis of their sexuality. Laws that perpetuate such inequalities are unjust and should be changed. They are also contrary to international human rights law.

This chapter sets out the circumstances under which a same-sex couple may become parents of a child and how federal law currently treats that relationship in the context of financial and work-related entitlements. The chapter then discusses how federal law should be changed to ensure greater protection of the interests of children born to and raised by gay and lesbian couples.

More specifically, this chapter addresses the following questions:

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- What is the legal status of child-parent relationships in same-sex families?
- How are same-sex families treated under federal financial laws?
- How are same-sex families treated under state and territory financial laws?
- How should federal law change to protect the best interests of all children?

### 5.2 What is the legal status of child-parent relationships in same-sex families?

It is important to understand the legal status of parent-child relationships in same-sex families in order to determine how the various federal law definitions of 'child', 'dependent child' and 'dependant' apply to those families.

The most recent Australian census results suggest that approximately 20% of lesbian couples and 5% of gay male couples in Australia are raising children.<sup>1</sup> These child-parent relationships arise in many different ways.

Some children are born to one member of a same-sex couple during an earlier opposite-sex relationship. Many children are born to lesbian couples using donor sperm and ART.<sup>2</sup> Some children are being born into and raised by gay male couples with the help of a female friend or through a surrogacy arrangement. A few children may be adopted by one or both members of a same-sex couple.

Felicity Martin and Sara Lowe explain how much thought they put into forming a family:

Felicity and I have been in a relationship for 6 years. We have spent 4 years trying to have a family. Two of those years were spent planning and making decisions, for example which clinic, known donor or unknown etc. No children of GLBTI people are born by accident. We go to great lengths and great expense to create these families.<sup>3</sup>

There are many more ways that a same-sex family may come about. This section does not seek to describe all the family forms in which a particular child may be raised. The following text discusses how family law treats the relationship between a child and his or her same-sex parents.

The Glossary to this report summarises the terms used in this chapter, and in following chapters, to describe the different child-parent relationships.

#### 5.2.1 General family law framework applying to children and their parents

In considering all of the following scenarios, it is important to keep in mind that the *Family Law Act 1975* (Cth) (Family Law Act) makes the best interests of a child a primary consideration in all decisions relating to children.<sup>4</sup>

In assessing the best interests of children, family law looks at the role of 'both of their parents' and 'other people significant to their care, welfare and development'.<sup>5</sup> In other words, family law operates on the assumption that a child will have one or two legal parents and possibly 'other people significant to their care'.

**(a) Birth parents and adoptive parents are a child's legal parents**

Under family law, a child's two legal parents are generally the woman who bears the child (the **birth mother**) and the male partner of the birth mother, if there is one (the **birth father**). These are generally the two people who are recorded on the child's birth certificate as parents, which will be evidence of the legal relationship throughout the child's life.<sup>6</sup>

Alternatively, if a child has been adopted, the child's legal parents will include the parents who adopt him or her.<sup>7</sup> Adoptive parents can also be added to a birth certificate.<sup>8</sup>

**(b) Birth parents and 'other people significant to care' in an opposite-sex family**

A child born to an opposite-sex couple will generally have a birth mother and a birth father and both of them will be legal parents.

However, a child being cared for in an opposite-sex family may well have other people significant to their care and welfare.

The 'other people significant to the care' of a child raised by an opposite-sex family are typically the subsequent partners of separated birth parents (**social parents**).<sup>9</sup> Social parents can formalise their parenting relationship by applying to the Family Court of Australia for a parenting order.<sup>10</sup> However, a social parent with a parenting order will not always have the same financial and work-related entitlements as the birth mother or birth father.

**(c) Birth parents and 'other people significant to care' in a same-sex family**

A child born to a lesbian couple will generally have a **birth mother** and a **lesbian co-mother**. The birth mother will be a legal parent under the current family law system.

A child born to a gay couple will often have a **birth father** and a **gay co-father**, as well as a birth mother. Alternatively, a child may have **two gay co-fathers** as well as a birth mother. If there is a birth father, he will be a legal parent.

The lesbian co-mother or gay co-father(s) can apply to the Family Court of Australia for a parenting order, as 'other people significant to the care, welfare and development' of the child. But the lesbian co-mother and gay co-father(s) will be treated in the same way as a social parent is treated under the law; they will not be treated in the same way as a birth parent.

In other words, federal law does not currently recognise the distinction between a person who is a *subsequent partner* of a birth mother or birth father, and a person in a same-sex couple who is either the *partner of the birth mother or birth father or an active co-parent at the time a child is born*.

This means the lesbian co-mother or gay co-father(s) may be denied financial and work-related entitlements available to a birth mother and birth father, even though they are the original and intended parents of the child.

The failure to make this distinction can compromise the best interests of a child born into a lesbian or gay family, because that child's parents will not have the same entitlements as the opposite-sex parents of another child.



The failure to recognise both gay or lesbian parents of a child may breach a child's right to identity under the articles 7 and 8 of the CRC. It may also breach Australia's obligation to support and promote the *common responsibilities of both parents* in raising a child (article 18). These rights are discussed in greater detail in Chapter 3 on Human Rights Protections.

The following explains the various parenting scenarios in more detail.

### 5.2.2 A child born to a same-sex couple will often have only one legal parent

Ever increasingly children are being born to lesbian and gay couples. However, where a child born to a lesbian or gay couple is conceived through ART, federal law only recognises the birth mother of the child as the legal parent. And where a child is conceived through intercourse, federal law only recognises the two people involved in intercourse as legal parents.

This puts the lesbian co-mother and gay co-father(s) at a significant disadvantage when attempting to access financial and work-related benefits intended to help support a family.

#### (a) *A child born to a lesbian couple usually has a birth mother and lesbian co-mother*

A lesbian couple can bring a child into the world through ART using donated sperm. The woman bearing the child will be the birth mother and her partner at the time of birth will be the lesbian co-mother. A sperm donor is not generally considered a legal parent under the applicable federal, state and territory laws regulating ART.<sup>11</sup>

##### (i) *Federal law does not recognise a lesbian co-mother as a legal parent of an ART child*

Under federal law, the child of a lesbian couple conceived through ART will have only one legal parent – the birth mother.

