RECOGNITION OF SAME-SEX PARENTING IN AUSTRALIA

South Australia the final frontier?

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Every state and territory in Australia has legislation the object of which is to provide legal certainty regarding the status of children and their parents.[1] Such legislation was introduced in all jurisdictions in the 1970s to address the stigmatisation of children born to women who were not married and to remove notions of 'illegitimacy'. There have been significant social changes since the inception of these Acts. Forty years later it is now common place that Australian families come in all shapes and sizes. Children may be parented by their biological parent(s) or they may have adoptive parents, foster parents, or live in blended families. The people who parent them may be heterosexual or gay, lesbian, bisexual or transgender ('GLBT'). They may be single, married, in heterosexual de facto or same-sex relationships. While the law has been slow to recognise *legal* parentage in some of these circumstances it is now the case that changes to laws in federal and most state/territory jurisdictions recognise and in some instances facilitate same-sex parenting.

This article compares the law in South Australia, which is the only jurisdiction yet to recognise and/or facilitate any form of same-sex parenting other than foster care, with those Australian jurisdictions that do. It is timely as there is currently a parliamentary inquiry into same-sex parenting in South Australia,[2] and a private members bill tabled in parliament concerning the recognition of lesbian co-parents of children born as a result of assisted reproductive treatment ('ART').[3]

The next section of the article outlines the current state of law in South Australia. It examines the lack of legal recognition of same-sex female co-parents of children born as a result of ART. It also examines a number of avenues to parenthood and whether GLBT individuals and same-sex couples may access ART, enter into surrogacy agreements, adopt either as a couple, individually or as a step parent, and/or become foster carers in this jurisdiction. It argues that by failing to facilitate or recognise GLBT or same-sex parenting arrangements in all bar foster care situations the laws in South Australia result in significant negative impacts on children.

The third section compares the situation in South Australia with the recognition of legal parentage at the federal level. It also considers the difficulties that may arise given the current state of law in South Australia when considered in relation to federal legislation.

Finally the article examines the law in other states/territories of Australia with regards to recognising same-sex parenting and providing access to ART treatment, surrogacy, adoption and/or foster care for family formation. It examines the subsequent recognition of legal parentage in these contexts. It is shown that while the law differs across jurisdictions all provide avenues to and/or legal recognition of same-sex parenting in some way.

It is concluded that children in South Australia who are or may be parented by GLBT individuals or same-sex couples are placed at a significant disadvantage when compared with children in other Australian jurisdictions that have similar family structures. A call for South Australia to reform its laws is made.

Parenting and the law in South Australia

Presumptions concerning legal parentage

In South Australia *legal* parentage[4] of children is determined by a number of presumptions. The first is that the birth mother is always presumed to be a legal parent. This is so notwithstanding that the child was conceived by the fertilisation of an ovum taken from another woman.[5] Birth mothers can relinquish their legal rights by adopting out their child. New surrogacy laws also allow surrogate mothers to surrender custody and legal rights to a *heterosexual* commissioning couple under a recognised surrogacy agreement.[6]

With regards to who is recognised as the second *legal* parent, generally a child who is born to a woman during her marriage[7] or within 10 months of the marriage being dissolved by death or otherwise, in the absence of proof to the contrary, will be presumed to be the child of the mother and her husband/former husband.[8] This includes heterosexual de facto relationships.[9] Where a married woman undergoes an artificial fertilisation procedure with the consent of her husband, the husband is the 'father' of any child born.[10] This is the case even if the mother's husband has no biological link to the child. Again 'husband' is considered to include a man with whom the woman is living as his 'wife' on a genuine domestic basis.[11] 'Where a woman becomes pregnant in consequence of a fertilisation procedure using donated ova or sperm, the donor is not a parent of the resulting child.'[12]

These presumptions are important. They illustrate that the law recognises legal parentage in situations where a child may not be biologically related to the person who is parenting them. In South Australia, however, this recognition only extends to male partners of birth mothers. There is no provision made under the current law to recognise a same-sex partner of a woman

REFERENCES

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

2. SA Parliament Social Development Committee Inquiry into Same-Sex Parenting, <parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CId=182> at 17 November 2010.

