

**The Costs of Denying Reality:
Social Security, Child Support and Medicare**

A submission to the HREOC
'Same-Sex: Same Entitlements' Inquiry
Submitted by the Hon Penny Sharpe MLC
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1 Executive Summary

1.1 *A new generation of illegitimate children*

A new generation of illegitimate children is emerging. A child conceived by a couple using artificial reproductive technology (ART) has two fully recognised parents in Australia, unless a lesbian couple conceives the child. The child of a lesbian couple is in the same position as the bastard child of the past – their relationship with their non-birth parent has no legal status. We bury our heads in the sand if we pretend that the status of these children has nothing to do with the nature of the sexual relationship between their parents. Australia is punishing these children for the alleged sins of their parents.

Recent reforms in Western Australia (WA) and the Australian Capital Territory (ACT) recognise the parental status of the non-birth parent of children born to lesbian couples for the purposes of the law in their State or Territory. However, whether such ‘recognised co-mothers’ are parents for the purposes of Commonwealth laws is unclear. If Commonwealth and State laws are not in harmony on this question, the child of a recognised co-mother may be left with a partial parent, one that is recognised for some purposes but not others. In effect, such a child is ‘semi-legitimate.’

The question of parentage is an important one, as many Commonwealth laws confer responsibilities or benefits on parents in order to promote the welfare of their children.

1.2 *The Family Assistance Office and Centrelink*

The Family Assistance Office (FAO) does not recognise same-sex couples. In addition, the FAO does not give co-mothers the recognition that it gives parents, nor same-sex stepparents the recognition that it gives heterosexual stepparents. Similarly, Centrelink does not recognise same-sex couples and does not give co-mothers the same recognition as it gives parents.

This lack of recognition impacts on same-sex couples, their children and Australian taxpayers. While some same-sex couples and their children who really need assistance from the FAO or Centrelink may miss out, many middle-class same-sex families are able to receive benefits they do not really need at the expense of Australian taxpayers.

1.3 *The Child Support Agency*

The existing schemes administered by the Child Support Agency (CSA) discriminate against same-sex families by forcing them to rely on the courts for the assessment and enforcement of child maintenance obligations in situations where they would not be required to rely on the courts if the parents in those families were heterosexual.

In particular, the CSA will not assess a co-mother’s liability to pay maintenance to a birth mother, nor will it *enforce* a co-mother’s liability to pay maintenance to a birth mother under a court order or court-registered agreement.

This discrimination also has implications for Australian taxpayers because, if a parent is entitled to receive or receives child support from their former partner, this may reduce their entitlements to tax payer funded income support payments.

1.4 Medicare and the PBS

Medicare and the Pharmaceutical Benefits Scheme (PBS) do not recognise same-sex couples. In addition, these schemes do not give co-mothers the recognition that they give parents, nor same-sex stepparents the recognition that they give heterosexual stepparents. This means that same-sex couples and their children may miss out on assistance to meet medical costs when it's most needed.

1.5 Kick them when they're down

In summary, many stable, healthy, middle-class gay and lesbian couple families are able to receive benefits they do not really need at the expense of Australian taxpayers. Meanwhile, when gay and lesbian couple families suffer from ill-health or relationship breakdown, they are offered fewer options and less assistance than equivalent heterosexual couple families.

Is our society saying that gay parenting is fine as long as nobody in the family gets sick? Or that lesbian mothers are wonderful as long as they never break-up? The Australian ideal is a fair go for all and a helping hand for those in genuine need. However, current policies towards same-sex families reflect a much meaner spirit, best summed up as "let's kick 'em when they're down."

1.6 Discrimination against same-sex families is not compatible with fundamental human rights

Arbitrary exclusion of same-sex families from financial benefits is not compatible with the fundamental human rights embodied in a number of international conventions, including the Convention on the Rights of the Child and the International Conventions on Civil and Political Rights and on Economic, Social and Cultural Rights. In particular, such exclusion is contrary to the State's responsibility to ensure all children and adults are treated as equal by the law and that special measures for the protection and assistance of children are taken on behalf of all children without discrimination of any kind.

1.7 The number of same-sex families is significant and growing

The most recent Census identified over 20,000 same-sex couples in Australia, including thousands of couples in New South Wales (NSW) alone. Of these, 20% of lesbian couples and 5% of gay male couples had children. The actual numbers of same-sex couples is likely to be considerably higher because of problems with the way in which this data was collected. Anecdotal evidence suggests that the proportion of same-sex couples with children is rising, in part because of increased use of ART.

Families with gay and lesbian parents are also becoming increasingly diverse and include single gay and lesbian parents with children from a previous heterosexual relationship, same-sex stepparent families, single lesbians and lesbian couples with

children conceived using ART, single gay men and lesbians and same-sex couples with foster children, and single gay men and lesbians with adopted children.

1.8 The trend is towards full legal recognition of same-sex families

Most Australian States and Territories have passed legislation providing for full or partial recognition of same-sex couples under State laws. In WA and the ACT, these legislative changes have included full recognition of same-sex couples for the purpose of adoption laws. In addition, WA and the ACT have provided for automatic recognition of the parentage of 'non-birth' mothers (co-mothers) where lesbian couples have children using ART.

These developments in Australia parallel developments overseas, where a number of jurisdictions now provide for same-sex marriages or full recognition of same-sex couples for legal purposes through civil unions. In addition, the law relating to adoption has specifically recognised same-sex couples on the same terms as heterosexual couples in Canada and the United Kingdom and in many jurisdictions within the United States.

1.9 Support for recognition of same-sex families is growing

Recent polling on same-sex relationship recognition shows majority support for same-sex relationship recognition in Australia, with support most pronounced amongst women and younger people. Comparisons with earlier polling results on attitudes to same-sex relationships suggest that support for same-sex relationship recognition is growing. The relatively strong support for relationship recognition amongst younger people and people caring for children suggest that future generations will be even more supportive of same-sex relationships.

The highest level of support for recognition and the lowest level of strong opposition to recognition is now found in WA, where legislative changes in 2003 provided for the full recognition of same-sex couples for all purposes including adoption laws. This suggests that legislative recognition encourages more favourable attitudes towards same-sex families, rather than polarising public opinion on this issue.

2 A New Generation of Illegitimate Children

2.1 Parentage

A child's parentage is its legally recognised relationship with its parents. Parentage automatically confers rights on the child in relation to the parent and responsibilities on the parent in relation to the child. Some of these rights and responsibilities only exist until the child is 18, whereas others may exist even when the child is an adult.

2.1.1 Illegitimacy

Generally, both a child's biological parents are legally recognised as its parents and both parents have the same responsibilities in relation to the child (and the child has the same rights in relation to both parents). However, this has not always been the case. In the Nineteenth Century, the paternal parentage of ex-nuptial children was regarded as of less status than the paternal parentage of the children of marriages (that is the paternal parentage of ex-nuptial children did not confer the rights and responsibilities conferred by the paternal parentage of children of marriages). The terms illegitimate and bastard were used to denote the lesser status of these children.

2.1.2 The abolition of illegitimacy

The concept that the parentage of some children was 'tainted' became unacceptable to most people in the twentieth century. People came to accept that, even if extra-marital sex was a sin, punishing children for that sin was repugnant. As a consequence, Australian law was reformed (through equal status of children legislation) to provide that parentage of ex-nuptial children and the children of marriages was of equal status.

2.1.3 Children born as a result of assisted reproductive technology

In the late twentieth century, the parentage of children born as a result of ART became an issue. The problem was that the social parents of these children (the birth mother and her spouse or de facto partner if she had one) were not necessarily the biological parents of these children.

To overcome this problem, parentage laws now provide that, where a child is conceived through ART:

- The birth mother of the child is the child's parent;
- The spouse or *male* de facto partner of the birth mother (if she had one when the child was conceived), is the child's parent;
- The sperm donor, if there was one, is not the child's parent.

However, in most Australian States and Territories, the *female* de facto partner of the birth mother (the co-mother) is not the child's parent. In other words, the parentage of children conceived by lesbian couples is not of equal status with the parentage of children conceived by heterosexual couples using ART.

2.1.4 Illegitimacy re-emerges

A new generation of illegitimate children is emerging – the children conceived by lesbian couples using ART. We will be bury our heads in the sand if we pretend that the lesser status of these children has nothing to do with the nature of the sexual

relationship between their parents. The fact is that a child conceived by a couple using ART now has two fully recognised parents in Australia, unless the child is conceived by a lesbian couple.

2.1.5 Adoption

After conception, a child's parentage can only be altered by adoption. An adoption order is intended to be permanent and it can only be revoked by a court with authority to revoke the order.

An adoption order alters a child's parentage so that its original parents are no longer its parents and its adoptive parents are its parents. An adoption order is only ever made in favour of a single person or a couple. The only exception to these general rules is stepparent adoption. In this case, one parent (the parent who is the stepparent's partner) remains the child's parent, while the other parent ceases to be the child's parent and the stepparent becomes the child's parent.

In most States and Territories, same-sex couples and same-sex stepparents (those that are stepparents as a member of a same-sex couple) cannot adopt.