Compare this to the ART child of an opposite-sex couple where both the woman and man consenting to the process of ART are *presumed* to be the child's legal parents, as long as they are in a genuine couple.<sup>12</sup> Federal, state and territory law recognises that the important thing is that the couple intend to have a child together – not the biology or technology involved in conception. However, federal law does not extend this logic to a lesbian couple.

##### (ii) *WA, ACT and NT law recognises a lesbian co-mother as a legal parent of an ART child*

In Western Australia (WA), Northern Territory (NT) and the Australian Capital Territory (ACT), the birth mother and lesbian co-mother of an ART child are *presumed* to be the legal parents of the child, if they are in a genuine relationship when the child is born.<sup>13</sup> They are both noted on the child's birth certificate, to the exclusion of the sperm donor.<sup>14</sup>

One couple describe how fortunate they feel to be living in the ACT where a same-sex couple can be recognised as a child's legal parents:

I feel fortunate to live in the ACT where at least some of the forms of discrimination levelled against those in same-sex relationships have been legislated against. For example, were I to give birth to a child through assisted conception, my partner's name goes on the birth certificate as that child's parent which is exactly what she would be. This is because in the ACT the term domestic partner includes partners in same-sex relationships and so where that term is used in ACT legislation my partner and I can essentially claim de facto status. This reflects how we

live and who we are and we applaud the Stanhope government for achieving these reforms in relation to same-sex relationships.<sup>15</sup>

It is unclear how a birth certificate from WA, NT and the ACT will be regarded under federal laws.

The Family Law Act presumes that a person who is noted as a parent on a birth register is the legal parent of that child.<sup>16</sup> There is therefore a strong argument that a lesbian co-mother noted on a birth certificate from WA, NT and the ACT should be presumed the parent of a child under federal law in the same way as the birth mother is presumed the parent.

However, the Family Law Act has not enacted parenting presumptions in favour of a lesbian co-mother. And the Family Law Act does not appear to recognise the parenting presumptions created by the WA, NT and ACT laws.<sup>17</sup> So it is also possible that federal law will not recognise the birth certificates created pursuant to those laws.

At best it is uncertain whether a birth certificate noting a lesbian couple as parents will be recognised for the purpose of federal financial laws.

*(iii) A child conceived through intercourse to a lesbian couple will have a birth mother, birth father and lesbian co-mother*

Intercourse is the least likely way a lesbian couple will conceive a child.<sup>18</sup> Nevertheless it does occur.

When a child is conceived through intercourse, the legal parents will usually be the woman (birth mother) and the man (birth father) involved in intercourse.<sup>19</sup>

The lesbian co-mother will not be recognised as a legal parent under any state, territory or federal law, unless she adopts the child from the birth father under the 'step-parent adoption' laws (see section 5.2.4 below).

*(b) A child born to a gay couple always has a birth mother and may have a birth father and gay co-father or two gay co-fathers*

A child born to a gay couple will always have a birth mother (the woman bearing the child). The birth mother will be the legal mother of the child under all federal, state and territory laws, unless she allows the couple to adopt the child. This makes adoption a particularly important mechanism for gay parents to obtain legal parental status.

If the child is conceived through ART, the birth mother will likely be the only legal parent and the gay couple will both be co-fathers.

If the child is conceived through intercourse, the two people involved (the birth mother and the birth father) will generally be the legal parents and the gay partner of the birth father will be the co-father.

*(i) A child conceived through ART to a gay couple will have a birth mother and two gay co-fathers*

There is no law in any state or territory which makes a parenting presumption in favour of a gay co-father or gay couple conceiving a child with a woman through ART. This is because a

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parenting presumption in favour of the gay co-father would mean automatically displacing the legal rights of the birth mother.

However, it is also important to note that existing parenting presumption laws may displace the legal rights of a gay man who donates his sperm to a woman with the intention of raising that child. This is because, under the ART parenting presumptions for opposite-sex and lesbian couples, a male donor to an ART process will only be a legal parent if he is in a genuine domestic relationship with the birth mother.<sup>20</sup>

Since a man in a gay couple will not be in a genuine domestic relationship with the birth mother, neither he nor his gay partner will be treated as legal parents unless adoption occurs.

### *(ii) A surrogate mother is the legal mother unless adoption occurs*

All states other than NSW and the ACT either prohibit surrogacy agreements or limit access to the ART necessary to fulfil a surrogacy arrangement.<sup>21</sup> As a consequence, '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.'<sup>22</sup> However, even if surrogacy does take place, the mother will be the legal parent, unless she allows the couple to adopt the child.

### *(iii) A child conceived through intercourse to a gay couple will have a birth mother, birth father and gay co-father*

If the child born to a gay couple is conceived through intercourse the law will recognise the birth mother and the birth father (one of the gay couple) as the legal parents.

## **5.2.3 A lesbian co-mother or gay co-father(s) cannot be a step-parent to a child**

A step-parent is sometimes entitled to the same financial and work-related benefits available to a legal (birth) parent. Thus becoming a step-parent could be a useful mechanism for a lesbian co-mother or gay co-father seeking access to the entitlements intended to assist parents raise their children.

However, the federal financial and work-related laws tend not to define who qualifies as a 'step-parent' or 'step-child' (see further section 5.3.3 below).

Further, under the Family Law Act a person can only become a 'step-parent' of a child if he or she *marries* the birth parent and treats that child as a member of the family.<sup>23</sup> Since a same-sex couple cannot marry, neither a lesbian co-mother nor a gay co-father can become a 'step-parent' under the Family Law Act.

Therefore, a lesbian co-mother or gay co-father will not qualify as a step-parent unless the federal financial laws themselves define a 'step-parent' or 'step-child' more broadly.<sup>24</sup>

#### 5.2.4 A same-sex couple, lesbian co-mother or gay co-father cannot generally adopt a child

A same-sex couple, lesbian co-mother or gay co-father would all be recognised as the legal parents of a child in federal law if they could adopt that child.<sup>25</sup> And adoptive parents can generally access the same financial and work-related entitlements as birth parents.