3. Private members bill was tabled on 26 July 2010. See Family Relationships (Parentage) Amendment Bill 2010.

4. Legal parentage may include but is not limited to genetic/biological parentage.

5. *Family Relationships Act 1975* (SA) s 10c.

6. *Statutes Amendment (Surrogacy) Act 2009* (SA) s10. (This Act will amend the *Family Relationships Act 1975* (SA).)

7. A 'married woman' includes a woman living with a man as his wife on a genuine domestic basis: s 10a(1).

8. *Family Relationships Act 1975* (SA) s 10c.

9. *Family Relationships Act 1975* (SA) s 10A.

10. *Family Relationships Act 1975* (SA) ss 10D(1)(a) & (b). In every case where it is necessary to determine whether a husband consented to his wife undergoing a fertilisation procedure, that consent shall be presumed, but the presumption is rebuttable (s 10D(2)).

11. *Family Relationships Act 1975* (SA) s 10A.

12. *Family Relationships Act 1975* (SA) s 10e.

who has a child, however conceived.[13] Nor is there provision for two male parents. In fact, same-sex co-parents are made invisible by the current laws' use of gender-specific terms such as 'husband' and 'wife'.[14]

Pathways to parenthood: Eligibility for ART, surrogacy, adoption and foster care

In considering the *International Covenant on Civil and Political Rights* ('ICCPR')[15] Aleardo Zanghellini[16] emphasises international obligations to recognise the rights to found a family (article 23(2)); to non-discrimination and equality (articles 2(1) and 26); and to give protection to the family and to family life (articles 23(1) and 17).[17] In considering whether these rights extend to gay and lesbian parenting, he states:

> Heteronormative approaches to the provisions of international human rights documents have traditionally constrained their potential for serving the rightful interests of lesbians and gay men. However, there is an increasing awareness among the actors in the international human rights field of the moral imperative to realise that potential, including with respect to family rights.[18]

To illustrate this increased awareness, Zanghellini refers to the *Yogyakarta Principles*,[19] which were developed and unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds.[20] These principles:

> enjoin states to protect the right to found a family, including through access to adoption or assisted procreation, without discrimination on the basis of sexual orientation, and to recognise the diversity of family forms.'[21]

South Australian laws regarding access or eligibility to ART, surrogacy and adoption are contrary to these principles.

Assisted reproductive treatment

Historically laws in South Australia governing the provision of 'artificial fertilisation procedures' restricted access to ART to married couples where the husband or wife (or both) appeared to be infertile, or there appeared to be a risk that a genetic defect would be transmitted to a child conceived naturally.[22] In 1996 the Supreme Court of South Australia found that the restriction of access to treatment on the basis of marital status was inconsistent with the *Sex Discrimination Act 1984* (Cth)[23] and was void to the extent of the inconsistency.[24] As a result single women and couples who did not meet the criterion as to marital status were able to access treatment. Recent changes to the legislation governing ART in South Australia reflect this position.[25]

The Act however continues to impose other eligibility criteria which serves to exclude numerous single women and/or women in same sex couples from accessing ART through licensed clinics. ART may only be provided by a registered clinic to a woman who 'is or appears to be infertile';[26] if a man living with a woman on a genuine domestic basis as her husband is or appears to be in fertile[27]; if there is a risk that a serious genetic defect, disease or illness would be transmitted to a child conceived naturally;[28] or in situations of posthumous use of sperm donated by a partner of a woman who was living with her on a genuine domestic basis and has consented to the use of such sperm prior to his death.[29] Women who do not meet the eligibility criteria must self-inseminate at home or through a registered medical practitioner.

In relation to lesbian women, the [now disbanded] South Australian Council of Reproductive Technology (SACRT) stated:

> if a lesbian woman is medically infertile, she would be eligible for treatment the same as any other infertile woman. Lesbian woman who are fertile [do not] require invasive treatments like IVF. They need only donor conception treatment using donated sperm. They can organise this in their own homes or through a medical practitioner registered to provide such services.[30]

Such a statement is highly unsatisfactory. It may deny women access to screened sperm by excluding them from the clinic system, and potentially places them at risk of being exposed to disease. Such women may therefore be offered less protections than infertile women.

