

Review of the legal status of children
being cared for by same-sex parents
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Introduction

On 8 October 2008, the Queensland Parliament's Investigation into Altruistic Surrogacy Committee tabled in Parliament its report, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland* (the Report). Recommendation 20¹ of the Report states:

"The committee notes the broader issue of recognition of same-sex parents and recommends to the Queensland Government that it conduct a review of the legal status of children being cared for by same-sex parents with particular reference to the operation of the Status of Children Act 1978."

On 23 April 2009, the Premier and Minister for Arts, the Honourable Anna Bligh MP, tabled the Government Response to the Report recommendations. The response to recommendation 20 noted the Committee's comments that the issue of same-sex parents has wider implications than surrogacy alone and relates to the legal status of all children being cared for by same-sex parents. The Government Response noted the Government would give consideration to the appropriate mechanism to review the legal status of children being cared for by same-sex parents.

There have been a number of reviews regarding same-sex parenting across Australian jurisdictions.² These reviews and the findings are discussed later in this paper.

This paper is the result of the Queensland Government's review of the legal status of children being cared for by same-sex parents.

This paper considers the current status of the law, the issues resulting from the current law, the findings and recommendations of the other jurisdictional reviews and provides the Queensland Government's position.

The need for legal certainty in parent-child relationships

Legal certainty is important because obligations and entitlements arise out of the parent-child relationship. If the parent-child relationship is not legally recognised, the child may have reduced rights or entitlements compared to other children within the community.

¹ Investigation into Altruistic Surrogacy Committee report, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland* October 2008, Page 79.

² New South Wales Law Reform Commission's Report, *'Relationships'*, June 2006; Human Rights and Equal Opportunity Commission's Report, *'Same Sex: Same Entitlement'*, May 2007; Victorian Law Reform Commission's Report, *'Assisted Reproductive Technology and Adoption'* March 2007 and Tasmanian Law Reform Institute's Report, *'Adoption by same-sex couples'* May 2003.

Some of the obligations and entitlements created out of the parent-child relationship include:

- entitlement to a share of the person's estate if they have made inadequate provision for the child under the will or the person dies without making a will;
- entitlement to a distribution of a person's superannuation after his or her death;
- power to consent to medical treatment and in particular, removal of tissue from the child or blood transfusions;
- power to appoint a testamentary guardian for the child;
- power to bring legal proceedings on behalf of the child;
- obligation to ensure the child is at school or employment if the child is under 16 years;
- entitlement to be a party in child protection proceedings; and
- entitlement to be present when the police are questioning a child.

Although a parenting order made under the *Family Law Act 1975* may create similar legal entitlements in some of these areas, a parenting order is not final and therefore can be varied at any time, expires when the child is 18 years and is subject to its specific terms³. Also a parenting order will not overcome the problems associated with the child's entitlements under succession law⁴.

The *Status of Children Act 1978*

The purpose of the *Status of Children Act 1978* (SCA) is to provide legal certainty in relation to the status of children and their parents⁵. All other States and Territories have similar legislation which was first introduced in the 1970s to remove the status and consequential stigma of 'illegitimacy' by providing that all children have the same status and have, where possible, two presumed legal parents⁶.

Under SCA, parental status is presumed for certain adults: to enable them to exercise the powers and responsibilities of parents under statute and common law to care for their children; and to ensure that there is parity in relation to the rights of children irrespective of their family arrangements.

The presumptions are reasonably uniform throughout Australia. Some of the presumptions are rebuttable and some are irrebuttable. It should be noted that the presumptions in the SCA are presumptions as to **legal** parentage, not genetic parentage.

⁴ See section 61D of the Family Law Act 1975 (Cwth). Also, section 64B(2) of the Family Law Act 1975 (Cwth) provides that a parenting order may deal with who the child lives with, the time the child is to live with other person and the allocation of parental responsibility.

⁴ For example, where the non-biological co-parent in a same-sex relationship dies intestate, the child of that relationship is not regarded as a child of the deceased parent and could not receive an entitlement of the estate of the deceased parent under the intestacy rules in Schedule 2 of the *Succession Act 1981*.