In theory, adoption should be a powerful tool for same-sex families who face biological challenges to being birth parents. However, in practice, the adoption laws in the various states and territories make it extremely difficult – and sometimes impossible – for same-sex couples to adopt.

It is important to remember that the CRC requires that the best interests of a child be *the paramount consideration* in adoption (article 21). Adoption laws which arbitrarily exclude a couple on the grounds of sexuality will breach these rights because they fail to consider the best interests of a particular child.

##### (a) *A same-sex couple can only adopt an unrelated child in WA and ACT*

At present, only WA and ACT allow same-sex couples to register for adoption of an unrelated child.<sup>26</sup> However, even in those states very few gay or lesbian couples successfully adopt children in Australia.<sup>27</sup>

An opposite-sex couple can apply to adopt an unrelated child under all state and territory laws.<sup>28</sup>

##### (b) *A lesbian co-mother or gay co-father is unlikely to achieve 'step-parent adoption'*

One member of a couple can apply to adopt the birth child of the other member of the couple under 'step-parent adoption' laws. Theoretically this would be an effective mechanism for a lesbian co-mother or gay co-father to obtain legal parental status regarding the child he or she has been caring for from birth.

However, New South Wales, Victoria, Queensland, South Australia and the Northern Territory do not allow step-parent adoption for same-sex couples.<sup>29</sup>

A lesbian co-mother or gay co-father could apply to adopt the birth child of their partner in Western Australia, the Australian Capital Territory and Tasmania.<sup>30</sup> However, the Australian Capital Territory and Tasmanian laws contain a general presumption against making an adoption order.<sup>31</sup> This is because an adoption order severs the legal relationship between the child and one of the child's birth parents.

Due to the serious consequences of an adoption order, all step-parent adoption laws (including those applying to opposite-sex couples) contain a strong preference for dealing with new parenting arrangements through a parenting order rather than an adoption order.<sup>32</sup>

The Victorian Law Reform Commission (VLRC) argues that the presumptions against step-parent adoption may not be appropriate for some same-sex couples. In the case of a lesbian co-mother of an ART child there is unlikely to be a competing interest.<sup>33</sup> In the case of other lesbian or gay co-parents, there may be consensual agreements between the various

people seeking to raise a child. The Inquiry supports amendments to legislation which open up additional options for a lesbian or gay couple to attain legal status and therefore better protect the best interests of their child.

**(c) Overseas adoptions by gay and lesbian couples may not be recognised in Australia in the future**

It appears that surrogacy and adoptions occurring overseas may not be recognised under Australian law in the future. As at March 2007, the federal government's list of legislation proposed for introduction includes the Family Law (Same Sex Adoption) Bill. The Bill is described as legislation to 'amend the Family Law Act 1975 to indicate that adoptions by same sex couples of children from overseas under either bilateral or multilateral arrangements will not be recognised in Australia'. However, the Bill is not available and it is unclear what will be the final form of the legislation (if it is indeed introduced).

**(d) Restrictive and discriminatory adoption laws have a particularly serious impact on the children of gay couples**

A lesbian co-mother may become a legal mother through a parenting presumption in her favour (although for the moment that is limited to ACT, WA and NT). But it is particularly difficult for a gay couple to become a legal parent of their child without adoption.

A gay male couple cannot have a child, whether through ART or intercourse, without involving a child-bearing woman. The Inquiry does not support the enactment of parenting presumptions which would automatically remove the rights of a child-bearing woman. Rather, it should be possible for a gay couple to adopt an unrelated child, or a child born through ART to a surrogate or friend, after the birth mother has made a positive decision to transfer her legal parenting rights.

However, the limited scope of state and territory adoption and step-parent adoption laws severely limits the possibility of adoption for gay and lesbian couples.

The outright prohibition of adoption by same-sex couples in some states and territories breaches article 21 of the CRC which requires that the best interests of the child be *the paramount consideration* in adoption. The other limitations may also compromise the best interests of the child under article 3(1) of the CRC.

**(e) Comments from gay couples trying to adopt**

Dr James Dowty compares adoption for same-sex couples in Australia and the Netherlands. He argues that adoption provides greater protection for children:

...I think it is important that same-sex couples should be allowed to adopt children. When the Dutch parliament was debating [legal] recognition of same-sex relationships they decided that same-sex couples should be given the same opportunities as opposite-sex couples to adopt. In a country where approximately 20% of lesbian couples have children from previous relationships, this was mainly seen as a way of ensuring the best outcome for the children in the event of the death or incapacity of the biological parent. Australian children deserve the same protections as Dutch children in such situations.<sup>34</sup>

Frank Gomez comments on his experience when considering adoption:

I have over the years enquired about adopting a child, as I think this would be an option I would like to entertain if I was ever in a long term, serious relationship again. However I have found that it is impossible for gay men to even be considered for adoption, regardless of income, character or [the] seriousness of their relationships.<sup>35</sup>

In his submission Marcus Blease discusses the issues of surrogacy and adoption for gay male couples:

My partner and myself would like to adopt a child. We would consider surrogacy from the US, however this is too expensive. We are however prohibited from adopting here and may have to move to the UK to do this if the law isn't changed within the next 5 years. If I sold a house I own in the UK we will consider surrogacy as a last resort, however this brings a set of discrimination as long as your arm. We would receive no family tax breaks as heterosexual couples, one of us would receive little federally recognised parenting rights of the child (the non biological one).<sup>36</sup>

### **5.2.5 A lesbian co-mother or gay co-father(s) can seek a parenting order as 'other people significant to the care' of a child**

As discussed previously, the Family Law Act acknowledges that children are frequently cared for by a range of 'other people significant to the care' of a child. Those people other than the two (or one) birth parents or adoptive parents can seek a parenting order from the Family Court of Australia if they wish to formalise their parenting role.<sup>37</sup>

Lesbian co-mothers and gay co-fathers are amongst those 'others' under the current family law regime. They can obtain a parenting order in respect of their child, but a person with a parenting order is not always entitled to the same financial and work-related benefits as a legal (birth) parent. This may compromise the best interests of a child born to a lesbian or gay couple.

Parenting orders are discussed further in section 5.3.4 below.

## **5.3 How are same-sex families treated under federal financial laws?**

The application of federal financial and work-related laws to same-sex families is very uncertain.