Encouraging single women or women in same-sex-couples to self-inseminate at home also ignores the consequences this may have upon children conceived in such a way. Such children may also be exposed to unnecessary health risks or disease as a result of the mother using unscreened sperm. Most importantly, it may result in them not having access to information about their genetic heritage — noting that the donor registry provisions in the *Assisted Reproductive Treatment Act 1988* (SA) only provide for registration of details of ART provided in accordance with the Act.[31] Access to information about donor identity has been recognised in Australia to be of primary importance to children conceived using ART.[32]

Surrogacy

Altruistic and commercial surrogacy are generally prohibited in South Australia as entering into and/or procuring a surrogacy contract[33] is 'illegal and void'.[34] Legislation commencing on 26 November 2010,continues to discriminate against same-sex couples.[35] Although permitting some altruistic surrogacy agreements, and providing for legal parentage to be recognised in such circumstances, the new provisions limit surrogacy arrangements to South Australian residents, who are married or in a heterosexual de facto relationship for three years; and the intended mother must be infertile or there must be a risk of a genetic disease being passed on.[36] Surrogacy agreements that are not 'recognised surrogacy agreements' remain 'illegal and void'.[37] This means single people (including GLBT individuals) and same-sex couples continue to be prohibited from entering into surrogacy contracts (as they are *illegal*), any such contract would be unenforceable (they are *void*), and transfer of legal parentage to single people or same-sex couples cannot occur.

Adoption

Adoption is generally restricted in South Australia to married or de facto heterosexual couples who have been cohabiting for a continuous period of at least

13. Family Relationships (Parentage) Amendment Bill 2010.

14. See, eg, s 10A provides: married woman or wife includes a woman who is living with a man as his wife on a genuine domestic basis; and husband has a correlative meaning.

15. *International Covenant on Civil and Political Rights,* Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

16. Aleardo Zanghellini, lecturer, Macquarie University.

17. Aleardo Zanghellini, 'To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men?' (2008) 9(1) *Melbourne Journal of International Law* 125.

18. Ibid

19. *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2007) <yogyakartaprinciples.org/principles_en.htm> at 20 August 2010.

20. Ibid. Group includes judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, NGOs and others.

21. Zanghellini, above n 17.

22. *Reproductive Technology (Clinical Practices) Act 1988* (SA) s 13(2). Note the Act was amended by *Reproductive Technology (Clinical Practices)(Miscellaneous) Amendment Act 2009* (SA) on 1 September 2010; now called *Assisted Reproductive Treatment Act 1988* (SA).

23. *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

24. *Australian Constitution* s 109.

25. *Assisted Reproductive Treatment Act 1988* (SA).

26. *Assisted Reproductive Treatment Act 1988* (SA) s 9(c)(i). SA Health states infertility 'usually means 12 months of unprotected intercourse': SA Health, *Fact Sheet 1: Access to ART at a registered clinic in South Australia,* <sahealth.sa.gov.au/> at 8 November 2010.

27. *Assisted Reproductive Treatment Act 1988* (SA), s 9(c)(ii).

... same-sex co-parents are made invisible by the current laws' use of gender-specific terms such as 'husband' and 'wife'.

five years.[38] Single persons may adopt only in special circumstances.[39] Same-sex couples are again excluded from legal parentage in this way. This again denies recognition of certain parental relationships, including for example step-parent relationships.

Foster Care

Alternatively, to be considered for foster caring there is no restriction regarding sexual orientation or whether one is in a heterosexual or same-sex relationship, or is single; rather applicant foster parent(s) must meet particular criteria as set out in the *Family and Community Services Act 1972* (SA), section 42. In South Australia *foster parent* means 'a person (not being a guardian or relative of the child) who, for monetary or other consideration, maintains and cares for a child on a residential basis, but does not include the licensee of a children's residential facility'.[40] Nonetheless, while there are GLBT individuals and same-sex couples who are acting as foster carers in South Australia, a clear statement in the law protecting such carers from discrimination is lacking.