2.2 Effect of recent reforms recognising same-sex parentage

2.2.1 Recognition of co-mothers in WA and the ACT

Recent reforms in WA and the ACT provide for the automatic recognition of the parental status of co-mothers and allow both the birth mother and the co-mother to be listed on the child's birth certificate. The effect of these changes is that such co-mothers ('recognised co-mothers') are regarded as the parent of the child for the purposes of the law in their State or Territory.

However, whether recognised co-mothers are parents for the purposes of Commonwealth laws is unclear. The question is an important one, as many Commonwealth laws confer benefits or responsibilities on parents. While no firm conclusions are possible, the issues arising are of sufficient importance to warrant detailed examination.

2.2.2 Who can determine the parentage of children

The States have power to determine the parentage of children, as is evidenced by their passage of both status of children and adoption legislation. The Constitution does not specifically give the Commonwealth power to determine the parentage of children and therefore, arguably, it does not have this power under the Constitution (unless it can tie its exercise of such power to some other matter over which it has power, as is the case with overseas adoptions and the parentage of children of marriages because the Commonwealth has power over foreign affairs and marriages).

However, all the States except Western Australia have referred their powers over the maintenance of children and parental responsibility for children to the Commonwealth. In order to consider whether this reference included the power to determine the parentage of ex-nuptial children, it is necessary to distinguish parentage and parental responsibility.

2.2.3 Parentage and parental responsibility distinguished

Parental responsibility is equivalent to the now largely defunct terms 'guardianship and custody'. Parental responsibility includes 'legal responsibility for the day-to-day care, welfare and development of the child', which is equivalent to the now largely defunct term custody.

A child's parent has parental responsibility for the child until the child turns 18, unless a court orders otherwise or the parent relinquishes that power by means of a court-registered parenting agreement. Thus, parental responsibility may be described as *one of* the legal consequences of parentage.

However, parentage is *not* parental responsibility, as evidence by the following facts:

- A person may have parental responsibility for a child without being their parent (by virtue of a court order)
- A child may have certain rights in relation to a parent even when the parent does not have parental responsibility for the child, including rights to maintenance and rights to inherit
- When a child turns 18, parental responsibility ends, but parentage continues
- A law affecting parentage (such as adoption or status of children legislation) never operates to give a child more than two parents but a court order can give parental responsibility for a child to more than two people

Arguably, therefore, when all the States referred their powers over parental responsibility and the maintenance of children to the Commonwealth, this reference did *not* include the power to determine the parentage of ex-nuptial children and this power, therefore, continues to reside exclusively with the States.

Therefore, arguably, the parentage of ex-nuptial children born in the Australian States is exclusively a matter for the States. This does not prevent the Commonwealth from treating recognised co-mothers differently to other parents but it does suggest that it must explicitly exclude them to do so. In other words, it cannot say that recognised co-mothers are not parents, it must rather say that a Commonwealth law applies to all parents except recognised co-mothers, or that for the purposes of some or all Commonwealth laws recognised co-mothers are not to be treated as parents.

2.2.4 Splitting the power to determine parentage

As is outlined below, despite these Constitutional issues, the Commonwealth behaves as though it does have the power to determine the parentage of children, or at least the parentage of children who are not from Western Australia.

Therefore, on the basis that the Commonwealth either has this power or is acting as though it has this power, it is appropriate to consider the public policy implications of joint State/Federal power over parentage. This issue will become even more important if a State other than Western Australia legislates to recognise co-mothers as parents (this scenario is not unlikely given the overall pace of gay law reform in the States and Territories).

State and Territory laws relating to parentage (including laws relating to the registration of births, as well as adoption and the status of children) are constructed to avoid the possibility that a child will have a parent whose status is recognised in one Australian jurisdiction but not another. Nobody wants children to 'lose' a parent simply by moving States!

Similarly, there are sound public policy reasons for not splitting the power to determine parentage between the States and the Commonwealth. To do so, risks making the parentage of some children less secure and less valuable than the parentage of other children.

If Commonwealth and State laws are not in harmony on the question of parentage, a child may be left with a partial parent, one that is recognised for some purposes but not others in their place of residence. While such a child is not, strictly speaking 'illegitimate', it could well be described as 'semi-legitimate.'

2.2.5 Western Australian *Family Court Act (FCA)*

The FCA provides that each of a child's parents have parental responsibility for it. Thus, recognised co-mothers have parental responsibility for their children in WA. Arguably, Commonwealth laws have to recognise their status as parents including their parental responsibility for their children.

In summary:

- The Commonwealth cannot determine who is or isn't a parent of an ex-nuptial child from any Australian State; and
- In relation to an ex-nuptial child from WA, the Commonwealth cannot determine whether the child's parent has parental responsibility for them.

However, when a child is neither from WA nor a child of a marriage, the Commonwealth can determine whether the child's parent has parental responsibility for them.

Theoretically, therefore, to exclude recognised co-mothers from a Commonwealth law that applies generally to parents and/or people with parental responsibility, the Commonwealth cannot:

- Determine that recognised co-mothers are not parents; nor
- If the child is from WA, determine that recognised co-mothers do not have parental responsibility.

Instead, the Commonwealth would have to:

- State that the provision applies to a parent except a co-mother who is a parent solely by virtue of being a parent under a State law that recognises co-mothers; and/or
- If the child is from WA, State that the provision applies to a person with parental responsibility except a co-mother who has parental responsibility solely by virtue of being a parent under a State law that recognises co-mothers.

2.2.6 Commonwealth *Family Law Act* (FLA)

The FLA provides that a child's parents have innate parental responsibility for the child. Parent is defined to include a person who is an adoptive parent by virtue of any State or Territory adoption order.

Section 60H of the *FLA* also explicitly recognises the parentage of children born as a result of ART for the purposes of the *FLA* as follows:

- Where the birth mother and her male partner are a couple, both are parents if they consented to the procedure;
- Where the birth mother is the mother of the child by virtue of certain specified State or Territory parentage laws, the birth mother is the mother;
- Where a man is the father of the child by virtue of certain specified State or Territory parentage laws, the man is the father.

However, the FLA is silent on the question of whether a woman who is not the birth mother of a child but is its mother by virtue of a State or Territory parentage law is its mother for purposes of the FLA.

To defend the Constitutional validity of these provisions, the Commonwealth could argue that they do not do what they appear to do (that is, determine parentage) but rather act to determine which parents in Australia outside WA have rights and responsibilities under the FLA (and which do not).

If this is the effect of the provisions, then those parents who are given parental responsibility by the FLA are:

- The biological parents (unless the child is adopted or fits within s.60H)
- Adoptive parents
- Parents who fit within s.60H (unless the child is adopted).

Parents who do not fall within these categories do not have parental responsibility (or, at least, do not have it by virtue of the FLA).

If these provisions determine parentage, their effect is that a child's parentage may be recognised by some Australian laws but not others. If the provisions determine which parents have parental responsibility, then, their effect is that the parentage of certain children has less status (lesser legal consequences) than the parentage of children generally.

2.2.7 FLA presumptions of parentage

The FLA provides that courts exercising jurisdiction under the FLA have the power to make findings as to the parentage of a child. The FLA gives such courts the power to make such findings for the purposes of their proceedings and to make a declaration of parentage that shall be conclusive evidence of parentage for the purposes of Commonwealth laws.

The provisions are premised on the basis that a child's parentage is a matter of fact for the court to determine, not a legal question over which the Commonwealth has power. They implicitly recognise:

- The power of the States and Territories to determine the parentage of a child;

- The value of ensuring that the parentage of a child does not vary regardless of which Australian laws are being applied.

The FLA sets out situations in which a person will be presumed to be the parent of a child when this issue is being considered in FLA proceedings, including:

1. Where the person's name is entered on the child's birth certificate under a law of a State or Territory; and
2. Where a State or Territory court has made a finding that the person is the child's parent or a finding that could only be made if the person was the parent.

These presumptions are rebuttable on the balance of probabilities. However, the second presumption is conclusive (not rebuttable) if the finding was made during the life of the person.

Therefore, where a co-mother is listed on the birth certificate, she is presumed to be a parent. Although this presumption is rebuttable, it is difficult to imagine what evidence would be adduced *against* the presumption in the case of recognised co-mothers. Genetic testing would be irrelevant in such a case, just as it would be in the case of an adoptive parent.

Furthermore, if a State or Territory Court makes a finding in favour of the co-mother during their lifetime, presumably, that co-mother is conclusively proven to be a parent for the purposes of proceedings under the FLA.

Under the *Parentage Act 2004* of the ACT, any person who claims they are the parent of a child can apply for a declaration of parentage from the Supreme Court of the ACT. If a co-mother obtained such a declaration, she would be entitled to be recognised as a parent for the purposes of any proceedings under the FLA.

If during the course of FLA proceedings, a court was required to make a finding of parentage and made a declaration of parentage in favour of a recognised co-mother, that declaration would then be conclusive evidence of parentage for the purposes of all Commonwealth laws.

Such a person would not be a parent within the FLA definition of parent (including section 60H) but would be conclusively proven to be a parent for the purposes of all Commonwealth laws (including the FLA). This absurdity illustrates the dangers of allowing conflicting definitions of parentage to develop within Australian law.