As suggested in the previous section of this chapter, the legal status of the various people involved in raising a child in a same-sex family is unclear. On top of this, there is inconsistency in the way a parent-child relationship is described within and between federal financial and work-related laws. And it is unclear how each of those definitions might apply to the various people involved in looking after a child – especially a lesbian co-mother, gay co-father or other social parents.

Some federal laws limit financial and work-related entitlements to the legal parents (or birth parents) of a child. Since the lesbian co-mother or gay co-father of a child is generally not considered a legal parent under family law, those laws will generally put the child of a same-sex couple at a disadvantage. This is because the lesbian co-mother or gay-co father cannot

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access the benefits available to the opposite-sex birth parents – despite being the effective parents of the child since birth.

On the other hand, there are some laws which extend financial and work-related benefits to people who are legally responsible for a child, or to people who financially support a child. Those laws potentially include a lesbian co-mother or gay co-father – particularly if they have obtained a parenting order from the Family Court.

The Inquiry's concern is that the best interests of a child are protected – irrespective of whether they are being raised by opposite-sex or same-sex parents. Senator Ruth Webber put it like this:

... it is completely absurd and unreasonable to argue for the best interests of children while at the same time promoting laws that discriminate against the children of same-sex parents. If benefits to couples are designed to promote the interests of children, then how can one possibly justify withholding those benefits from some children for no other reason than that their parents are both of the same gender?

It is most probable that the children of same-sex couples are harmed by the discrimination that same-sex couples and their families face. I do not find the argument that withholding rights from same-sex couples is in the interests of children very convincing.

Same-sex couples have continued to raise children in the current environment – demonstrating that current discrimination does nothing to “discourage” such behaviour. We are not preventing same-sex couples from raising children with current discriminatory practices – and nor should we – but we *are* making the lives of their children more difficult.<sup>38</sup>

The lack of clarity in federal law in itself puts the best interests of children raised in same-sex families at risk. It also causes distress to same-sex couples who are trying to arrange their financial affairs to best care for their children:

For me, this is not about our rights as parents, but our child's rights to have her family validated and accepted by her own country. It's about her right to full legal protection in the case of the death of either of her parents. It is her right to be included on a Medicare card which lists every member of her family. It is blatantly wrong to deny children this protection because there are still so many in the community who neither approve of nor understand the sexuality of their parents. Our sexuality is not, or should not be the issue, it is all about our children who are Australian citizens, born of Australian citizens, and deserve every protection that is available to Australian children born to any other family.<sup>39</sup>

The following sections try and make some sense of how federal financial and work-related laws might apply to same-sex families and what needs to change to ensure greater equality in financial assistance for the children raised in those families.

### 5.3.1 Summary of definitions used in federal laws

The following text selects a representative sample of the various definitions describing a parent-child relationship in federal financial and work-related laws and seeks to determine whether, or when, lesbian and gay parents may qualify for the relevant entitlements.

**(a) Parent-child relationships are described by four types of definitions**

The various legislative definitions can be categorised into four broad groups:

- laws which do not define the relevant parent-child relationship
- laws defining a child to include an adopted, ex-nuptial or step-child
- laws defining a child to include a person for whom an adult has legal responsibility or custody and care
- laws including a child who is wholly or substantially dependent on an adult or who stands in the position of a parent.

**(b) Caveats in using these groups of definitions**

In reading the following text it is important to keep in mind the following caveats.

Firstly, sometimes laws which determine financial and work-related entitlements use terms other than 'child', including 'dependant' or 'dependent child'. However, the following text uses the term 'child' to cover these various terms.

Secondly, these categories do not represent a comprehensive list of all the different definitions of 'child' discussed throughout this report. Rather, they are a sample of the general groups of definitions used. The specific definitions are discussed in the relevant topic chapters.

Thirdly, sometimes one piece of legislation will use different definitions in different parts of the act. The specific topic chapters provide a full explanation of the impact of the different definitions on financial and work-related entitlements.

Fourthly, this text should be used to assist in the interpretation of the definitions discussed in other chapters. However, these interpretations are not definitive and may vary in the context of the specific legislation.

Finally, this text tries to provide guidance in an area of law which is inherently uncertain. There may well be legitimate interpretations which are different to those discussed in this chapter.

Ultimately, the Inquiry's concern is that the application of these definitions to the children of a same-sex couple is inherently, and unnecessarily, unclear. This lack of clarity puts the best interests of the child at risk and threatens to discriminate against children and their parents. Thus there need to be amendments to the law to provide equality and clarity.

**5.3.2 Laws which do not define the relevant parent-child relationship**

Some federal legislation conferring financial and work-related entitlements does not specifically define who qualifies as a person's child. Other legislation assumes the meaning of 'mother', 'father', 'daughter', 'son'.

For example, the *Life Insurance Act 1995* (Cth) provides that, under certain circumstances, a life insurance company can pay out a policy to an insured person's child without going through probate.<sup>40</sup> However, the legislation does not define who qualifies as the person's child.



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In another example, the definition of 'dependant' in the *Safety, Rehabilitation and Compensation Act 1988* (Cth) includes terms such as 'father', 'mother', 'son' and 'daughter'.<sup>41</sup> These terms are not defined in the legislation.

In the Inquiry's view, where legislation does not define terms relating to a parent-child relationship, it is likely that the birth certificate will be determinative of who qualifies for the entitlements. This is because the Family Law Act presumes that a person who is noted as a parent on a birth register is the legal parent of that child.<sup>42</sup>

These terms would also include an adopted child.<sup>43</sup>

If this interpretation is correct, then the following children may (or may not) qualify for benefits under laws which do not define a parent-child relationship:

- the child of a *birth mother or birth father* (or the birth parents themselves) may qualify for the benefits
- the child of a *lesbian co-mother* (or the co-mother herself) is unlikely to qualify in the absence of adoption (unless the child is an ART child; the child has a birth certificate from WA, NT or ACT; and that birth certificate is recognised under federal law)<sup>44</sup>
- the child of a *gay co-father* (or the co-father himself) will not qualify in the absence of adoption
- an adopted child may qualify.