Impact on children

That the law does not recognise legal parentage or facilitate parenting in the above circumstances does not prevent GLBT individuals or same-sex couples forming families. Yet the lack of recognition of certain family structures and the parent-child relationships within them has important ramifications for children of these families. Legal recognition of parents gives rise to a set of rights and responsibilities (or obligations) under the law that serve to protect and maintain children. Children who do not have their parent-child relationship recognised may have fewer rights and/or entitlements than other children within the community. For example the same-sex co-parent may not have the power to make decisions about medical treatment for the child, including removal of tissue and blood transfusions; appoint a testamentary guardian for the child; bring about legal proceedings on behalf of the child; make decisions or meet legal obligations concerning schooling or employment for children under 17 years of age; be entitled to be party to child protection hearings; or be entitled to be present if the child is being questioned by police. In addition, the child may not be able to lay claim to the co-parent's estate if adequate provision in a will has not been made or the co-parent dies intestate.[41]

Although parenting orders under the *Family Law Act 1975* (Cth) can create similar entitlements in some of these areas, they do not create equal entitlements for children from same-sex parented families. Such orders can be changed, only last until a child turns 18, are subject only to the terms of the order,[42] and may not overcome the issues concerning succession.[43] In addition, it is discriminatory to require certain parents to attend court and pay for such orders to be made, when in other family structures parental status and the accompanying legal rights and responsibilities are presumed under the law.

Justification for the South Australian law is lacking. There is much research that children reared in same-sex families have positive family experiences and outcomes.[44] In a recent review of research and literature on the matter, Short et al found:

> ...it is family *processes* (such as the quality of parenting and relationships within the family) that contribute to determining children's wellbeing and 'outcomes', rather than family *structures*, per se, such as the number, gender, sexuality and co-habitation status of parents. The research indicates that parenting practices and children's outcomes in families parented by lesbian and gay parents are likely to be at least as favourable as those in families of heterosexual parents, despite the reality that considerable legal discrimination and inequity remain significant challenges for these families.[45]

It is exactly the legal discrimination and inequity that Short et al refer to which remain in South Australia.

Tobin has identified that 'prohibition against discrimination is a fundamental principle of international law and a guiding principle under the international *Convention on the Rights of the Child*'.[46] He emphasises that states must therefore ensure and respect the rights under the Convention of each child without discrimination of any kind irrespective of the child's status.[47] This would include their status as a child living with parents of the same-sex. The Convention further provides that states must take all appropriate measures to ensure a child is protected from all forms of discrimination on the basis of the status of their parents, which would extend to their sexual orientation.[48] 'It is not necessary that the discrimination be intended, it need only be shown that the effect of the treatment is to undermine the enjoyment of a right.'[49] The application of this test to the failure under South Australian law to recognise same-sex partners as the lawful parents of a child reveals discrimination relating to a child's enjoyment of several rights under the Convention including the right to birth registration; the right to an identity; and

28. *Reproductive Treatment Act 1988* (SA) s 9(c)(iii).

29. *Reproductive Treatment Act 1988* (SA) s 9(c)(iv).

30. SA Council on Reproductive Technology, *Eligibility fact sheet: Reproductive technology legislation and regulation in SA*. (No longer available, SA Dept of Health website).

31. *Reproductive Treatment Act 1988* (SA) s 15(1).

32. Two parliamentary inquiries on this topic were conducted in 2010: See Parliament of Australia Senate Committee Inquiry into Donor Conception in Australia, <aph.gov.au/senate/committee/legcon_ctte/donor_conception/index.htm> at 9 August 2010; Parliament of Victoria Law Reform Committee Inquiry into Access by Donor-Conceived People to Information about their Donors, <parliament.vic.gov.au/lawreform/inquiry/241> at 9 August 2010.

33. *Family Relationships Act 1975* (SA) s 10F: A surrogacy contract is one under which a person agrees to become pregnant or to seek to become pregnant; and to surrender custody of, or rights in relation to, a child born as a result of the pregnancy; or a person who is already pregnant agrees to surrender custody of, or rights in relation to, a child born as a result of the pregnancy.

34. *Family Relationships Act 1975* (SA) s 10G: surrogacy contracts are illegal and void.

35. *Statutes Amendment (Surrogacy) Act 2009* (SA).