⁵ *Status of Children Act 1978*, Section 6 (All children to be of equal status)

⁶ See, *Status of Children Act 1996 (NSW)*; *Status of Children Act 1974 (Vic)*; *Artificial Conception Act 1985 (WA)*; *Status of Children Act (NT)*; *Parentage Act 2004 (ACT)*; *Family Relationships Act 1975 (SA)* and *Status of Children Act 1974 (Tas)*.

Parental presumptions under the *Status of Children Act 1978* when a fertilisation procedure is used

Where a child is born as a result of a fertilisation procedure and the birth mother is married (married includes being in a heterosexual de facto relationship) the SCA creates irrebuttable presumptions that the birth mother is the mother of the child and her male partner is the father of the child.⁷

A fertilisation procedure is either artificial insemination or a procedure of implanting in the womb of a woman an embryo derived from an ovum produced by her (or another woman) and fertilised outside her body by semen produced by her husband (or another man). These presumptions are made whether or not the ova or semen are from the birth mother or her male partner.

Where a child is born as a result of a fertilisation procedure and the birth mother is single, is married but does not have her male partner's consent to the procedure or is in a same-sex relationship, the SCA creates an irrebuttable presumption that the birth mother only (whether or not the ova is from the birth mother) is the mother of the child.⁸ There is no presumption about who is the father of the child. In relation to the male donor, SCA provides that the male donor has no rights or responsibilities in relation to the child (except if he later marries or enters into a de facto relationship with the birth mother).⁹

Therefore, where the birth mother is in a same-sex relationship and she undergoes a fertilisation procedure with the consent of her partner, SCA does not recognise the birth mother's same-sex partner as a parent of the child, even though the birth mother's partner has agreed for the birth mother to have the procedure and to co-parent the child.

Consequences of the SCA presumptions

The gender specific wording of the presumptions treats children of lesbian couples differently from children of heterosexual de facto couples.

Unlike children of heterosexual couples, children conceived from a fertilisation procedure or artificial insemination and born into a same-sex relationship have only one legal parent (the birth mother), although the intention of the couple is to co-parent the child. A child born into this situation may be disadvantaged throughout life and on the death of their parents by having a legal connection to only one parent and one set of extended family.

⁷ Section 17 for when conception is by artificial insemination; Section 18 for when conception is by fertilisation procedures and Section 19 for when donor ovum is used.

⁸ Section 21 for when conception is by artificial insemination; Section 22 for when conception is by fertilisation procedures and Section 23 for when donor ovum is used.

⁹ . Section 21 for when conception is by artificial insemination; Section 22 for when conception is by fertilisation procedures and Section 23 for when donor ovum is used.

Inter-jurisdictional reviews

There has been recent law reform reviews around Australia that have included a consideration of this issue.

The New South Wales Law Reform Commission's June 2006 '*Relationships*' report (the NSWLRC Report) discussed the possibilities of reform to the ways in which functional parents in same-sex families can acquire recognition as legal parents. The NSWLRC view is that '*.. there is no justification for excluding co-mothers from the Status of Children Act 1996 (NSW) parentage presumptions. The legal disadvantage suffered by children born within a lesbian relationship and their co-mothers constitutes a compelling justification for prompt legislative amendment.*'.¹⁰ The NSWLRC Report recommended that the *Status of Children Act 1996 (NSW)* be reworded in gender neutral terms so as to extend the presumption of parentage to parties to a same-sex de facto relationship and that the amendments should apply retrospectively except to the extent that the amendments should not affect the vesting in possession or in interest of any property that happened before the commencement of the amendments.¹¹

The Human Rights and Equal Opportunity Commission (HREOC) May 2007 report, '*Same Sex: Same Entitlement*' (the HREOC report) determined that for children of same-sex parents, inequalities exist and suggested a number of amendments including that all States enact parenting assumptions in favour of a lesbian co-mother and that federal law clearly recognise those presumptions and the birth certificates flowing from those presumptions.¹²

The Victorian Law Reform Commission's March 2007 'Assisted Reproductive Technology and Adoption' report (the VLRC Report) also considered this issue. The Victorian Law Reform Commission (VLRC) found that the failure of the law to recognise the full parental role of the birth mother's female partner has important implications for children because it affects their rights to inheritance as well as their legal relationship with the extended family of the non-birth mother.¹³ The VLRC found that a parenting order made under the *Family Law Act 1975* would not confer a full range of parental obligations and powers on the person in whose favour it is granted and nor would it require a person to be recorded on the child's birth certificate¹⁴.

