From Here to Maternity: A Review of the Research on Lesbian and Gay Families

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Introduction

Many areas of social and legal policy in Australia affect lesbians, gay men and the children they raise. There is a distinct lack of information about how such families are formed and how they function. In the absence of good quality information, decision-makers and policy-makers may either ignore the existence of such families, or proceed on the basis of assumptions that may be inappropriately drawn or inaccurate.

Judith Stacy and Timothy Biblarz note (in the context of the US):

> [T]he consequences of [research into lesbian and gay families]...bear on marriage and family policies that encode Western culture's most profoundly held convictions about gender, sexuality, and parenthood. As advocates and opponents square off in state and federal courts and legislatures, in the electoral arena, and in culture wars over efforts to extend to nonheterosexuals equal rights to marriage, child custody, adoption, foster care, and fertility services, they heatedly debate the implications of a youthful body of research, conducted primarily by psychologists, that investigates if and how the sexual orientation of parents affects children.[1]

There remains a presumption in much legal and social policy that lesbian and gay parenting is suspect, second-rate or harmful to children. The sexuality of a parent is still a factor to be taken into account in Family Court decisions on

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residence and contact with children, to determine whether it is harmful.[2] No state in Australia allows a lesbian couple or gay male couple to apply to adopt a child together as joint parents[3] nor does there appear to be any political will to change this.[4] The exclusion from ability to adopt operates even in Western Australia, which has recently passed the most broad-ranging legislation in Australia recognising same-sex relationships (including, more remarkably, a presumption that the non-biological mother is the parent of the child for all legal purposes in state law if the child is born through donor insemination and she is the consenting de facto partner of the mother.)[5]

Access to fertility services for lesbians and single heterosexual women has been widely debated in Australia since 2000 as a result of a challenge brought to restrictive fertility legislation, and the lengthy legislative aftermath and appeal process once the decision was handed down. In 2000, John McBain, the doctor of Leesa Meldrum, challenged provisions in the law of Victoria limiting access to fertility services in that state to married and heterosexual de facto couples.[6] The restrictive legislation was found to be in breach of federal law prohibiting marital status discrimination.[7] The media uproar that followed principally focused on lesbian mothers, even though Ms Meldrum herself was heterosexual.[8] While the Victorian government accepted the decision (and indeed did not take an active part in defending proceedings), the Federal Government responded to the decision by attempting to amend the *Sex Discrimination Act* 1984 (Cth) to permit states to discriminate against lesbians and single heterosexual women in the provision of fertility services if they so chose. A Senate Inquiry recommended against the Bill and it failed to pass the Senate.[9] The Commonwealth then took the unprecedented step of granting a fiat to the Catholic Bishops Conference to seek to overturn the *McBain* decision in the High Court (this allowed the Bishops to bring proceedings even though they were not parties to the original case and the original respondent, the State of Victoria, had accepted the decision).[10] The High Court ultimately upheld the original decision.[11] Meanwhile, the administrative agency responsible for licensing fertility services in Victorian interpreted the *McBain* ruling as applicable only to "medically infertile" and not to "socially infertile" women. Thus, lesbians and single heterosexual women who required IVF were made eligible to receive treatment, but women who want access to safe and/or anonymous sperm, because they cannot or do not wish to conceive with a man, continue to be excluded from fertility services in Victoria to date.[12] This

position has been much criticised,[13] not least of all because it ignores the health risks to both mothers and children through the use of un-tested semen.[14] In late 2002 the Victorian government showed a greater readiness to consider change when it initiated an inquiry into the eligibility of lesbians and gay men to adopt, the accessibility fertility services, and the legal status of children born through donor insemination by the Victorian Law Reform Commission for detailed consideration.[15]

This lengthy and bitterly contested case study demonstrates that there continues to be an enormous cultural and legal resistance to the recognition of gay and lesbian parenting in Australia. However, the intensity of the debate on this topic has not been matched by detailed or grounded discussion. There has been much rhetoric about "proper" families and what is "good" for children, but little sourcing to actual data on child development or social science literature on different family forms. When reasons are articulated for exclusionary measures such as the ones discussed above, they are frequently made on the basis of the child's "best interests". The Federal Government consistently denied that it was discriminating against single women or lesbians in attempting to overturn *McBain* to restrict fertility services. For example Mr Howard stated, "We're not talking here about discrimination. We're talking about the rights of children".[16] Nonetheless this did slip into broader rhetorical statements about controlling family forms:

> We're looking to the interests of unborn children. I think the Government does have a responsibility to express a view, send a signal, as to what its beliefs [are] about the kind of society we ought to be.[17]

The Catholic Church went further, with the Archbishop of Melbourne calling the *McBain* decision a "massive social experiment" (despite the fact that it brought Victoria into line with most other Australian states) that would "create a generation of stolen children".[18] Senator Brian Harradine echoed this claim.[19] Who the children were being stolen *from* was never articulated (the sperm donor? the father that lesbians and single heterosexual women might have been eventually driven to marry by their unfulfilled desire to have children?) but the premise was clear: real normal families were being undermined by homosexuals selfishly having children in circumstances that were profoundly disadvantageous to them. The Australian Family Association (AFA) in their

submission to the Senate Inquiry included a number of documents asserting that lesbians and gay men are unstable, physically and emotionally diseased, drug-prone and unhealthy (including, a now infamous claim that homosexuals are fond of sex with animals).[20] The submission asserted that homosexuality is "dangerous" and expressly linked it to paedophilia and suicide. The AFA tendered long lists of references, many of them second-hand references to obscure or disreputable sources.[21] Equality-seeking submissions also included long lists of studies, many of which originate from major universities and appear in reputable journals.[22] Faced with long lists of references, the Senate Committee did not appear to read or engage with the available literature on child development, and instead simply claimed that there were "extensive references" to support claims on both sides.[23]

Good quality demographic information about lesbian and gay families is essential to inform current and future law reform and policy inquiries. It is important in both a defensive and a pro-active sense. Defensively, this information is useful to rebut ill-informed presumptions of harm such as those discussed above. Pro-actively it is essential to provide a basis for policy development that it directed to serving the largely unmet needs of increasing numbers of lesbian and gay parents and their children. As law and policy gradually shift to take the needs of such families into account it is vital to have an understanding of how such families are formed and how they function.[24] Do same-sex couples tend to share income equally? Do they make equal financial and non-financial contributions to the acquisition of property? Do they contribute to childcare equally? Are the answers to these questions different for lesbian couples compared to gay male couples? This information matters when we consider that assumptions about contribution and sharing — such as those in property division regimes that now apply to same-sex couples in the ACT, NSW, Victoria, Queensland and WA[25] — are drawn from the experience of heterosexual de facto couples.[26] Information on family forms and responsibilities matters when we consider whether child support laws ought to be reformed to include same-sex couples who are parenting. There are myriad other legal and policy questions that could and should be addressed for lesbian and gay families.[27] These questions need a solid empirical base to work from.

At present there is very little Australian information on these issues. This article reviews much current British and American literature on the children of lesbians and gay men. It also connects this literature, for the first time, with the

small amount of information available on lesbian and gay families in Australia. The article is divided into two main parts. The first outlines what demographic information is available about lesbian and gay family forms. The second section provides an overview of the results of sociological and psychological research into the development and well being of children raised in lesbian and gay families. The concluding section makes some comments on the implications of this body of research for both current and future legal and policy regulation of lesbian and gay families.

I. Family Forms

When considering the parenting of same-sex couples, issues of gender and sexuality can become intermingled. Much of the recent overt objection to lesbian-mother families, for instance, has centred on father absence rather than lesbian sexual orientation *per se*. In the debate surrounding access to fertility services in Australia, Prime Minister John Howard repeatedly stressed the "right of children to a father".[28] Howard also stated that

> *The evidence* does suggest that children raised in the environment of having both a mother and a father are more likely to have happier, more fulfilled lives.[29] (emphasis added)

The question here is: what evidence?

It is well documented that in Australia and elsewhere, American literature on "father absence" has been much misused. Louise Silverstein and Carl Auerbach argue concisely that much literature on "father absence" represents an essentialist view of fathers and a "dramatic oversimplification of the complex relations between father presence and social problems".[30] They make the point that studies positing the detrimental effects of "father-absence" are in fact explicable as a direct result of maternal poverty. When poverty is controlled for in studies there is no demonstrable difference in the well being of children in father-present and father-absent families.[31]

Silverstein and Auerbach undertook original research into over 200 men from different subcultures in America to study different fathering styles. They conclude that "responsible fathering" occurs across all family types and is not connected to family structure. Silverstein and Auerbach state:

> ... our data on gay fathering couples have convinced us that neither a mother nor a father is essential. Similarly, our research with divorced, never-married, and remarried fathers has taught us that a wide variety of family structures can support positive child outcomes. We have concluded that children need at least one responsible, caretaking adult who has a positive emotional connection to them and with whom they have a consistent relationship. Because of the emotional and practical stress involved in child rearing, a family structure that includes more than one such adult is more likely to contribute to positive child outcomes. Neither the sex of the adult(s) nor the biological relationship to the child has emerged as a significant variable in predicting positive development. One, none, or both of those adults could be a father (or mother). We have found that the stability of the emotional connection and the predicability of the caretaking relationship are the significant variables that predict positive child adjustment. We agree with the neoconservative perspective that it is preferable for responsible fathers (and mothers) to be actively involved with their children. We share the concern that many men in US society do not have a feeling of emotional connection or a sense of responsibility toward their children. However, we do not believe that the data support the conclusion that fathers are essential to child well-being and that heterosexual marriage is the social context in which responsible fathering is likely to occur.[32]

It is also fallacious to assume that lesbian-led families necessarily and universally involve raising children completely in the absence of men, fathers, or father-figures. As will be outlined below, many lesbian women are having children through donor insemination in a variety of family forms where the biological father may have contact with the child or even extensive involvement in the child's life. Even women who have conceived with anonymous donors have male friends and family members of their own. Numerous studies have demonstrated that the children of lesbians have contact with their fathers and/or the involvement of male role-models in their lives,[33] and that many lesbians report that they value such relationships and encourage them.[34]

It is also important to note that difference does not necessitate disadvantage. Some new research suggests that lesbian and gay families are in some respects better for children than heterosexual families. In Gillian Dunne's interviews with 37 lesbian-led families in the UK she concludes: "creativity and cooperation...appear to characterise much of the parenting of lesbian couples".[35] Research on the division of parenting and household labour among lesbian co-parents and gay co-parents has shown a distinct pattern of equality and sharing compared to heterosexual parents, with corresponding positive well-being for the partner's relationship with each other, *and* the child's adjustment.[36] These issues are discussed in some detail below.

Charlotte Patterson sums up the issues facing lesbian and gay parents in social and legal policy as follows:

> In conceptualising parenthood, it is helpful to distinguish three facets of the status or role — the biological, the social, and the legal. Traditionally, all three facets of parenthood have been expected to correspond to one another. When a heterosexual couple fell in love, got married, and had children, there was no separation among the biological, social and legal aspects of parent-child relations...In the contemporary world, however, these three aspects of parenthood are often disconnected. With many births taking place outside of marriage and with frequent divorces and remarriages, children are increasingly unlikely to be cared for by both their biological parents throughout their childhood and adolescence and increasingly likely to live with adults (such as step-parents) who are not their legal parents...
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> Families that are created when lesbians have children often bring such issues out in high relief. Consider, for example, a lesbian couple attempting to conceive a child using [donor insemination]. There are three adults involved — the two women and a male sperm donor. If a child is conceived, there will be two biological parents — a biological mother and a biological father.... In most states, there will likely be only one legal parent — namely the biological mother. While there will be two social parents, one of them will be a legal stranger to the child... Thus, children brought up in this family will find that the expected

correspondence of social, biological and legal aspects of parent-child relations do not hold true for them.[37]

While there are few important differences in parenting styles or child adjustment across lesbian and gay families compared with heterosexual families, lesbian and gay families do face particular challenges and have unique needs. They must, for example, try to craft their own social resolutions to the problems of legal and social non-recognition of lesbian and gay co-parents and step-parents. They must also try to build frameworks of social recognition for known donors, whom lesbian mothers often wish to have a role greater than "friend" but distinctly different to "father" in relating to their children. Current legal frameworks in Australia do not assist in this process and often inflexibly exclude the lived reality of the relationships of lesbian and gay parents and their children — so that a child raised by two lesbian mothers and a gay father has only one legal parent, while socially there may in fact be three parents.

How Many Children have Gay or Lesbian Parents?

There is no reliable demographic information on the proportion of the adult population who are lesbian or gay identified. Non-random survey figures taken from lesbian and gay populations can, however, give a sense of what proportion of lesbians and gay men have or are raising children. In a recent survey of the relationships of 670 lesbians, gay men, bisexuals and transgendered people in Victoria, children were part of the relationship of 22% of respondents.[38]

Several large scale studies of gay men in the USA have suggested that around 10% of gay men are parents.[39] A smaller Australian survey of "homosexually active" men published in 1996 found that 19% of the men had a child or children — however these figures may be inflated by the fact that not all of the men were gay identified and some were living with a female partner.[40] Of the gay male couples who identified themselves as such in the 1996 Australian Census, only 2.4% were living with children. McNair et al note that this figure is an under-representation as it does not register parents who are not in couples and it also does not record fathers who do not live with their children.[41]