36. *Statutes Amendment (Surrogacy) Act 2009* (SA) s 10. This section inserts a new provision into the *Family Relationships Act 1975* (SA) which provides for such surrogacy agreements to occur. (*Family Relationships Act 1975* (SA), ss 10G(4) & 10F).

37. *Statutes Amendment (Surrogacy) Act 2009* (SA) s 9. Amends *Family Relationships Act 1975* (SA) by inserting s 10G(4)

38. *Adoption Act 1988* (SA) s 12(1). In special circumstances a lesser period will suffice: s 12(2).

39. *Adoption Act 1988* (SA) s 12(3).

40. *Family and Community Services Act 1972* (SA), s 6.

a collection of rights with respect to the obligation of parents to care for their children.[50]

The Australian Human Rights Commission report '*Same-Sex Entitlements: National Enquiry into Discrimination Against People in Same-Sex Relationships, Financial and Work Related Entitlements and Benefits*' (2007) made clear that denial of same-sex parenting is discriminatory and leads to injustices for children. This has been echoed by numerous reports and inquiries around the country concerning same-sex parenting across Australia.[51] For these reasons, and to remove discrimination against GLBT individuals and same-sex couples, other jurisdictions in Australia have moved to amend their laws.

Recognition of legal parentage at a federal level

In 2008 the federal government changed 85 laws to give same-sex couples in a de facto relationship or registered relationship the same rights as de facto opposite-sex couples. Of relevance to this discussion specifically are changes to the *Family Law Act 1975* (Cth) ('FLA') which mean that federal law now recognises most same-sex couples and their child/ren as a family. They include:

- the recognition of a consenting female de facto partner as the parent of a child born to a woman as a result of an artificial conception procedure;[52]
- provision that the gamete donor is not a parent of the resulting child for the purposes of the FLA;[53]
- the extension of parental status to a person whose de facto partner has adopted a child with their consent;[54] and
- clarification that transfer of parentage by state and territory courts for surrogacy families alters parentage under the FLA.[55]

The provisions apply to children born before, as well as after, the amendments and have been adopted in various other federal Acts. Same-sex parents are now also recognised for the purposes of child support; parenting orders; superannuation; tax; child care and family benefits (including Medicare and the Pharmaceutical Benefits Scheme); recognition of extended family members of both parents as family members of the child/ren; and other recognitions of family formation which are relevant to consent regarding stored human embryos and witness protection.[56] Same-sex families are protected from discrimination on grounds of 'family responsibilities', by the *Sex Discrimination Act 1984*.

While the changes to the federal laws are not without their shortcomings,[57] they do generally enhance access to justice for children born into non-traditional families. It is unacceptable that South Australia maintains a position contrary to this. As the changes to federal law do not affect any state/territory responsibilities the issues faced by children in South Australia parented by same-sex couples remain. The changes to federal law may also pose additional difficulties for families in South Australia. For example, while federal legislation recognises legal obligations in relation to child support, lack of state recognition of legal parentage may make such obligations difficult to enforce. Conversely a situation might arise where a parent is able to seek child support from a same-sex co-parent in the Family Court, but because the co-parent is not recognised under state law they continue to be unable to make decisions for the child whom they 'parent'. Again this is unsatisfactory.

Australian state/territory regulation of same-sex parenting

An examination of other state and territory regulation in Australia illustrates the shift to recognising same-sex parents and/or recognising some or all of the pathways to parenthood described above.

Following numerous inquiries and law reform reports across Australia,[58] all other Australian jurisdictions presume the same-sex partner of a birth mother who has used ART to conceive is a legal parent of a child born.[59] This is an irrebuttable presumption in all jurisdictions, provided consent was given to the birth mother undergoing ART.[60] All jurisdictions provide for the same-sex co-parent to be entered on the child's birth certificate.

Surrogacy parentage reforms across Australia have been less uniform. However, they do demonstrate a trend towards according parental status in surrogacy families through 'state-based post-birth court sanctioned transfer processes'.[61] This was confirmed in January 2009 when the Standing Committee of Attorneys-General issued a discussion paper calling for a harmonious approach in particular relating to parentage transfer in such arrangements.[62] Nonetheless, while altruistic surrogacy arrangements are possible in all jurisdictions except South Australia, only Victoria,[63] Queensland[64] and the Australian Capital Territory[65] make provision for transfer of legal parentage to the commissioning person/couple regardless of sexual orientation.[66] Western Australia, while allowing for transfer of legal parentage in relation to surrogacy agreements, limits such transfer to two people 'of opposite sexes who are married or in a de facto relationship with each other'.[67] The other jurisdictions do not prohibit surrogacy, but they do not provide for transfer of legal parentage (for anyone) by way of parenting orders.