### 5.3.3 Laws including an adopted, ex-nuptial or step-child

Some laws define a person's child or dependant to 'include an adopted child, a step-child or an ex-nuptial child of that person'.<sup>45</sup>

In the Inquiry's view, these definitions *assume* that a 'child' includes the child of his or her birth parents, as described on a birth certificate. It also explicitly extends the scope of the definition to include an 'adopted' child, 'ex-nuptial' child and 'step-child'.

The discussion in section 5.2 above notes that a child of a lesbian co-mother or gay co-father cannot be a 'step-child' because a subsequent partner must marry the birth parent to become a step-parent. It is also highly unlikely that a child will be successfully adopted by a lesbian co-mother (or couple) or gay co-father (or couple).

It further appears that a child of a lesbian co-mother or gay co-father cannot be an ex-nuptial child. Neither the Family Law Act nor the federal legislation conferring federal and work-related benefits on parents defines who qualifies as an 'ex-nuptial child'. Theoretically it is possible that this term could apply to the child of any couple who is not married – including a same-sex couple. However, the Inquiry does not believe that the term will be interpreted in this way, given the general non-recognition of same-sex couples under federal laws.

If the Inquiry's interpretation of this type of definition is correct, then the following children may (or may not) qualify for benefits under laws using this definition:

- the child of a *birth mother or birth father* (or the birth parents themselves) in a same-sex or opposite-sex couple may qualify

- the child of a *lesbian co-mother* (or the co-mother herself) is unlikely to qualify in the absence of adoption (unless the child is an ART child; the child has a birth certificate from WA, NT or ACT; and that birth certificate is recognised under federal law)<sup>46</sup>
- the child of a *gay co-father* (or the co-father himself) is unlikely to qualify in the absence of adoption
- the step-child of a person who has *married* the birth mother or birth father (opposite-sex only) may qualify
- an adopted child may qualify.

#### 5.3.4 Laws including the child of an adult who is 'legally responsible'

Several laws give financial and work-related entitlements to adults who are legally responsible for a child.

These laws will automatically include the people noted as parents on a birth certificate because they are presumed to be the legal parents. But they also have the scope to include the child of a lesbian co-mother or gay co-father.

As discussed below, it is likely that a parenting order will be proof of 'legal responsibility' or 'custody and care' under the different pieces of legislation. However, the legislation itself does not explicitly recognise parenting orders and there does not appear to be specific case law to support the view that a gay co-father or lesbian co-mother with a parenting order will necessarily qualify under the relevant legislative definitions.

In the Inquiry's view the children who *may* qualify for benefits under laws using this definition include:

- the child of a *birth mother or birth father* (or the birth parents themselves) in a same-sex or opposite-sex couple may qualify
- the child of a *lesbian co-mother or gay co-father* with a parenting order (or the co-parents themselves) may qualify
- the step-child of a person who has *married* the birth mother or birth father (opposite-sex only) may qualify
- an adopted child may qualify.

However, greater clarity as to the status of a parenting order in favour of a gay co-father and lesbian co-mother would be of great assistance to those parents.

##### (a) *A lesbian co-mother or gay co-father can probably assert legal responsibility through a parenting order*

In the Inquiry's view, where a person has a parenting order setting out that person's legal responsibility for a child, then that child is likely to qualify for the entitlements available under these laws. This is because parenting orders cover issues like where and with whom a child should live, contact between a parent and child, financial maintenance of a child, parental responsibility over a child and any other aspect of the care, welfare or development of a child.<sup>47</sup>

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Any person with an interest in the 'care, welfare and development' of a child can approach the federal Family Court for a court order clarifying that person's parental responsibilities – a 'parenting order'.<sup>48</sup> And the federal Family Court can make a parenting order in favour of any person it thinks is proper, irrespective of gender, biological or legal relationships.<sup>49</sup>

The Inquiry heard from several lesbian co-mothers and gay co-fathers who have been awarded parenting orders in their favour.

### **(b) The benefits of parenting orders**

The main benefit of a parenting order for the purposes of this Inquiry is that it should be sufficient evidence that an adult will be 'legally responsible' for the child for the purposes of accessing certain financial and work-related entitlements.<sup>50</sup>

Many of the people who made submissions or gave evidence to the Inquiry, spoke of the comfort they found in having a parenting order from the Family Court of Australia.

Some of the important aspects of parenting orders for gay and lesbian couples include:

- Parenting orders are made with the best interests of the child as a primary consideration.<sup>51</sup> Thus the focus is on the impact on the child rather than the gender of the carers.
- Parenting orders are a flexible and practical mechanism for recognising the intended parenting role of both members of a same-sex relationship and any additional adults involved in the conception and care of a child.<sup>52</sup>
- Parenting orders provide official evidence of the legal relationship between the lesbian co-mother, gay co-father and child so that the co-mother can prove her right to exercise parental authority and consent (for example, decisions about schooling, medical treatment etc).<sup>53</sup>

### **(c) The limitations of parenting orders**

Many people told the Inquiry that the process of obtaining a parenting order can be very onerous and prohibitively expensive. Some pointed out that it was unfair to be forced through a bureaucratic legal process just to prove what is already assumed for an opposite-sex couple – that the parents at birth are the legal parents.

Janet Jukes describes her frustration that a parenting order does not make her a legal mother:

Firstly, it is important to note that because we each conceived one of our daughters, we are not considered the legal parents of both our children. In Victoria we are not allowed to adopt our children to remedy this fact. In order to minimise the discrimination that this causes we have obtained court orders that give residency and contact responsibilities to us as a couple and limits the donor's responsibilities. Although this remedy has been invaluable in dealing with the hospital system, childcare and other service systems, it is inadequate because it does not and cannot make Hannah my daughter nor Ava Marion's daughter *in law*. Further, a court order is only relevant while the girls are minors, once Hannah is 18 years old she will have no legal relationship to me nor Ava to Marion. Although our daughters have the same father, they are not considered sisters *by law* and their birth certificates do not recognise the existence of each other.<sup>54</sup>

A couple in Townsville talked about the considerable time, expense and intrusion involved in getting a court order recognising what they already knew to be true – that they are their son's parents. They also highlight that opposite-sex couples need not go through any of this:

We have recently undergone lengthy and expensive legal proceedings (incl. the hiring of a solicitor) to have parenting orders granted via the Family Law Court. Although we are very proud of this successful application, the order simply tells us what we know to be true – that our son is loved and cared for by his two mums, that he resides with us in our home, that we are both economically responsible for him, that we share every single decision about his care, welfare and development. To secure this order we had to lay bare information about how [name removed] and I met, our living arrangement, our financial position, our professions and working hours, how we came to have a son, how we decided who was going to be the birth mother, how we look after him given our working commitments, our plans for our son's education, not to mention the materials our house is constructed from, - and after all of that our son ended up with less legal security than his counterparts with heterosexual parents. At the end of this process [name removed] and I have been granted a watered down version of what heterosexual couples acquire automatically.<sup>55</sup>

A lesbian woman at the Sydney Forum spoke about the barriers she and her former partner faced in obtaining a parenting order in relation to their child:

I am the biological mother of a daughter and [when] my then partner and I decided to have a child we made that decision together. My former partner is quite clearly in every sensible person's eyes the mother of our daughter. When our relationship broke up, when our daughter was three, we wanted to formalise and legalise, so to speak, the relationship between her and our daughter and it proved to be fairly difficult.

It's probably only due to the fact that I'm a lawyer and I'm stroppy and obnoxious and I don't like being told no for an answer that we proceeded to do it. And also the fact that the break up was fairly amicable. We were still speaking and we could agree on a way to deal with custody arrangements. I don't know how couples would do it if they hated each other or weren't highly educated and very determined.

We went before the Family Court ... We both had to file affidavits attesting to the nature of our relationship, the nature of the relationship between us and our daughter, and how things worked. We came before a magistrate who asked us what I consider fairly offensive and inappropriate questions. I ended up, in effect, being my former partner's advocate. It wasn't her sphere and she didn't know how to respond to these ridiculous questions. The magistrate said things to me like well you've had one relationship and now that's broken up and then you'll have another relationship – basically trying to say that there is no relationship between my former partner and our child. There is and there was. My daughter is three years old and all she knew was that she had two mothers. ...

It took a lot of persuasion and I'm glad to say that in the judgement he almost apologised. He heard our submissions and he was impressed by the fact of the strength of feelings in the genuineness of the relationship between me and my daughter and my partner and her daughter. We now have Family Court orders that say that both of us are her legal guardians and we both have a say in her upbringing. All this would have been completely unnecessary of course had my partner had been formally recognised as my daughter's mother when she was born.<sup>56</sup>

Other limitations of parenting orders include:

- Parenting orders do not confer any automatic parental status for the purposes of federal laws other than the Family Law Act.<sup>57</sup>

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- Parenting orders can be varied or challenged at any time.<sup>58</sup>
- Legal costs of applying for a parenting order may be in the range of \$3000 to \$6000.<sup>59</sup>
- Parenting orders expire once the child turns 18 years old.<sup>60</sup>
- Parenting orders do not give the universal or durable status accorded by adoption.<sup>61</sup>
- The primary purpose of parenting orders is to address disputes between separating parents, rather than affirm the intention of parents who are in a couple.

### 5.3.5 Laws including a child who is wholly or substantially dependent on a person

Some laws take a much broader approach to the circumstances under which an adult may be entitled to financial and work-related benefits relating to a child.

Some definitions focus on whether a child is '*wholly or substantially dependent*' on a person. Others talk about a child being wholly or substantially dependent on a person who '*stands in the position of a parent*'.

These laws will generally include the legal parents of a child automatically. But they also have the scope to include a child who is financially dependent on a lesbian co-mother or gay co-father.

A parenting order may assist in establishing that a child is wholly or substantially dependent or that a person is 'standing in the position of a parent'. But a parenting order may not be necessary where there is other evidence of financial dependence.

In the Inquiry's view the children who *may* qualify for benefits under laws using this definition include:

- the child of a *birth mother or birth father* (or the birth parents themselves) in a same-sex or opposite-sex couple
- the child of a *lesbian co-mother or gay co-father* with a parenting order (or the co-parents themselves)
- the child of a *lesbian co-mother or gay co-father* (or the co-parents themselves) where there is evidence of substantial financial dependence
- the step-child of a person who has *married* the birth mother or birth father (opposite-sex only)
- an adopted child.

Some of the laws using this broader concept tend to use the term 'dependent child', 'dependant' or other terms, rather than 'child' on its own. And some of the laws set out what will constitute being 'wholly or substantially dependent'.

#### **(a) Dependence can be 'liability to maintain a child'**

As discussed in more detail in Chapter 10 on Veterans' Entitlements, the *Veterans' Entitlements Act 1986 (Cth)* (Veterans' Entitlements Act) defines the 'child of a veteran' to include a child of whom the veteran is a mother or father, an adopted child, and:

any other child who is, or was immediately before the death of the veteran, *wholly or substantially dependent* on the veteran.<sup>62</sup> (emphasis added)

The Veterans' Entitlements Act clarifies that if a veteran is 'liable to maintain a child, the child shall be deemed to be wholly or substantially dependent on that veteran'.<sup>63</sup>

A definition like this seems to suggest that evidence of the 'liability to maintain a child' will be sufficient to qualify for an entitlement. A parenting order will likely assist in proving that liability. However, it would be helpful if the legislation were clear on this matter.

**(b) Dependence can be 'living with a child'**

Some workers' compensation laws state that a person living with the employee at the time of death will be 'wholly dependent' on that person.<sup>64</sup> There is no suggestion of a pre-existing legal relationship, just that the person be living with the deceased employee.

In definitions such as these there may be no need for a parenting order. However, it seems that parenting orders have 'been used on numerous occasions to confirm that the child legally resides with the co-mother as well as confirming her authority to make medical and educational decisions about the child'.<sup>65</sup>

## 5.4 How are same-sex families treated under state and territory financial laws?

As discussed in Chapter 4 on Recognising Relationships, all of the states and territories have redefined the concept of de facto relationships so that same-sex and opposite-sex de facto couples can now access the same financial and work-related entitlements.