2.2.8 Full recognition for same-sex adoptive parents

Recent changes to the law in WA and the ACT allow same-sex couples and same-sex stepparents to adopt, although no such adoption has yet occurred.

As most definitions of parent in Commonwealth Laws include adoptive parents (regardless of which State or Territory the child was adopted in), if any such adoption were to occur the adoptive parent would be recognised as a parent for the purposes of Commonwealth laws.

This would mean that they would be recognised as having parental responsibility including legal responsibility for the day-to-day care, welfare and development of the

child, even in the absence of any court orders in relation to their parental responsibilities.

The unambiguous status of same-sex adoptive parents illustrates the advantages of ensuring that definitions of parentage within Australian law do not conflict.

3 Family Assistance Office

The Family Assistance Office (FAO) does not recognise same-sex couples. In addition, the FAO does not give co-mothers the recognition that it gives parents, nor same-sex stepparents the recognition that it gives heterosexual stepparents.

This lack of recognition impacts on same-sex couples, their children and Australian taxpayers. While some same-sex couples and their children who really need assistance from the FAO may miss out, many middle-class same-sex families are able to receive benefits they do not really need at the expense of Australian taxpayers.

3.1 *The FAO does not recognise same-sex couples*

3.1.1 Benefits and family income and workforce participation

The FAO administers a range of benefits for families, including:

- Family Tax Benefit (FTB) Part A
- Child Care Benefit (CCB)
- FTB Part B

These benefits are targeted towards low to middle income families and are subject to a various income tests. In addition, CCB is targeted at working parents, while FTB Part B is targeted at families with one main income.

Eligibility for FTB Part A may lead to other benefits, including:

- Rent Assistance (RA) - for those who receive more than the base rate of FTB Part A
- FTB Health Care Card - for those receiving the maximum rate

In some circumstance, these benefits may be worth hundreds of dollars a week to families.

3.1.2 Family income test for FTB Part A or CCB

The FAO treats a parent in a same-sex couple as a sole parent. This means that their partner's income does not affect the family income tests for FTB Part A or CCB for approved care. This in turn means that a parent in same-sex couple is much more likely to receive FTB Part A and CCB and those who receive either benefit are likely to receive higher amounts. Thus, they are also more likely to receive RA and an FTB Health Care Card.

The benefits of non-recognition for a parent in a same-sex couple are likely to be greatest where the parent has a low to middle income and their partner has a middle to high income.

3.1.3 Income test on lower income earner for couples for FTB Part B

Because the FAO treats a parent with a same-sex partner as a sole parent, they are also automatically eligible to receive the maximum rate of FTB Part B. In contrast, for most couples with children, eligibility for FTB Part B is determined by a fairly stringent test on the income of the lower earner in the couple.

Thus, in relation to FTB Part B, the benefits of non-recognition for a parent in a same-sex couple are likely to be greatest where the parent has a low income.

3.1.4 Workforce participation test for CCB

Generally, if one partner is out of the workforce, couples can only receive childcare benefit for a maximum of 20 hours per week per child. Where both partners work (or are actively seeking work or studying), the maximum number of hours is 50. However, because the FAO treats a parent with a same-sex partner as a sole parent, even if the parent's partner is out of the workforce, they will still be eligible for the higher maximum number of hours.

3.1.5 Rental payments and rate of RA

For people receiving more than the base rate of FTB Part A, the rate of RA received is determined by the recipient's number of children, relationship status and rental payments. The rules are complex. In some circumstances, non-recognition may benefit same-sex couples, in others it may not.

Same-sex couples are most likely to be advantaged by non-recognition where both members of the couple are eligible for RA as single people (for example, both have children from previous relationships, both receive more than the base rate of FTB Part A and their rental payments are very high).

On the other hand, heterosexual couples may benefit from recognition because the rent the couple must pay to receive RA is less than double the rent that a single person must pay to receive RA. The rent a couple must pay to receive the maximum RA is also less than double what a single person must pay. Thus, a heterosexual couple may receive RA or a higher rate of RA in circumstances where a same-sex couple would receive no RA or less RA.

3.2 *The FAO and co-mothers and same-sex stepparents*

3.2.1 A person claiming FTB or CCB must have an FTB child

To be eligible for FTB or CCB, a person must have a FTB child. The most important factors taken into account when determining whether a child under 18 is an FTB child of a person are whether:

1. The person has legal responsibility for the day to day care welfare and development of the child ('legal responsibility');
2. The child is in the care of the person

When one person has legal responsibility for a child in their care, another person who has the child in their care but does not have legal responsibility cannot claim for that child *unless* that person is someone with whom the child is supposed to live or have contact with under a parenting order or registered parenting plan.

The children of an in-tact heterosexual couple meet the first criteria and will be assumed to meet the second for both parents. However, only one member of a couple can claim FTB for the children at a time (and only one person can claim CCB

for the same session of child care). Generally, the claimant will be the primary care giver (and lower income earner).

The definition of an FTB child has been extended to cover stepparents, provided the child qualifies as the FTB child of the parent who is the stepparent's partner (this includes de facto stepparents). This allows a stepparent to claim FTB or CCB for their stepchild even if they are not legally responsible for the child (and even if there are no applicable parenting orders). Generally, only one member of such a couple can claim. However, in the case of blended families (where both parents are stepparents or one is a stepparent and the couple also have a child of their own), a couple may choose to take an agreed percentage of their family's entitlement each.

3.2.2 Co-mothers

When a lesbian couple co-parent a child, the child is in the care of both the birth mother and the co-mother. However, only the birth mother automatically has legal responsibility for the child. This means that the co-mother cannot claim FTB or CCB for the child, even if the co-mother is the primary care giver. While this may disadvantage and/or inconvenience co-parents in some instances, it is likely that the financial benefits of the birth mother being treated as a sole parent would outweigh any possible benefits to be gained from the co-mother being able to claim in most cases.

Lesbian co-parents may be able to obtain parenting orders that provide that the co-mother has legal responsibility for the child jointly with the birth mother (or that the child reside or have contact with the co-mother). In this situation, the co-mother could conceivably claim FTB or CCB for the child. In fact, as the mother and co-mother would still not be recognised as a couple, both could conceivably claim FTB Part A (and CCB but not for the same session of child care).

Where two carers who are not a couple claim FTB Part A for the same child, the eligibility of each is assessed individually. They are then given a percentage of the rate to which they are entitled based on their percentage of care for the child. This 'percentage of care' is agreed upon between the carers or, failing that, is based on legal or actual arrangements relating to the care of the child. Thus, where lesbian co-parents are both able to claim FTB Part A because of a parenting order in favour of the co-mother, they could agree on their respective percentages of care for the child for the purposes of their FTB Part A entitlements.

3.2.3 Same-sex stepparents

The FAO does not recognise same-sex stepparents because it does not recognise the relationship between the stepparent and the child's parent. Therefore, a same-sex stepparent couple is in a similar position to a lesbian co-parent couple in relation to the FAO. The major difference is that a same-sex stepparent may face greater difficulties obtaining an applicable parenting order in their favour (because the family law system seeks to encourage and maintain parents' joint care and responsibility for their children, even when those parents separate). Thus, a stepchild of a same-sex stepparent is unlikely to ever be their FTB child (at least while the parent and the stepparent live together and the child's other parent remains alive).

3.2.4 Children over 18

The question of legal responsibility becomes irrelevant when a child turns 18 (because nobody has parental responsibility for adults). For a child aged 18-23, it is sufficient that a child be in the care of a person for that child to be that person's FTB child. However, older children may receive Youth Allowance, in which case their carer/s will no longer receive FTB on their behalf. Furthermore, if the child is over 21, they must be a full-time student before their carer/s can receive FTB on their behalf. Nevertheless, some co-mothers and same-sex stepparents may find that their child suddenly becomes their FTB child simply by turning 18.

3.3 Effect of separation or death

3.3.1 No effect on income or work tests, nor the determination of RA

When same-sex co-parents or a same-sex parent and stepparent separate or one of the couple dies, the death or separation has no effect on income or work tests, or the determination of RA (because the couple were never considered to be a couple by the FAO in the first place).

3.3.2 Same-sex stepparent or co-mother and the FTB child

The separation of a same-sex couple or the death of the member of the couple who is the parent may affect whether or not a co-mother or same-sex stepparent has an FTB child. In the absence of an applicable parenting order, the child will not be the FTB child of the stepparent or co-mother if the child is not in their care but may be their FTB child if the child is in their care.

If the child is in the care of the stepparent or co-mother after the death or separation and *not* in the care of a parent, the child will become their FTB child (because, where person one has a care of child, and no other person has legal responsibility *and* care of the child, the child is the FTB child of person one). This is likely to be the case where the mother dies leaving the child in the co-mother's care, as the only person who automatically has legal responsibility for such a child is its mother.

If the child's care is shared between the stepparent or co-mother and one or more of the child's parents after the death or separation, the child will not become their FTB child (as the parent or parents will have legal responsibility *and* care of the child). For co-mothers, this is only an issue in the event of separation, not death.