With regards to adoption, the Australian Capital Territory[68] and Western Australia[69] allow for same-sex couples, step-parent and single people to adopt children provided they meet suitability criteria. Tasmania allows for step-parent adoption where partners who have a registered relationship for three or more years can adopt a child who is related to one of them.[70] In NSW, Victoria, NT, and Queensland adoption by same-sex couples is not possible. However there is some scope for individual applicants to adopt in limited,[71] exceptional[72] or special[73] circumstances.

41. For detailed discussion, see Qld Govt, *Review of the Legal Status of Children Being Cared for by Same-Sex Parents* (August 2009); Victorian LRC, *Assisted Reproductive Technology and Adoption* (March 2007); John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (2004) viii (Occasional Paper Commissioned by VLRC).

42. *Family Law Act* 1975 (Cth) s 61D.

43. Qld Govt, above n 41, 2.

44. Ruth McNair, *Outcomes for Children Born of ART in a Diverse Range of Family Types* (2004).

45. Elizabeth Short et al, *Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families: A Literature Review Prepared for the Australian Psychological Society* (2007).

46. Tobin, above n 41.

47. Ibid 28.

48. Ibid.

49. Ibid.

50. Ibid.

51. Qld Govt, above n 41; HREOC, *Same-sex: Same Entitlement* (May 2007); VLRC, above n 41; NSW LRC, *Relationships* (June 2006); and Tasmanian Law Reform Institute, *Adoption by Same-Sex Couples* (May 2003).

52. *Family Law Act 1975* (Cth) s 60H(1)).

53. *Family Law Act 1975* (Cth) s 60(H)(1)(d).

54. *Family Law Act 1975* (Cth) s 60HA.

55. *Family Law Act 1975* (Cth) s 60HB.

56. See *Law Officers Act 1964*; *Customs Act 1901*; *Service and Execution of Process Act 1992*; *Witness Protection Act 1994*; *Export Market Development Grants Act 1997*; *Family Law Act 1975* (Cth); *Sex Discrimination Act 1984*; *Research Involving Human Embryos Act 2002*.

57. For a detailed discussion see Jenny Millbank, 'Defacto Relationships, Same-sex and Surrogate Parents: Exploring the Scope and Effect of the 2008 Federal Relationship Reforms' (2009) *23 Australian Journal of Family Law* 21.

This means single people (including GLBT individuals) and same-sex couples will continue to be prohibited from entering into surrogacy contracts (as they are illegal), any such contract would be unenforceable (they are void), and transfer of legal parentage to single people or same-sex couples cannot occur.

Finally, similar to South Australia, there is no exclusion of GLBT or same-sex couples becoming foster parents in any other jurisdiction of Australia.

In the ACT and Victoria, legislation which governs children and families explicitly recognises same-sex partnerships. The ACT *Children and Young People Act 2008* refers generally to domestic partnerships which are defined as 'the relationship between two people, whether of a different or the same-sex, living together as a couple on a genuine domestic basis'.[74] Similarly in Victoria section 3 of the *Children, Youth and Families Act 2005* (Vic) defines 'domestic partner' as referring to unmarried people living in a genuine domestic relationship (irrespective of gender)'. New South Wales explicitly legislates against discrimination by providing that 'Children's Services must also have regard to the provisions of the *Anti-Discrimination Act 1977* [NSW]',[75] which in turn prohibits discrimination on the grounds of homosexuality.[76]

That all Australian jurisdictions, other than South Australia, have significantly amended their laws to recognise and/or in some circumstances facilitate same-sex parenting reflects increasing consensus that discrimination against GLBT individuals and same-sex couples in relation to parenting is unacceptable. Most importantly it also moves to provide children within these families the legal protections and recognition they deserve.