The VLRC Report recommended that the law should recognise a birth mother's female partner (non-birth mother) as a parent of the child in circumstances where the

¹⁰ Paragraph 5.57 of the New South Wales Law Reform Commission's June 2006 '*Relationships*' report

¹¹ Recommendations 18 and 19 of the New South Wales Law Reform Commission's June 2006 '*Relationships*' report

¹² See: Paragraph 5.5.2, Recommendation 2 of the Human Rights and Equal Opportunity Commission (HREOC) May 2007 report, '*Same Sex: Same Entitlement*'

¹³ Page 126 of the Victorian Law Reform Commission's March 2007 'Assisted Reproductive Technology and Adoption' report

¹⁴ Page 126 of the Victorian Law Reform Commission's March 2007 'Assisted Reproductive Technology and Adoption' report

non-birth mother is the domestic partner of the birth mother and the non-birth mother consented to the treatment procedure by which the birth mother conceived.¹⁵

With the exception of Queensland, South Australia and Tasmania, the States have taken steps to remove provisions which differentiate between male and female partners of a birth mother– see the **Table A** below. Because of the reciprocity of the presumption in relation to registration of birth in all state and federal legislation, a person who is presumed to be the parent of a child under State, Territory or Commonwealth legislation and is registered as such on the child’s birth certificate is recognised as a parent in other jurisdictions.

Table A: Interstate provisions recognising same-sex partner of birth mother as parent of the child (as at 18 June 2009)

Jurisdiction	Recognition	Legislation details
NSW	Yes	Section 14(1A) <i>Status of Children Act 1996</i> – same-sex partner of birth mother who undergoes a fertilisation procedure is presumed to be a parent - provided the same-sex partner consented to the procedure. Irrebuttable presumption
Vic	Yes	Section 13 of the <i>Status of Children Act 1974</i> - same-sex partner of birth mother who undergoes a procedure is presumed to be a parent - provided the same-sex partner consented to the procedure. Irrebuttable presumption
WA	Yes	Section 6A <i>Artificial Conception Act 1985</i> – same-sex partner of birth mother who undergoes a fertilisation procedure is presumed to be a parent - provided the same sex partner consented to the procedure. Irrebuttable presumption
NT	Yes	Section 5DA <i>Status of Children Act</i> - same-sex partner of birth mother who undergoes a fertilisation procedure is presumed to be a parent - provided the same-sex partner consented to the procedure. Irrebuttable presumption
ACT	Yes	Section 11 (4) of the <i>Parentage Act 2004</i> . Same-sex partner of birth mother who undergoes a procedure is presumed to be a parent - provided the same-sex partner consented to the procedure. ‘Procedure’ means artificial insemination, transfer into the uterus an embryo derived from an ovum fertilised outside the woman’s body or any other way a woman may become pregnant (whether medically assisted or not) apart from having sexual intercourse with a man.. (Note re surrogacy ‘procedure’ limited to transfer into the uterus an embryo derived from an ovum fertilised outside the woman’s body.) Irrebuttable presumption
Tas	No	
SA	No	
Qld	No	

The Federal Parliament recently passed amendments to the *Family Law Act 1975*¹⁶ to recognise female same-sex de facto couples as the parents of a child born where the couple consent to the artificial conception procedure and one of them is the birth mother. The amendments will ensure these children can have their parents recognised and have access to child support in the same way as children of opposite-sex couples who separate. (The amendments also recognise children born under surrogacy arrangements where there has been a State court order relating to the parentage of a

¹⁵ Page 128 of the Victorian Law Reform Commission’s March 2007 ‘Assisted Reproductive Technology and Adoption’ report

¹⁶ *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*, passed both Houses of the Commonwealth Parliament on 10 November 2008. Section 60H was amended.

child.)¹⁷ These amendments are also consistent with the approach of the States that have laws providing presumptions of parentage for children born to a female in a same-sex de facto relationship.¹⁸

Proposed reform

To achieve consistency with other jurisdictions and in line with the other jurisdictions' reviews, amendments to the *Status of Children Act 1978* to extend the current presumptions are required. Amendments to the *Births, Deaths and Marriages Registration Act 2003* enabling the birth mother's partner to be recorded as a parent of the child are also required.