It should also be noted that, where a child remains in the care of a same-sex stepparent or a co-mother after the death or separation, it may become easier to obtain an applicable parenting order (thus making the child their FTB child, if the child is in their care). Nevertheless, co-mothers, in particular, are disadvantaged by these rules relative to other parents, whose children would be their FTB children after separation if the children were in their care, without the need for a court order.

3.4 Effect of adoption and parentage reform in the ACT and WA

3.4.1 No effect on the status of same-sex couples

These reforms have no effect on the status of same-sex couples for the purposes of the FAO (because the FAO does not recognise same-sex couples under any circumstances). Therefore, for the purposes of the FAO:

- If a same-sex couple adopt a child in WA or the ACT, the couple are still not a couple for the purposes of the FAO
- If a same-sex stepparent adopts their stepchild in WA or the ACT, the stepparent and their partner (the child's parent) are still not a couple
- If a co-mother is recognised as a parent in WA or the ACT, the co-mother and the mother are still not a couple.

3.4.2 Adopted child of a same-sex couple or same-sex stepparent

If a same-sex couple adopted a child, both members of the couple would be its parents and would have parental responsibility for the child (including legal responsibility). The same applies to a same-sex stepparent who adopts their stepchild. In both situations, the child would be the FTB child of the adoptive parents or parent (provided the child was in their care).

This is because the FAO:

- Uses the definition of parent in the Social Security Act (SSA), which is that a parent is the natural or adoptive parent of a child;
- Accepts that parents have parental responsibility for their child because the FLA says that they do.

3.4.3 The child of a recognised co-mother

However, the position of parents who are parents only by virtue of a parentage law is less clear. On the face of it, current FAO policy excludes recognised co-mothers *and* any other parent of a child who is its parent solely by virtue of a parentage law (including all birth mothers who are not biological mothers and all the male partners of birth mothers who conceive children using donor sperm).

However, with the exception of recognised co-mothers, parents who are parents because of a parentage law may be accepted as having parental responsibility because:

- Though they are not parents under the SSA, they may be parents by virtue of s60H of the FLA; and
- Therefore, they have parental responsibility under the FLA.

As recognised co-mothers do not fall within s60H of the FLA, their position is even less clear. It may depend on the interaction of many factors, including whether:

- The Commonwealth has the power to determine the parentage of an ex-nuptial child born in any Australian State;
- The Commonwealth has the power to determine the parentage of an ex-nuptial child born in Western Australia;
- The Commonwealth has the power to determine whether the parent of an ex-nuptial child born in Western Australia has parental responsibility for it;

- A State or Territory court has made a finding that confirms the co-mother is the child's parent;
- A court has made a declaration that the co-mother is the parent of the child, while exercising jurisdiction under the FLA.

For a more detailed discussion of the issues involved, see section 2.

4 Centrelink

Centrelink does not recognise same-sex couples and does not give co-mothers the same recognition as it gives parents. This lack of recognition impacts on same-sex couples, their children and Australian taxpayers. While some same-sex couples and their children who really need assistance from Centrelink may miss out, many middle-class same-sex families are able to receive benefits they do not really need at the expense of Australian taxpayers.

4.1 Centrelink does not recognise same-sex couples

4.1.1 Income support payments are affected by income and assets tests

Centrelink administers a range of income support payments for individuals, including:

- Parenting Payment (PP)
- Carer Payment (CP)
- Disability Support Pension (DSP)
- New Start Allowance (NSA)
- Sickness Allowance (SA)
- Austudy

Eligibility for these payments may also lead to other benefits, notably Rent Assistance (RA) and a Health Care Card.

These payments are targeted at individuals with limited means. Means tests for these payments may also take account the income and/or assets of an individual's partner. These payments may be worth hundreds of dollars a fortnight to the recipient. Centrelink does not recognise same-sex couples. This has major implications for their entitlements. Some of these implications are outlined below.

4.1.2 Non-recognition and the assets test

Individuals receiving PP, CP, DSP, NSA, SA or Austudy are subject to an assets test. The assets test is on the individual's assets, unless the individual is a member of a couple, in which case, the test is applied to the combined assets of the couple. For example, the assets limit for a full payment for homeowners is \$157,000 for individuals and \$223,000 for couples. Thus, the limit for couples is substantially higher than the limit for individuals but is still less than double the limit for individuals. Assets over these limits progressively reduce the amount of payment received. Thus, the assets test affects both whether an individual receives an income support payment and the amount received.

Whether this advantages or disadvantages same-sex couples will depend on the distribution of assets between the couple. For example, if one member of a home owning same-sex couple has \$200,000 of assets and the other has none, only one member of the couple will meet the assets test for individuals, whereas as a heterosexual couple would meet the test on their combined assets. On the other hand, if both members of a home owning same-sex couple have assets of \$150,000, both will meet the assets test for individuals, whereas a heterosexual couple would not meet the test on their combined assets.

Ironically, as the example above illustrates, the same-sex couples that are disadvantaged by non-recognition will have fewer combined assets than the same-sex couples that are advantaged by non-recognition.

4.1.3 Non-recognition and income testing

A partner's income impacts on income tests for most Centrelink income support payments except Austudy and Youth Allowance. The impact of a partner's income depends on the income support payment concerned. The most common impacts are outlined below.

4.1.3.1 Combined income test for CP and DSP (and PP in some cases)

CP and DSP are subject to an income test on the recipient's income, unless the individual is a member of a couple, in which case, the test is applied to the combined income of the couple. This form of income test also applies to PP where the parent's partner is a pensioner. The limit for couples is substantially higher than the limit for individuals but is still less than double the limit for individuals. Income over these limits progressively reduces the amount of payment received. Thus, the income test affects both whether an individual receives a payment and the amount received.

Whether non-recognition advantages or disadvantages same-sex couples in relation to the combined income test will depend on the distribution of income between the couple. As with the combined assets test, those that are advantaged by non-recognition are likely to have more means independent of the income support payment claimed than those that are disadvantaged.

4.1.3.2 Test on partner's income for SA and NSA (and PP in some cases)

SA and NSA are subject to an income test on the recipient's income *and*, where the recipient is a member of a couple, to a separate test on the recipient's partner's income. This form of income test also applies to PP where the parent's partner is not a pensioner. Partner income over the prescribed limit progressively reduces the amount of payment received. Thus, the test on partner's income affects both whether an individual receives a payment and the amount received.

This means that a person who is part of a same-sex couple is more likely to receive SA and NSA than a person who is part of a heterosexual couple and those who receive such a payment are likely to receive higher amounts. A parent in a same-sex couple whose partner is not a pensioner is also more likely to receive PP than a parent in a heterosexual couple. The advantages of non-recognition for same-sex couples will be greatest where the person claiming the payment has little or no income and their partner has a moderate to high income.

4.1.4 Non-recognition and maximum payment rates

Whether or not an individual has a partner impacts upon the maximum rate of payment for most Centrelink income support payments. For example, while the maximum rate of PP for a single person is \$499.70 per fortnight, the maximum for a partnered person is \$370.50.

In the case of Austudy, there is only a difference between the single and the partnered maximum rates for a person with children. For PP, CP, DSP, NSA and SA,

the maximum rate is higher for a single person regardless of whether or not they have children.

Because income and asset tests on Centrelink income support payments operate progressively, being eligible for the higher single rate affects both whether a payment is received and how much is received. Because they are able to receive the single rate, members of a same-sex couple are more likely to receive a payment, and likely to receive a higher amount, than their heterosexual counterparts.

4.1.5 Non-recognition and RA

For people receiving Centrelink income support payments, the rate of RA is determined by the recipient's number of children, relationship status, rental payments and whether the recipient's partner also receives an income support payment. The rules are complex. In some circumstances, non-recognition may benefit same-sex couples but in others it may disadvantage them. Same-sex couples are most likely to be advantaged by non-recognition where both members of the couple are eligible for RA as single people.

4.2 Centrelink and co-mothers and same-sex stepparents

4.2.1 For some Centrelink benefits, a person needs a dependent child

Whether or not an individual has a dependent child may impact upon the maximum rate for some Centrelink income support payments. For example, while the maximum rate of NSA and SA for a single person without children is \$410.60 per fortnight, the maximum for a single person with children is \$444.20. In the case of NSA and SA, having a dependent child only increases the maximum rate for single people. For Austudy, the maximum rate is higher for those with children, regardless of whether or not they have a partner.

In addition, to be eligible for PP a person must have a dependent child under 16 (their PP child). A child may be the dependent child of more than one person at a time but can only be the PP child of one person at a time.

The most important factors taken into account when determining whether a child under 16 is a dependent child of a person for Centrelink purposes are whether:

- The person has legal responsibility for the day to day care welfare and development of the child ('legal responsibility');
- The child is in the care of the person.

When one person has legal responsibility for a child in their care, another person who has the child in their care but does not have legal responsibility cannot claim for that child. The children of an in-tact heterosexual couple meet the first criteria and will be assumed to meet the second for both parents.

4.2.2 Co-mothers

When a Lesbian couple co-parent a child, only the birth mother automatically has legal responsibility for the child. This means that the co-mother cannot claim PP or a higher 'with child' rate of a payment such as NSA. While this may disadvantage and/or inconvenience co-parents in some instances, it is likely that the financial

benefits of the birth mother being treated as a sole parent would outweigh any possible benefits to be gained from the co-mother being able to claim in most cases.