Conclusion

South Australia is the only state in Australia that does not recognise the female co-parent of a child conceived through assisted reproduction. Nor does it allow for same-sex couples or single people to engage in surrogacy agreements or adopt children pursuant to the same criteria that married or heterosexual de facto couples are subject to. Changes to South Australian assisted reproductive technology and surrogacy laws , have not addressed issues concerning single and same-sex partnered people in relation to parenthood. The law in South Australia may also place some women at risk by suggesting that single women who are not infertile have the option of self-insemination at home, potentially exposing them and their children to communicable diseases as a result of conceiving using unscreened sperm.

Like all other jurisdictions in Australia, South Australia does however allow GLBT individuals and same-sex couples to foster children. In all other Australian jurisdictions, be it by way of accessing ART, entering surrogacy arrangements and/or adoption as a couple, step-parent or single person, there is also the possibility that GLBT individuals or same-sex couples may become parents.

Simple legislative changes to South Australian laws will bring the state into step with the rest of the country and remove discrimination against GLBT individuals, same-sex couples and their children. Such changes should include the recognition of the same-sex partner of a woman who gives birth to a child conceived using artificial insemination or ART as the *legal* parent of that child. Discrimination and exclusions that prevent GLBT individuals and same-sex couples accessing ART, entering surrogacy arrangements, and adopting children subject to meeting all other existing criteria, should also be removed. Legislative changes that recognise legal parentage in all such situations should be implemented. Where donor gametes are used, associated rules about record-keeping and disclosure may provide children added protections and avenues to access information about their genetic heritage.

Making such changes might also reduce private arrangements and/or 'reproductive tourism',[77] both of which may negatively impact on children by exposing them to risks of disease or resulting in lack of information/records about their genetic heritage. It is again emphasised that excluding GLBT individuals and same-sex couples from particular avenues to parenthood or failing to recognise their legal parentage, does not prevent such families from existing. Rather, it leads to discrimination and disadvantage for both parents and children alike. As such, the final recommendation in this article is that in relation to all avenues for parenthood a prohibition on discriminating against GLBT individuals or same-sex-couples and their children might be included in all relevant legislation by referring to the *Equal Opportunity Act 1984* (SA) and the principles of non-discrimination therein.

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58. Qld Govt, above n 41; HREOC, above n 51; VLRC, above n 41; NSW LRC and Tasmanian Law Reform Institute, above n 51.

59. *Status of Children Act 1996* (NSW) s 14(1A); *Status of Children Act 1974* (Vic) s 13; *Artificial Conception Act 1985* (WA) s 6A; *Status of Children Act* (NT) s 5DA; *Parentage Act 2004* (ACT) s 11(4); *Status of Children Act 1974* (Tas)10C(1A); *Status of Children Act* (Qld) s 19C–19E.

60. Ibid.

61. Millbank, above n 57.

62. Standing Committee of Attorneys-General Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (January 2009).

63. *Assisted Reproductive Treatment Act 2008* (Vic); *Status of Children Act 1974* (Vic).

64. *Surrogacy Act 2010* (Qld).

65. *Parentage Act 2004* (ACT).

66. Each jurisdiction has other criteria that must be met before entering into a surrogacy agreement (eg, age of surrogate, counselling, gestational versus partial surrogacy) however this is beyond the scope of this article.

67. *Surrogacy Act 2008* (WA) ss 19(1)(i) & (2).

68. *Adoption Act 1993* (ACT) ss 14–16.

69. *Adoption Act 1994* (WA) ss 39–50.

70. *Adoption Act 1988 (Tas)* s 20(1).

71. *Adoption Act 2000* (NSW) ss 23(1), 26; *Adoption Act 1993* (ACT), s 18(3).

72. *Adoption of Children Act* (NT) s 12(1), (2).

73. *Adoption of Children Act 1964* (Qld) s 12(1), (3).

74. *Legislation Act 2001* (ACT) 169(2).

75. *Young Persons (Care and Protection) Act 1998* (NSW).

76. *Anti-Discrimination Act 1977* (NSW) Part 4C.

77. 'Reproductive tourism' refers to travelling interstate or overseas to access ART or engage in surrogacy arrangements because the person cannot do so in their own jurisdiction.