A large scale US survey of lesbians found that 9% of the respondents were custodial parents.[42] In contrast, of the lesbian couples who responded to the

first NZ census question on same-sex couples in 1996, 21% of them had children.[43] This is on par with the lesbian couples who responded to the 1996 Australian Census: 17.9% of them lived with children.[44] As with the gay male couples' response to the Australian Census this is an under-representation because it excludes single parents and non-residential parents (but is likely to be more accurate for women than for men for the reason that women are more likely to be residential parents of children).

A small survey of lesbian readers of a Sydney-based magazine in 1995 found that 19% of lesbian respondents had or lived with children, and a further 14.5% planned to have children in the next 5 years.[45] In 1999 a similar survey by the same magazine of found that 12.7% of lesbian respondents had dependent children and a further 9.1% had non-dependent children. Moreover a further 19.7% of respondents reported that they intended to become pregnant in the next 5 years, with almost 70% of them stating that they expected to use donor insemination (DI) to do so.[46]

Taking the available Australian figures of existing mothers, rather than those who report a desire to become mothers, and comparing the figures from the same sampling method across years (although the number of respondents varied), the survey company Significant Others concluded that there was a discernible trend to increasing numbers of lesbians having children: in 1993 the proportion of respondents with children had been 14.3%; in 1995 it was 19%; and in 1999 it was 21.8%.[47]

Given this range of figures, it seems likely that around 15–20% of Australian lesbians have children. There is much less information available regarding gay men, but it appears that around 10% of gay men are parents. The proportion of lesbians and gay men who have children is likely to increase in the next 5–10 years.[48]

Family Forms into Which Children are Born

Lesbian Families

Women who come to parent the child of a partner from a previous relationship — either a previous heterosexual relationship, or, increasingly, through donor

insemination (either alone or with a previous lesbian partner) - are referred to here as "step-parents". Women who are non-biological parents in a relationship with a partner where they have jointly planned, conceived and raised a child are often called "co-mothers." Biological mothers in all of the above situations often have the unhyphenated luxury of being called "mothers", but are sometimes referred to as "birth-mothers" or "biological mothers".

In Fiona Nelson's survey of 30 lesbian mothers in Alberta, Canada, roughly half of the women had children through previous heterosexual relationships and half had borne children within a lesbian relationship.[49] This is roughly comparable with the preliminary results of an Australian study currently underway, the Lesbian and Gay Families Project. Preliminary data from the Victorian sample of 136 women found that 52% of the current parents had children through a heterosexual relationship.[50] In this sample, 42% of the children had been born through donor insemination (DI) (6% of them through IVF), while 2% of the children were fostered and 2% of the children were adopted.[51] Only 2% of the prospective parents intended to conceive through intercourse.

In Gillian Dunne's Lesbian Household Project, which was based upon interviews with 37 cohabiting lesbian couples with children in the UK, the proportion of children from heterosexual relationships was much lower. In that study only 22% of children were from a previous marriage, in one household a child was adopted and in 75% of households the child had been conceived through donor insemination. It is notable also that in 40% of households the co-mother was also the birthmother of an older child.[52]

In Charlotte Patterson's study of 37 lesbian families in the US, she focused *only* on families where a child had been born into or adopted by a lesbian family. Of the 37 families, 70% were headed by a lesbian couple, 19% by a single lesbian mother while in 11% of the families the child had been born to a lesbian couple who had since separated and were sharing custody of the child.[53]

Likewise in the longitudinal National Lesbian Family Study of 84 families in the US, the focus was only on children born through DI. A lesbian couple led 83% of those families, while the remaining 17% were lesbian single mothers.[54] At the second stage of the study, when children were 2 years old, 8 of the couples had separated (11%), with 7 of the 8 separated couples continuing to

jointly parent the children; while 3 of the single mothers had partnered, with the new partners taking on the role of step-mother.[55] At Stage 2 of the study there were thus: 62 families led by lesbian couples who were co-parenting; 7 separated couples co-parenting; 1 separated mother sole parenting; 11 mothers sole parenting and 3 mothers parenting with step-parents. At Stage 3 of the study, when the children were 5 years old, 23 of the 73 couples had separated (31.5%), one co-mother had died, and one single mother had acquired a partner. In 29 of the families (35%), there was another child born since the beginning of the study. Sixteen babies had been born to the birth-mothers of the original children (48%), 9 had been born to co-mothers (27%) and 8 children had been adopted (24%).[56] Of the 23 separated couples at the third stage of the study, child custody was shared in 10 of the families (43.5%), while the birth-mother had sole custody in 7 cases (30.5%) and primary custody in 6 (26%).[57]