The couple could obtain a parenting order giving the co-mother legal responsibility for the child jointly with the birth mother (an order that simply provided that the child reside or have contact with the co-mother would not be sufficient). The co-mother could then claim PP or a rate of another payment based upon having a dependent child.

Even if a court order gives the co-mother legal responsibility, the birth mother and co-mother could not both claim PP at the same time, because a child cannot be the PP child of more than one person at a time. However, as the birth mother and the co-mother would not be recognised as a couple, one mother may be able to claim PP and the other may be able to claim the higher 'with child' rate of another payment such as NSA.

4.2.3 Same-sex stepparents

Unlike the definition of an FTB child used by the FAO, the definition of a dependent child used by Centrelink has not been extended to cover stepparents. Thus, for heterosexual couples, a parent and a stepparent are recognised as a couple but the stepchild is not a dependent child of the stepparent for Centrelink purposes. For same-sex couples, the parent and the stepparent are not a couple and the stepchild is not a dependent child of the stepparent for Centrelink purposes.

A stepparent may obtain a parenting order giving them legal responsibility. However, a stepparent is likely to face difficulties obtaining such an order because the family law system seeks to encourage and maintain parents' joint care and responsibility for their children, even when those parents separate. Thus, a child is unlikely to ever be the dependent child of their stepparent (at least while the parent and the stepparent live together and the child's other parent remains alive).

If a same-sex parent did manage to obtain a parenting order giving them legal responsibility, the parent and the stepparent would then be in the same position for Centrelink purposes as a birth mother and co-mother who had obtained such an order. A heterosexual stepparent who had obtained such an order would be in a different position because the stepparent and the child's parent would be recognised as a couple.

4.2.4 Children over 18

The question of legal responsibility becomes irrelevant when a child turns 18. For a child aged 18-21, it is sufficient that the child is a full-time student and is wholly or substantially dependent on a person for the child to be their dependent child for Centrelink purposes. However, older children may receive Youth Allowance, in which case they will no longer qualify as a dependent child for Centrelink purposes. Furthermore, to be a person's PP child, a dependent child must be under 16. Nevertheless, some co-mothers and same-sex stepparents may find that their child or stepchild suddenly becomes their dependent child for other Centrelink purposes simply by turning 18.

4.3 Effect of separation or death

4.3.1 No effect on income or asset tests, maximum rates of payment, nor the determination of RA

When same-sex co-parents or a same-sex parent and stepparent separate or one of the couple dies, the death or separation has no effect on income or asset tests, maximum rates of payment, or the determination of RA (because the couple were never considered to be a couple by Centrelink in the first place).

4.3.2 Same-sex stepparent or co-mother and ‘dependent child’

The separation of a same-sex couple or the death of the member of the couple who is the parent may affect whether or not a co-mother or same-sex stepparent has a dependent child. In the absence of a parenting order giving the stepparent or co-mother legal responsibility, the child will not be the dependent child of the stepparent or co-mother if the child is not in their care but may be their dependent child if the child is in their care.

The factors to be considered are the similar to those relating to the FTB child category used by the FAO (see sub-section 3.3.2). However, in the case of the dependent child category, a child must be ‘wholly and substantially in the care’ of a person where the person does not have legal responsibility whereas, in the case of the FTB child category, the child must simply be ‘in the care’ of the person.

As with the FTB child rules, co-mothers, in particular, may be disadvantaged relative to other parents, whose children would be their dependent children after separation if the children were in their care, without the need for a court order.

4.4 Effect of adoption and parentage reform in the ACT and WA

These reforms have no effect on the status of same-sex couples for Centrelink purposes. Their effect on whether co-mothers and same-sex stepparents have a ‘dependent child’ is similar to their effect on whether co-mothers and same-sex stepparents have an FTB child (see sub-section 3.4).

4.5 Youth Allowance

Youth Allowance (YA) is an income support payment for unemployed people aged under 21 and full-time students aged 16 to 24 years. Like other Centrelink income support payments, it is targeted at individuals with limited means. However, the means tests for YA do not take into account the income of an individual’s partner. Instead, YA is subject to a parental income and family assets test, unless the recipient qualifies as independent.

4.5.1 Parental income test and family asset test

A person who is not a parent of a young person for other Centrelink purposes may be their parent for the purposes of YA. The Social Security Act defines parent for purposes of YA as:

1. A natural or adoptive parent with whom the young person lives; or
2. A stepparent who lives with the young person’s natural or adoptive parent as a member of a couple and lives with the young person; or

3. Any person on whom the young person 'is wholly or substantially dependent' (except the young person's partner); or
4. If none of the above applies, the natural or adoptive parent with whom the young person last lived.

A natural or adoptive parent may fall within the first, third and/or fourth parts of this definition. A heterosexual stepparent may fall within the second and/or third parts of this definition. In contrast, a co-mother or same-sex stepparent may fall within the third part of this definition, but can never fall within the first, second or fourth parts of the definition. Nevertheless, a same-sex stepparent or co-mother is much more likely to be defined as a parent for the purposes of YA, than they are to be defined as having a dependent child for other Centrelink purposes.

If a person is a parent of a young person for the purposes of YA, that person's income will be taken into account when the parental income test is applied and that person's assets will be taken into account when the family assets test is applied.

4.5.2 Qualifying as independent

Those who qualify for YA as an independent young person are not subject to the parental income test or the family assets test. Instead, they are subject to a personal assets test (or a test on their own and their partner's combined assets if they are a member of a couple). Qualifying as independent may also affect the maximum rate of YA to which a young person is entitled. There are ten ways of qualifying as independent. Two ways of qualifying have particular implications for same-sex couples.

4.5.2.1 Qualifying by being a member of a YA couple

A young person may qualify as independent if they are a member of a YA couple. A person may be considered to be a member of a YA couple if they are in a de facto relationship but only if the relationship is with a person of the opposite sex.

4.5.2.2 Qualifying by having a YA dependent child

A young person may qualify as independent if they have a YA dependent child. However, to be a young person's YA dependent child, a child must be their natural or adoptive child. In addition, the child must be, or have been, wholly or substantially dependent on the young person or their partner. Thus, if the young person is a co-mother or a stepparent, their child or stepchild will not be their YA dependent child. Furthermore, if a young person is the parent of a child, and that child is not, and has never been, dependent on them, but that child is, or has been, dependent on their partner, that child will only be their YA dependent child if their partner is an opposite-sex partner.

5 Child Support Agency

The Child Support Agency (CSA) was established to make the assessment and enforcement of child maintenance obligations easier. Its establishment was based on the recognition that systems where child maintenance matters are dealt with by the courts do not adequately meet the needs of separated parents and their children.

The existing schemes administered by the CSA discriminate against same-sex families by forcing them to rely on the courts for the assessment and enforcement of child maintenance obligations in situations where they would not be required to rely on the courts if the parents in those families were heterosexual.

In particular, the CSA will not assess a co-mother's liability to pay maintenance to a birth mother, nor will it enforce a co-mother's liability to pay maintenance to a birth mother under a court order or court-registered agreement.

This discrimination also has implications for Australian taxpayers because if a parent is entitled to receive or receives child support from their former partner, this may reduce their entitlements to tax payer funded income support payments.

5.1 Administrative assessment

The CSA uses a formula to determine child support obligations. An eligible carer or a liable parent may apply to the CSA for an administrative assessment of child support in accordance with the formula. Once the administrative assessment has been made, the liable parent must pay child support to the eligible carer in accordance with the assessment. The CSA operates on the assumption that co-mothers, whether recognised or not, are not parents for the purposes of administrative assessments. This has two important implications:

1. The CSA will not recognise a co-mother as a liable parent, regardless of whether or not the co-mother is recognised in their State or Territory;
2. Co-mothers must meet the extra conditions imposed on non-parent carers in order to qualify as eligible carers.

Further details of the implications of this policy and its legal validity are considered below.

5.1.1 Liable parent

The CSA cannot accept an application for an administrative assessment unless it is satisfied that the liable parent named in the application is a parent of the child. A liable parent cannot be a stepparent, regardless of whether or not the past relationship between the stepparent and the child's parent was heterosexual.

5.1.1.1 Legislative definition and presumptions

The *Child Support Assessment Act* (CSAA) defines parent as including an adopted parent and, if the child was born using ART, a parent under section 60H of the FLA.

The CSAA also specifies that the CSA can only be satisfied that a person is a parent of a child in eight fact situations, these include:

1. Where the person's name is entered on the child's birth certificate under a law of a State or Territory;

2. Where a State or Territory court has made a finding that the person is the child's parent or a finding that could only be made if the person was the parent;
3. Where the person has adopted the child.

Where there is evidence that more than one of these fact situations exists and this produces conflicting presumptions regarding the parentage of a child, the CSA can base its decision on whichever presumption appears to be the most likely to the CSA. Thus, unlike the presumptions under the FLA, all the presumptions are rebuttable.