However, those reforms did not address the question of parental relationships between a lesbian co-mother or gay co-father and child, other than in WA, ACT and NT. And even in those states, the issue is only resolved with respect to lesbian couples conceiving a child through ART.

The Inquiry has not had sufficient resources to examine all the definitions of 'child', 'dependant', 'dependent child' and so on in all state and territory laws.

Where the Inquiry has identified problems they have been noted elsewhere in this report. However, the Inquiry urges all state and territory governments to audit laws to remove any existing discrimination in the treatment of children of same-sex couples, as described in the previous sections of this report.

## 5.5 How should federal law change to protect the best interests of all children?

Protecting the best interests of the child is a fundamental principle of international human rights law. So is the principle of non-discrimination.

This means that two members of a same-sex couple taking care of children should have the same access to financial and work-related entitlements as two members of an opposite-sex

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couple in the same situation. The right of same-sex families to those entitlements, and the avenues for obtaining access to those entitlements, should also be clear.

This chapter has identified four different categories of definitions attempting to define who will qualify as the 'child' of a person for the purposes of accessing financial and work-related entitlements.

Those four categories are:

1. laws which do not define the relevant parent-child relationship
2. laws including an adoptive, ex-nuptial and step-child
3. laws including a child for whom an adult has specific legal responsibility or where the child is in 'the custody or care' of an adult
4. laws including a child who is wholly or substantially dependent on an adult (including an adult standing in the position of a parent).

None of the legislation using this range of definitions provide clear guidance on how they apply to the lesbian co-mother or gay co-father in a family. However, it does appear that a same-sex family is less likely to qualify for entitlements than an opposite-sex family because of the way that family law recognises the legal status of lesbian and gay co-parents.

### 5.5.1 Amended laws must recognise the reality of same-sex parenting

One problem with the various definitions of 'child' in federal financial and work-related laws lies in the variation between and within the laws.

Sometimes there are good reasons for the variations in the definitions. In some cases the entitlements are only intended to go to a narrow group of people defined by reference to the child and parents at birth (for example parental leave entitlements). In other cases the entitlements are intended to extend to those people who are, in a practical sense, financially supporting a child even if they are not the birth parents.

However, none of the definitions recognise a child being raised by lesbian and gay co-parents from birth in the same way as they recognise a child being raised by opposite-sex parents from birth. This is primarily because the definitions rely on federal family laws and state adoption laws which do not leave room to recognise legal parental status between a child and his or her lesbian co-mother or gay co-father(s).

The result is that same-sex families are excluded from a range of federally funded entitlements and benefits which are available to opposite-sex families. Denying access to benefits intended to help parents support their children leaves the children in a same-sex family worse off than other children.

Thus, the purpose of amending laws is to ensure equality for the children being raised in same-sex families, and clarity for the parents seeking to access entitlements to support their children in the best way they can.

### 5.5.2 Seven recommendations to ensure equality for the children of same-sex parents

In the Inquiry's view the following steps should be taken to better ensure equal protection for the children of same-sex parents:

1. *Federal laws without a definition of 'child' should include a definition which recognises the children of a birth mother, birth father, lesbian co-mother or gay co-father.*
2. *Federal laws should ensure that a lesbian co-mother of an ART child can access the same financial and work-related entitlements available to a birth mother and birth father (a legal parent).*

This could be achieved by amending:

- the *Family Law Act 1975* (Cth) (Family Law Act) to include a parenting presumption in favour of the lesbian co-mother of an ART child and ensuring that the definition of 'child' in any relevant legislation recognises the parenting presumptions in the Family Law Act; or
- the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) such that any references to a person's 'child' in federal legislation includes the ART child of a lesbian co-mother.

It could also be achieved if:

- all states enacted parenting presumptions in favour of a lesbian co-mother (following the models in WA, ACT and NT); and
- federal law clearly recognised those presumptions and the birth certificates flowing from those presumptions.

While parenting presumptions are appropriate for the ART child of a lesbian couple, broader adoption laws are the better solution for a gay couple having an ART child (as set out in the following recommendations 4–5).<sup>66</sup>

3. *Federal financial and work-related laws should include a definition of 'step-child' which recognises a child under the care of a 'de facto partner' of a birth mother or birth father.*

Chapter 4 on Recognising Relationships suggests an appropriate definition of 'de facto partner'.

Amending laws in this way would generally recognise the child of a lesbian co-mother or gay co-father as a step-child. It would also include a child under the care of a subsequent de facto partner in an opposite-sex and same-sex couple. (Currently a step-child can only be a child under the care of a subsequent partner who marries the birth parent).

4. *'Step-parent adoption' laws should more readily consider adoption by a lesbian co-mother or gay co-father.*

This will require amendments to remove the prohibition on same-sex step-parent adoption in all state and territory laws other than in WA, the ACT and Tasmania.



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It may also require reconsideration of the general presumption against step-parent adoption, in the event of gay and lesbian co-parenting arrangements. The Victorian Law Reform Commission is due to publish a report on this issue during 2007.

5. *Gay and lesbian couples should have equal rights to apply for adoption of an unrelated child.*

This will require amendments to adoption laws in all states and territories other than in WA and the ACT. Further, the federal government should not introduce legislation limiting the possibility of overseas adoptions by gay and lesbian couples.

6. *Where access to financial or work-related benefits is intended to extend beyond the legal parents, federal laws should explicitly recognise the eligibility of a person who has a parenting order from the Family Court of Australia.*

This could be achieved by amending:

- the relevant federal legislation to define a person who is 'legally responsible', has 'custody and care', is in the 'position of a parent' (and other similar terms) to *include* a person who has been granted a parenting order from the Family Court of Australia; or
  - the Acts Interpretation Act such that any reference to a person who is 'legally responsible', has 'custody and care', is in the 'position of a parent' (or other similar terms) *includes* a person who has been granted a parenting order from the Family Court of Australia.
7. *There should be a public information and education campaign to ensure that gay and lesbian families are aware of their rights and entitlements under federal financial and work-related laws.*

In particular, same-sex parents should be:

- informed about the role of parenting orders in asserting legal rights; and
- assisted through the process of obtaining such an order.