In the ACT, the presumptions of parentage have been extended to include same-sex couples who cohabit or where a fertilisation procedure has been used to conceive a child. The amendments replace the gender specific wording in the relevant sections with references to 'parent' and 'spouse' as defined in the *Acts Interpretation Act 1954*.

In Victoria, New South Wales, Western Australian, Northern Territory and the Commonwealth (under the *Family Law Act 1975*), the amendments to the presumptions have been limited to where there has been a fertilisation procedure used to conceive the child. The amendments insert a new provision to recognise the non-biological lesbian co-parent, where the birth mother has undergone the fertilisation procedure with the consent of her partner.

The effect of the operation of these presumptions is that when the child's birth is registered, the non-biological lesbian co-parent is eligible to be registered as 'parent' alongside the birth mother's registration as 'mother'. The birth certificate issued subsequent to this registration similarly identifies the 'mother' and 'parent'.

Either approach will remove the situation whereby male partners of women who become pregnant are presumed to be the parent of the child, but female partners are not, as a result of part 3 of the *Status of Children Act 1978*.

The presumptions in the *Status of Children Act 1978* are presumptions as to **legal** parentage, not genetic parentage, and any such amendments would be consistent both with the current framework and objectives of the Act to provide for legal certainty for children. Also the amendments will not detract from the uniformity sought in relation to the presumptions of paternity in circumstances of cohabitation or artificial conception. The amendments will not affect the parental responsibilities of fathers in circumstances where an opposite sex couple separate after having children and the woman commences a later relationship with another woman.

Queensland reform in this area will adopt the approach of the majority of Australian jurisdictions who have opted for the insertion of a specific provision relating to where

¹⁷ *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008, Schedule 3A – Children, Section 8.*

¹⁸ See: *Status of Children Act 1996 (NSW) Section 14(1)(a); Status of Children Act 1974 (Vic) Section 13; Artificial Conception Act 1985 (WA) Section 6A; Status of Children Act (NT) Section 5DA; and Parentage Act 2004 (ACT) Section 11(4).*

artificial insemination and IVF have been used to conceive the child. This proposal will provide legal recognition of the parental status of a non-biological parent who has planned with her partner to have and raise a child together as a family. The legal recognition of the family structures of children born into same sex relationships will:

- provide these children with two legal parents instead of only one;
- promote certainty for parents and children in terms of the legal relationships with each other;
- provide legal certainty for service providers when they act on the basis of the consent of the non-biological parent; and
- provide children with the same level of security, both personal and financial, as children of heterosexual parents, should either of their parents die.¹⁹

This proposal would not affect children of male same-sex couples as the presumptions are based on the relationship with the woman who gives birth to the child. However, male same-sex couples may be eligible to apply for a transfer of legal parentage from the birth mother under the proposed Queensland surrogacy model provided that there is compliance with the prescribed requirements under the model, such as a pre-conception arrangement with no commercial benefits to any party.

This proposal also does not affect the legal relationship between a child and the same sex partner of a biological parent where the relationship was formed after the birth of the child. However, these relationships are more analogous to heterosexual step-parenting and are able to be legally secured through Family Court parenting orders.

¹⁹ For example, where the non-biological co-parent in a same-sex relationship dies intestate, the child of that relationship is not regarded as a child of the deceased parent and could not receive an entitlement of the estate of the deceased parent under the intestacy rules in Schedule 2 of the *Succession Act 1981*

Comments

Comments on the proposed changes to the parentage presumptions for same-sex parents can be made before 18 September 2009:

- By email to: legalpolicysubmissions@justice.qld.gov.au; or
- By writing to : Director, Strategic Policy, Department of Justice and Attorney-General, GPO Box 149, Brisbane QLD 4001

This document is also available on the Department of Justice and Attorney-General community consultation website: <http://www.justice.qld.gov.au/33.htm>

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