5.1.1.2 Interpretation by the CSA

The CSA's *Guide* states that:

- The CSA is not obliged to be satisfied that a person is the parent of a child merely because one of the eight fact situations exists if there is conflicting evidence which casts doubt on the child's parentage;
- The term parent has its common meaning and 'also includes' adoptive parents and parents within section 60H of the FLA;
- A recognised co-mother is not a parent for the purposes of the CSAA, because they are not a parent under section 60H of the FLA;
- The CSA does not make findings of parentage but merely administrative decisions about whether or not to accept applications.

On the basis of the above, the CSA would accept an application that named any adoptive parent as a liable parent, even if that adoptive parent was a same-sex stepparent or a member of a same-sex couple who had adopted a child. However, it would not accept an application that named a co-mother as a liable parent, even if they were a recognised co-mother.

Clearly, the CSA does not believe that a recognised co-mother is a parent within the 'common meaning' of the term. In fact, for the CSA, 'parent within the common meaning of the term' is a synonym for 'biological parent,' as the CSA implies that adoptive parents and parents under section 60H of the FLA are included *in addition* to those covered by the common meaning of the term parent.

5.1.1.3 Court's jurisdiction

The CSA's decision to accept or reject an application may be appealed by either the applicant or the person from whom payment is sought. The Court then has to determine, among other things, whether the person from whom payment is sought is the parent of the child concerned. The Court would not be bound by the eight fact situations referred to above but only by the definition of parent in the CSAA.

As the definition includes adoptive parents, a same-sex stepparent or a member of a same-sex couple who had adopted a child would be a parent. As the definition does not include recognised co-mothers explicitly, the question would become whether they are included in the generic term 'parent'. A Court exercising jurisdiction under the CSAA is bound to apply the FLA. Therefore, it would probably be guided by the definitions of parent and the presumptions of parentage in the FLA if called upon to determine this question.

As recognised co-mothers do not fall within s60H of the FLA, their position is unclear. It may depend on the interaction of many factors, including whether:

- The Commonwealth has the power to determine the parentage of an ex-nuptial child born in any Australian State;
- The Commonwealth has the power to determine the parentage of an ex-nuptial child born in Western Australia;
- A State or Territory court has made a finding that confirms the co-mother is the parent of the child;
- A court has made a declaration that the co-mother is the parent of the child, while exercising jurisdiction under the FLA.

For a more detailed discussion of the issues involved, see section 2.

5.1.2 Eligible carer

The CSA cannot accept an application for an administrative assessment unless it is satisfied that the person to whom child support is to be paid is an eligible carer. An eligible carer need not be a parent but carers who are not parents (as defined by the CSA) may find it more difficult to qualify as an eligible carer than parents.

5.1.2.1 Level of care

In order to be an eligible carer, a person must be providing a specified level of care. This requirement applies to all carers, whether or not they are parents. The decision is usually based upon how many nights a year the carer is responsible for caring for the child. However, the issue is who has responsibility for making arrangements for, and decisions about, the child's welfare, not simply who the child lives with. A carer who is not a parent may not be assumed to be responsible for a child's care, even when the child is in their care. They may, therefore, face added difficulties demonstrating that they are responsible for the child's care for a sufficient proportion of time. These difficulties may be alleviated if the carer's care of the child is authorised by a parenting order.

5.1.2.2 Non-parent carer

An extra condition must also be met in order for a 'non-parent carer' to be an eligible carer. A non-parent carer, for this purpose, is a carer who is neither a parent nor a legal guardian of the child. Where a parenting order provides that a person has parental responsibility for a child, that person will be their legal guardian. A person may also become the legal guardian of a child if the child's parent dies leaving a will that appoints the person as the child's guardian.

A non-parent carer will not be an eligible carer if a parent or legal guardian of a child has indicated that they oppose the non-parent carer's care of the child, unless it is unreasonable for the parent or guardian to oppose the non-parent carer's care of the child. The parent or guardian's opposition will be considered unreasonable if:

- Their has been extreme family breakdown; or
- There is a serious risk to the child's mental or physical well being from violence or sexual abuse in the home of the parent or guardian concerned.

The CSA's *Guide* states that:

- The terms of the legislation imply that the parent opposing the non-parent's care must be able to provide an alternative care arrangement for the child;

- There will have been extreme family breakdown if the child has never lived with the parent or the parent has not provided care for the child for a substantial period;
- If a court order provides that the child reside with the non-parent carer, the non-parent carer will be assumed to be an eligible carer;
- If a court order provides that a child reside with one of its parents and that parent opposes the non-parent carer's care, the non-parent carer will be assumed *not* to be an eligible carer.

A co-mother or a stepparent would have to meet this extra condition in order to be an eligible carer (unless they were already a legal guardian of the child concerned). The simplest means of ensuring that this condition is met is to obtain a parenting order that provides that the child reside with the co-mother or stepparent.

5.2 Registration, collection and enforcement

As well as making administrative assessments of child support liabilities, the CSA is responsible for registering and enforcing all maintenance liabilities arising from its own assessments and certain maintenance liabilities arising from court orders or court-registered agreements. Separated same-sex couples *may* be able to obtain maintenance orders relating to their children from a State or Territory court in circumstances where they would not be able to obtain an administrative assessment from the CSA. However, not all such maintenance orders would be registrable by the CSA. In particular, any liability of a co-mother to pay maintenance *to* a birth mother is not registrable (although this point may be open to challenge in the case of recognised co-mothers).

5.2.1 Registrable maintenance liabilities

To be registrable, maintenance liabilities arising from court orders or court-registered agreements, must:

- Require a parent or stepparent to pay periodic maintenance for their child or stepchild; or
- Require a person to pay periodic maintenance for a person to whom they are or were married.

5.2.1.1 Liabilities of same-sex spouses and of same-sex stepparents

These requirements exclude any liability of a member of a de facto couple to pay maintenance to their spouse (which excludes all same-sex couples because they cannot be married in Australia). The requirements also exclude any liability of a de facto stepparent (including all same-sex stepparents) to pay maintenance for their stepchild because the *Child Support (Registration and Collection) Act* (CSRCA) definition of stepparent is confined to stepparents by marriage.

5.2.1.2 Liabilities to co-mothers and to same-sex stepparents

However, a liability of a parent to pay periodic maintenance for their child to any person is included. This includes a parent's liability to pay maintenance for their child to their child's de facto stepparent (including a same-sex stepparent). It also includes a birth mother's liability to pay maintenance for their child to their child's co-mother (whether recognised or not).

5.2.1.3 Liabilities of co-mothers

Where a co-mother is not recognised, the requirements would also exclude a liability of a co-mother to pay maintenance for their child because they are not their child's parent. Where a co-mother is recognised, the position is unclear. The CSRCA does not define parent. However, the CSRCA does make the decision to refuse to register a maintenance liability arising under a court order or a court-registered agreement subject to judicial review. As a Court exercising jurisdiction under the CSRCA is bound to apply the FLA, it would probably be guided by the definitions of parent and the presumptions of parentage in the FLA if called upon to determine the question of whether a recognised co-mother is a parent for the purposes of the CSRCA.

6 Medicare and the Pharmaceutical Benefits Scheme

Medicare and the Pharmaceutical Benefits Scheme (PBS) do not recognise same-sex couples. In addition, these schemes do not give co-mothers the recognition that they give parents, nor same-sex stepparents the recognition that they give heterosexual stepparents. This means that same-sex couples and their children may miss out on assistance to meet medical costs when it's most needed.

6.1 Medicare Safety Net

The Medicare Safety Net (MSN) is designed to help people with high medical costs. It means that once an individual or a family reach certain thresholds of expenditure, medical treatment covered by Medicare may cost them less. The expenditure thresholds are the same for couples and families as for individuals. Therefore, couples or families who register for the MSN may reach the thresholds faster than individuals.

6.1.1 MSN family

For MSN purposes, a family consists of:

- A married or heterosexual de facto couple, with or without dependent children; or
- A single person with dependent children.

Therefore, a same-sex couple cannot be members of the same family for MSN purposes.

Step families are covered provided the couple are heterosexual for two reasons:

- A couple is a family regardless of whether or not the couple have children; and
- The dependent child of a person is also counted as the dependent child of that person's spouse.

6.1.2 MSN dependent child

For MSN purposes, a child is the dependent child of a person, if the child is under 16 and:

- The child is in the person's custody, care and control; or
- The child is wholly or substantially in the person's care and control and no other person has the custody, care and control of the child.

A child's parents have custody of the child unless a court orders otherwise. So where a child is in the care and control of one or both of their parents, the child cannot be the dependent child of any other person, unless that person is a heterosexual spouse of one of the child's parents or a court order has placed the child in that person's custody.

A child is able to be registered as a member of more than one family provided more than one family jointly share the right to have, and to make decisions regarding, the daily care and control of the child. However, medical expenses incurred on behalf of such a child will:

- Be taken to be medical expenses incurred in respect of the child by the registered family that actually incurred the expense; or
- If Medicare is not satisfied as to which family incurred the expense, will be taken to have been incurred half by one registered family and half by the other.

6.1.2.1 Co-mothers and same-sex stepparents

Co-mothers and same-sex stepparents cannot count their child or stepchild as their dependent child unless:

- A court has ordered that they have custody of the child; or
- The child is not in the care and control of either of its parents.