## Endnotes

- 1 Australian Bureau of Statistics, *Year Book Australia*, 'Same-Sex Couple Families', p142 (2005). See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p206, referencing M Pitts et al, 'Private Lives: A Report on the Health and Wellbeing of GLBTI Australians' (2006); Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption Position Paper Two: Parentage*, (July 2005), para 3.1.
- 2 Assisted Reproductive Technology (ART) includes in vitro fertilisation (IVF), clinically-assisted donor insemination and self-insemination.
- 3 Felicity Martin and Sarah Lowe, Melbourne Hearing, 26 October 2006.
- 4 *Family Law Act 1975* (Cth), s 60B.
- 5 *Family Law Act 1975* (Cth), s 60B(2).
- 6 *Family Law Act 1975* (Cth), s 69R.
- 7 *Family Law Act 1975* (Cth), s 4.
- 8 See for example, *Births, Deaths and Marriages Act 1995* (NSW), pt 3, divs 1, 2, 4.
- 9 The term 'social parent' is adopted from the Victorian Law Reform Commission, *Assisted Reproduction and Adoption Position Paper Two: Parentage*, (July 2005).
- 10 *Family Law Act 1975* (Cth), ss 64B – 64C.
- 11 *Family Law Act 1975* (Cth), s 60H. A sperm donor is presumed not to be a parent of the child: *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 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). See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p233.
- 12 *Family Law Act 1975* (Cth), s 60H.
- 13 *Artificial Conception Act 1985* (WA), s 6A; *Status of Children Act 1979* (NT), s 5DA; *Parentage Act 2004* (ACT), s 8.
- 14 See J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p253.
- 15 Ruth Corris and Michelle Murray, Submission 56. See also Speaker, Adelaide Forum, 28 August 2006.
- 16 *Family Law Act 1975* (Cth), s 69R.
- 17 *Family Law Act 1975* (Cth), s 60H; Family Law Regulations 1984 (Cth), regs 12C, 12CA, schs 6 – 7. See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, pp254-255.
- 18 A recent study suggested that among 43 lesbians trying to conceive, only two percent used intercourse: see J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p207, referencing McNair et al, 'Lesbian Parenting: Issues, Strengths and Challenges', *Family Matters*, vol 63, 2002, p40.
- 19 The federal Family Court found that a man was the legal parent of a child conceived through intercourse, even though the lesbian mother, the co-mother and the man had an express agreement that the man would have no legal rights or liabilities with respect to the child: *ND v BM* [2003] FamCA 469. See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p207.
- 20 *Family Law Act 1975* (Cth), s 60H; *Artificial Conception Act 1985* (WA), ss 3(1)-(2) 6; *Status of Children Act 1979* (NT), ss 5A(2), 5D; *Parentage Act 2004* (ACT), s 11(4).
- 21 See for example *Parentage Act 2004* (ACT), ss 41, 44; *Surrogate Parenthood Act 1988* (Qld), s 3; *Surrogacy Contracts Act 1993* (Tas), ss 4-5, 7; *Family Relationships Act 1975* (SA), ss 10G-H; *Infertility Treatment Act 1995* (Vic), ss 59, 61. See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, pp212-214.
- 22 J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p217.

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- 23 *Family Law Act 1975* (Cth), s 4.
- 24 J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p248; In footnote 245, Millbank notes that '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).
- 25 *Family Law Act 1975* (Cth), s 4.
- 26 *Adoption Act 1994* (WA), ss 38-39; *Adoption Act 1993* (ACT), s 18(1). In Tasmania, a same-sex partner can apply to adopt a child if that child is related to his or her partner: *Adoption Act 1988* (Tas), s 20(1)-(2A). See section 5.2.4(b).
- 27 See J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, pp208-212.
- 28 In 2005-06 there were 576 adoptions in Australia: 73% were inter-country, 10% were local and 16% were 'known' child adoptions: Australian Institute of Health and Welfare (AIHW), 'Adoptions Australia 2005-06', *Child Welfare Series*, no 39, 2006, pvii.
- 29 *Adoption Act 1984* (Vic), s 11(5)-(6); *Adoption Act 2000* (NSW), s 30; *Adoption of Children Act 1994* (NT), s 15; *Adoption of Children Act 1964* (Qld), s 12; *Adoption Act 1988* (SA), s 12. See also, J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p248. See also Victorian Law Reform Commission, *Assisted Reproduction and Adoption Position Paper Two: Parentage*, (July 2005). At page 51, the Victorian Law Reform Commission recommends that 'the Adoption Act is amended to allow the court to make an adoption order in favour of a same-sex couple'.
- 30 *Adoption Act 1993* (ACT), s 18(1)-(2); *Adoption Act 1994* (WA), s 55; *Adoption Act 1988* (Tas), s 20(1),(2A). See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p249.
- 31 See *Adoption Act 1993* (ACT), s 18(2); *Adoption Act 1988* (Tas), s 20(7).
- 32 See *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. See also J Millbank, 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children', *Federal Law Review*, vol 34, no 2, 2006, p249 and footnote 247.
- 33 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption Position Paper Two: Parentage*, (July 2005), paras 3.34-3.39. The VLRC final report is due for release in 2007.
- 34 Dr James G Dowty, Submission 99.
- 35 Frank Gomez, Submission 216.
- 36 Marcus Blease, Submission 111.
- 37 *Family Law Act 1975* (Cth), s 64B.
- 38 Senator Ruth Webber, Submission 280.
- 39 Dr Kate Stewart, Submission 82.
- 40 *Life Insurance Act 1995* (Cth), ss 211-212.
- 41 *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 4.
- 42 *Family Law Act 1975* (Cth), s 69R.
- 43 *Family Law Act 1975* (Cth), s 4.
- 44 See further, the discussion in section 5.2 above.
- 45 *Income Tax Assessment Act 1936* (Cth), s 6(1); *Income Tax Assessment Act 1997* (Cth), s 995.1; *Fringe Benefits Assessment Act 1986* (Cth), s 136(1); *Superannuation Industry (Supervision) Act 1993* (Cth), s 10; *Parliamentary Contributory Superannuation Act 1948* (Cth), s 19AA(5).
- 46 See further, the discussion in section 5.2 above.