A same-sex stepparent may face difficulties obtaining a court order in their favour in relation to custody (because the family law system seeks to encourage and maintain parents' joint care and responsibility for their children, even when those parents separate). Thus, a stepchild of a same-sex stepparent is unlikely to ever be their dependent child for MSN purposes (at least while the parent and the stepparent live together and the child's other parent remains alive).

If a co-mother or a same-sex stepparent does have custody, care and control of their child or step-child, they could register as a family as a single person and dependent child. This would not prevent another person who has custody, care and control of the same child, including the stepparent's or co-mother's same-sex partner, from also being registered as a single person with a dependent child because a child is able to be registered as a member of more than one family when two families share the care of the child.

However, it is not as advantageous for, for example, a birth mother and a co-mother to both be registered as a single person with a dependent child as it would be for them to be registered as a couple with a dependent child. This is because, in the former case, the medical expenses that count towards the threshold will only ever be those of one adult and a dependent child, whereas in the latter case, the medical expenses that count will be those of two adults and a dependent child.

6.1.2.2 Older children

For MSN purposes, a child aged 16-24 is the dependent child of a person if:

- The child is a full-time student; and
- The child is wholly or substantially dependent on the person.

Thus, it is highly likely that many co-mothers and same-sex stepparents may find that their child or stepchild becomes their dependent child for MSN purposes when the child concerned turns 16.

6.1.2.3 Effect of WA and ACT reforms

These reforms have no effect on the status of same-sex couples for MSN purposes.

The *Health Insurance Act*, which governs the MSN, does not define parent. However, if a court were called upon to rule on the meaning of parent for MSN purposes, it would be exercising jurisdiction in relation to a Commonwealth law and

would presumably be guided by the definitions of parent and presumptions of parentage in the FLA.

Thus, any child adopted by a same-sex stepparent or by a same-sex couple would be the dependent child of the same-sex stepparent or of both members of the same-sex couple. The position of recognised co-mothers is unclear and may depend on the interaction of many factors, including whether:

- The Commonwealth has the power to determine the parentage of an ex-nuptial child born in any Australian State;
- The Commonwealth has the power to determine the parentage of an ex-nuptial child born in Western Australia;
- The Commonwealth has the power to determine whether the parent of an ex-nuptial child born in Western Australia has parental responsibility for it;
- A State or Territory court has made a finding that confirms that the co-mother is the parent of the child;
- A court has made a declaration that the co-mother is the parent of the child, while exercising jurisdiction under the FLA.

For a more detailed discussion of the issues involved, see section 2.

6.2 Pharmaceutical Benefits Scheme Safety Net

The Pharmaceutical Benefits Scheme Safety Net (PBSSN) is designed to help people with high medical costs. It means that once an individual or a family reach certain thresholds of expenditure, pharmaceuticals covered by PBS may cost them less. The expenditure thresholds are the same for couples and families as for individuals. Therefore, couples or families who register for the PBSSN may reach the thresholds faster than individuals. A 'family' and a 'dependent child' for PBSSN purposes, is the same as a 'family' and a 'dependent child' for MSN purposes, with the same implications for same-sex couples and their children.

7 Human Rights Implications

7.1 The rights of children

The rights of children are protected under a number of international human rights conventions. Australia is a signatory to each of these conventions.

7.1.1 The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR provides that: 'Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.' (Article 24, paragraph 1)

7.1.2 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR provides that: 'Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.' (Article 10, paragraph 3).

7.1.3 The Convention on the Rights of the Child (CRC)

With regard to children generally, the CRC provides that:

7.1.3.1 Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

7.1.3.2 Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

7.1.3.3 Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

7.1.4 Family assistance, social security and child support arrangements are not compatible with children's rights under these conventions

The failure of the FAO, Centrelink, the CSA, Medicare and the PBS to recognise the relationship between members of same-sex couples who have children and the relationships between same-sex stepparents and their stepchildren and co-mothers and their children is not compatible with children's rights under these conventions. In particular, it is contrary to the State's responsibility to:

- Ensure children's rights to such measures of protection on the part of their family, society and the State as are required by their status as minors without discrimination as to their social origin or birth;
- Ensure that special measures of protection and assistance are taken on behalf of all children and young people without any discrimination for reasons of parentage or other conditions;
- Protect children against discrimination of any kind, including discrimination based upon the status or activities of the child's parents, guardians or family members;
- Respect the roles played by parents, guardians, extended family and community members in providing direction and guidance for children;
- Protect children from arbitrary interference with their privacy, family and home.

7.2 The rights of same sex couples, co-mothers and same-sex stepparents

The right of adults to equal treatment under the law is also protected by international conventions. International conventions also require family units to be given the widest possible protection, particularly while they are responsible for the care and protection of children.

7.2.1 The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR provides that: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' (Article 26).

7.2.2 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR provides that: 'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children...' (Article 10)

7.2.3 Family assistance, social security and child support arrangements are not compatible with these conventions

The failure of the FAO, Centrelink, the CSA, Medicare and the PBS to recognise the relationship between members of same-sex couples and the relationships between same-sex stepparents and their stepchildren and between co-mothers and their

children is not compatible with human rights under these conventions. In particular, it is contrary to the State's responsibility to:

- Provide equality before the law without any discrimination on any ground;
- Provide the widest possible protection to families, particularly when they are responsible for the care and protection of dependent children.

8 Changing Practices

8.1 Same-sex families are becoming increasingly common

8.1.1 The number of same-sex couples is increasing

The 2001 census identified over 20,000 same-sex couples in Australia.¹ This was twice the figure identified in the 1996 Census. This rapid growth indicates that same-sex couples are more willing to identify as such and/or it may indicate that more same-sex couples are now aware that they can choose to record their relationship on the census form.

8.1.2 The number of same-sex couples is probably underestimated

It is highly likely that the Census underestimates the number of same-sex couples for two reasons. Firstly, same-sex partners must choose to define themselves as a de facto partnership in the relationship question on the Census form. Same-sex couples may not be aware that they can choose the de facto option in this question, especially as same-sex partnerships are not always recognised by the law as de facto partnerships. As a result, many same-sex couples may fail to report their relationship. It is also possible that some closeted same-sex couples may be reluctant to acknowledge their relationship on an official form.

8.1.3 There thousands of same-sex couples in NSW alone

Even on the Census figures, there are thousands of same-sex couples in NSW. The two Commonwealth Electoral Divisions (CEDs) with the highest numbers of same-sex couples recorded at the last Census were both in NSW, Sydney and Grayndler (both inner city). Other CEDs with relatively high numbers of same-sex couples are Wentworth and Kingsford-Smith (both eastern suburbs), Macquarie (Blue Mountains) and North Sydney.²

8.1.4 The proportion of same-sex couples with children is increasing

At the 2001 Census, 19% of female same-sex couples and 5% of male same-sex couples had children. About half of these couples had more than one child. Anecdotal evidence from gay and lesbian community organisations and the gay and lesbian media indicates that the number of children living in same-sex families has risen rapidly since 2001.

8.2 Families are becoming increasingly diverse

Families come in many forms in across the whole community. Gay and Lesbian families are no different.

8.2.1 Stepparents

When one or both partners in a same-sex relationship have children from a previous relationship, the other partner is effectively the children's stepparent. Usually, such children already have two parents (a mother and a father), both at law and in fact.

¹ Australian Bureau of Statistics, *Year Book Australia 2005*.

² Gerard Newman, 'Same-sex couples by Commonwealth Electoral Division', Research Note, Department of the Parliamentary Library, Commonwealth of Australia, 2004.

This has always been and remains a common reason for same-sex couples to have the care of children. However, widespread access to ART has seen other family forms become increasingly common.

8.2.2 Co-mothers

An increasing number of lesbian couples are using ART to have children. Such children have two mothers. However, unlike heterosexual couples using the same services, under the laws of most of the States and Territories, when such a child is born to a lesbian couple, the child has only one legal parent.

8.2.3 Donor ‘dads’

Some women choose a known man to be the donor when they use ART. Some of these women are lesbians, with and without partners, and their known donor may be a gay man. These men may be involved in the lives of any children conceived. They may even take on a role very similar to that of a traditional parent. Where the birth mothers of these children have a partner, such children may effectively have three parents (or even four, if the donor dad has a partner). It is noted that the question of the legal status of donor dads is separate to the recognition of same-sex *couples* and is outside the scope of this review but warrants further attention.

8.3 Same-sex parents are as competent as heterosexual parents

8.3.1 Social science research on same-sex parenting is supportive

There have been a significant number of studies that are supportive of same-sex parenting. These studies indicate that, while there may be some differences between same-sex and heterosexual parenting, overall outcomes are similar and are neither better nor worse for the children of same sex families or heterosexual families.

8.3.2 Reputable professional organisations rely on this research.

Reputable professional organisations have viewed the studies as credible and relied upon them in forming their own conclusions regarding same-sex parenting. These organisations include the American Academy of Paediatrics, the American Psychiatric Association and the American Psychological Association. The American Academy of Paediatrics has also presented a compelling case to its members in favour of same-sex ‘second’ parent adoption (see Appendix 1).

8.3.3 Homophobic attitudes have negative effects on same-sex families

Research does show that same-sex couples and their children are liable to be adversely affected by homophobic attitudes and discrimination based upon sexual orientation. In particular, the children of same-sex families can encounter homophobic teasing and bullying at school, which may have a negative impact on their education and social interactions. This is an argument *for* combating prejudice and not *against* same-sex families. Laws that discriminate against same-sex couples imply that same-sex families are inferior and this may suggest that such homophobia is acceptable. Non-discriminatory laws send a clear signal to the children of same-sex couples, their peers and those responsible for their education and development that same-sex families are equal before the law and that homophobia is not socially sanctioned.

9 Changing Laws

9.1 Recognition of same-sex families under laws in NSW

In 1999, the Property (Relationships) Legislation Amendment Act gave same-sex couples the same rights as heterosexual couples in most areas of NSW law. Specifically, the Act:

- Gave same-sex de facto couples access to the property division regime that has applied to heterosexual couples in NSW since the passage of the De Facto Relationships Act in 1984 (which allows applications for a share of property on the breakdown of a relationship)
- Same-sex couples may also apply under the same provisions for a maintenance order in respect of a child (where the child is under a specified age and both parties to the relationship have taken responsibility for the child)
- Recognised a same-sex de facto partner as a beneficiary where their partner dies without making a will, and also allowed them to make claims to a share of their partner's estate under the *Family Provision Act 1982*
- Created a legal assumption that a same-sex partner should make medical decisions for their partner in the event of incapacity
- Recognised same-sex couples for the purposes of workers' compensation and motor accident compensation laws.

These changes give some limited recognition to the parenting roles played some same-sex couples. Not only do the changes allow claims for maintenance in relation to some children of same-sex couples, having a child together is one criteria which can be used to establish de facto status under these provisions.³

Similar reforms have also been implemented in Victoria, Queensland, Tasmania, WA and the ACT to give same-sex couples recognition equivalent to that provided to heterosexual de facto couples, for most purposes under State/Territory laws.

9.2 Parentage Law Reform

9.2.1 Western Australia

In 2002-2003, WA implemented a wide range of reforms aimed at giving same-sex couples equal status with heterosexual de facto couples. Unlike previous law reforms in this area in NSW, Victoria and Queensland, these changes recognised same-sex couples for the purposes of adoption laws.

Furthermore, the reforms in WA also provided for automatic recognition of the parental status of non-birth mothers (in lesbian couples who have children using ART) and allow both mothers to be listed on the child's birth certificate. This change applies to children born before the reforms as well as afterwards.⁴

³ Jane Saunders et al (eds), *Acts of Passion*, <http://www.actsofpassion.nsw.gov.au>

⁴ Jenni Millbank, *Same-sex Families*, Hot Topics 53, Legal Information Access Centre, 2005; John Seymour and Sonia Magri, *ART Surrogacy and Legal Parentage: A Comparative Legislative Review*, Victorian Law Reform Commission, 2004.

9.2.2 Australian Capital Territory

In 2003-2004, the ACT implemented legislative reforms aimed at extending the legal recognition of same-sex couples. As in WA, these reforms allow same-sex couples and same-sex stepparents to adopt and recognise non-birth mothers.⁵

9.3 Recognition of same-sex families in overseas jurisdictions

9.3.1 Same-sex civil unions and same-sex marriages

In addition to recognising same-sex couples as de facto couples, a growing number of countries have either allowed same-sex couples to marry or allowed same-sex couples to enter into civil unions that create identical rights and responsibilities to marriage. Jurisdictions that either allow same-sex couples to marry or provide for civil unions of this type include Canada, the Netherlands, the United Kingdom, Spain, New Zealand and Belgium.⁶

9.3.2 Adoption laws

A recent comparative review of adoption legislation undertaken by the Victorian Law Reform Commission found that up to 22 states in the US permit gay and lesbian individuals and same-sex couples to adopt in at least some counties. In the United Kingdom, same-sex couples and stepparents in same-sex couples were eligible to adopt even before they were able to enter into civil unions.⁷

Similarly, even before same-sex couples were able to marry in Canada, the Canadian Supreme Court ruled that restrictive definitions of 'spouse' in adoption legislation that excluded same-sex couples were unconstitutional because they infringed the *Canadian Charter of Human Rights and Freedoms*, which guarantees every person the equal benefit and protection of the law without discrimination.⁸

9.4 Law reform commission recommendations

The NSW Law Reform Commission, the Victorian Law Reform Commission and the Law Reform Institute of Tasmania have all recommended that the adoption laws of their respective States be altered to enable same-sex couples and stepparents in same-sex couples to adopt on the same basis as heterosexual couples and stepparents in heterosexual couples. In addition, the Law Reform Institute of Tasmania and the Victorian Law Reform Commission have both recommended that non-birth mothers be recognised automatically, as is already the case in WA and the ACT.

⁵ Millbank, *Same-sex Families*.

⁶ NSW Gay and Lesbian Rights Lobby, 'All Love Is Equal – Isn't It: Towards Same-Sex Relationship Recognition on a Federal Level', Community Consultation Discussion Paper, March 2006.

⁷ Seymour and Magri, *ART Surrogacy and Legal Parentage*.

⁸ Tanya Canny, 'Same Sex Couple Adoption: The Situation in Canada and Australia', Research Note, Department of the Parliamentary Library, Commonwealth of Australia, 2000.

10 Changing Attitudes

10.1 *Australians support legal recognition of same-sex couples*

10.1.1 **The most recent polling shows majority support**

In February 2006, *Newspoll* asked a representative sample of 1200 Australians aged over 18: “Do you personally agree or disagree that the Federal Government should introduce a new law which formally recognises same sex relationships?”⁹ The results showed:

- *The majority of Australians agree, with over a third strongly agreeing*
- Only 36.6% disagreed (27.6% strongly), with 10.9% undecided

10.1.2 **Support is strongest amongst women and younger people**

In the 2006 *Newspoll* survey:

- *Almost three quarters of those aged 25-34 supported same-sex recognition, with over half strongly supporting it*

These trends are supported by other recent surveys:

- A *Newspoll* survey conducted in June 2004 regarding same-sex marriage found support for same-sex marriage was strongest amongst women, younger people and those in capital cities.¹⁰
- The Australian Survey of Social Attitudes (AuSSA) 2003 found that most Australians aged under 50 believe that a same-sex couple with a child constitutes a family, as do half of all Australian women.¹¹

10.1.3 **Support is strongest in WA and NSW**

In the 2006 *Newspoll* survey:

- Support for recognition was strongest in WA (57.8% support, including 42.7% who strongly support)
- NSW had the next highest level of support (55.8%)

10.2 *Support for legal recognition is increasing*

10.2.1 **The most recent opinion poll is the most favourable**

The AuSSA was conducted in late 2003, while the *Newspoll* on same-sex relationship recognition was conducted in early 2006. While the two surveys asked slightly different questions, the higher level of support for same-sex relationship recognition in the later survey probably indicates that *support for same-sex relationship recognition is growing*.

⁹ Newspoll Market Research, ‘Church and State’, prepared for Humanist Society of NSW Inc, February 2006.

¹⁰ Newspoll Market Research, on Gay Marriage, for SBS World Television, June 2004,

<http://www.newspoll.com.au>

¹¹ Shaun Wilson et al (eds), *Australian Social Attitudes: The First Report*, UNSW Press, Sydney 2005.

10.2.2 Public debate and law reform appear to increase support

Between the two surveys, there has been extensive debate about same-sex marriage and civil unions. The higher level of support for recognition in the later survey combined with the higher level of support for recognition in WA where comprehensive State law reform took place four years ago, both suggest that *public debate and legal reform have increased support for recognition*. The Western Australian result also indicates that *legislative reform does not polarise public opinion*. As well as having the highest support for same-sex relationship recognition, Western Australia also has the lowest level of strong opposition to recognition.

10.2.3 Future generations will be more supportive

The high level of support for same-sex relationship recognition amongst people under 50 and amongst those with children would also suggest that support for recognition will continue to increase over time.

11 Recommendations

11.1 Recognition of same-sex couples for the purposes of family assistance, social security and medical benefits

The laws governing entitlements and benefits administered by the Family Assistance Office, Centrelink, the Child Support Agency, Medicare and the Pharmaceutical Benefits Scheme should be amended to give the same recognition to same-sex couples as is given to heterosexual de facto couples. This should include giving equal recognition to the relationship between stepparents and stepchildren where that relationship arises from a same-sex couple relationship as is given when that relationship arises from a heterosexual de facto couple relationship.

11.2 Recognition of co-mothers under all State and Territory parentage laws

All States and Territories should amend their parentage laws to recognise co-mothers on the same terms as they are recognised under the parentage laws of Western Australia and the Australian Capital Territory.

11.3 Equal recognition of the parentage of all children for the purposes of all Commonwealth laws

The Commonwealth should pass whatever legislative changes are necessary to ensure that, when the parentage of a child is recognised in their State or Territory and given equal status by that State or Territory with the parentage of other children in that State or Territory, it is also recognised by the Commonwealth and given equal status by the Commonwealth as the parentage of other children in the Commonwealth.

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