There is clearly considerable diversity as to the range of lesbian families in which children are being born and raised. As the social stigma around homosexuality declines in Western culture, more women are coming out as lesbians earlier in life and they are less likely to have children in heterosexual relationships. Similarly, lesbian women appear to feel less inhibited about choosing to have children within lesbian relationships, and the proportion of lesbians seeking to become mothers appears on the rise. On the basis of the available information it is very hard to generalise, but as an estimate it seems that between 50–70% of the children being raised in lesbian households are now children born into lesbian families rather than from previous heterosexual relationships. This proportion appears likely increase in the next 10 years.

Of children born to lesbians, it is noteworthy that between 15–20% of children are being born to lesbian single mothers rather than lesbian couples. Also, as the rate of separation of lesbian couples appears to be on par with the divorce rate in the general population, with relationships ending in divorce averaging 7 years (and the separated couples in the US National Lesbian Families Survey averaging 8 years[58]), it is apparent that there will be an increasing number of children from separated lesbian parents and from blended lesbian step-parent homes when and if their parents re-partner. The role of separated lesbian co-mothers, and lesbian step-parents as well as resident lesbian co-parents therefore will require increased attention.

The Role of Co-Mothers in Lesbian Families

In Nelson's Canadian study she reports significant differences in how women who were co-mothers and step-mothers saw their parenting relationships with children. Step-mothers saw themselves as having an "auxiliary" role as a parent, rather than being a primary parent. Step-mothers were concerned not to cross the line of the biological mother's relationship with her children and took a lesser role in discipline and decision making.[59] Co-mothers, by contrast, shared the care of children and parenting roles evenly with biological mothers. Nelson reports that:

> Couples who had children through DI were much more likely to describe their roles as 'the mother' and 'the other mother'. Having equal authority over the children was not a problem in these families...What was problematic was that the non-biological mothers had no *legal* authority. Several non-biological mothers reported difficulties in getting children admitted to hospital or in to see a doctor because they could not prove their maternal identity or their legal right to make medical decisions for the child. This legal barrier had emotional repercussions for the non-biological mothers, who could not help feeling excluded from their children's lives when in the public realm.[60]

In Dunne's Lesbian Household Project in the UK the participants were a mix of co-parents and step-parents, but parenting was described as jointly shared in 80% of the households.[61] Dunne's study found that although co-mothers are more likely than mothers to be in full time employment, they were less likely than fathers to be in full time employment. Tasker and Golombok suggest that, "co-mothers may be more willing than most fathers to compromise paid work in order to take on more involvement in parenting".[62]

Patterson and Chan give an overview of several US and UK studies through the 1990s of families where lesbian couples had planned and borne children together and conclude that:

> Lesbian couples, by and large, reported being able to negotiate their division of labor equitably. In addition, lesbian non-biological mothers were consistently described as more involved than heterosexual fathers with their children.[63]

In the US National Lesbian Family Study (of 84 families) in the second stage of the study when the child was at the age of 2, in 75% of the two mother families the mothers reported that they shared responsibilities of child rearing equally and considered themselves equal parents. Among the other 25%, child rearing was shared but (with one exception) the birth-mother was considered the primary parent.[64] At Stage 3 of the study of the 50 original couples that had stayed together: 29 shared the child caring responsibilities for their five year old child equally (58%), in 17 of the couples the birth-mother had more responsibility (34%), and in 4 of them, the co-mother had more responsibility (8%).[65]

In Sullivan's interviews with 34 lesbian families in the US, 32 of whom had jointly planned and conceived their child or children, 29 couples reported that parenting and domestic work were equally shared between the partners. Further, respondents stated that they actively sought to ensure that both partners were involved and responsible and that neither one took on a disproportionate load for any length of time.[66] Sullivan adds that of the families where one partner did take a heavier burden, "she was no more likely to be the birth-mother than the co mother".[67] In only 5 of the couples was there a clear breadwinner/caregiver split with the caregiver relying heavily upon her partner's income. In 19 of the 29 equal sharing couples, both partners worked full time and paid for childcare. In eight of the equal sharing couples the partner with a more flexible workplace undertook the bulk of child care during the week with the other partner doing more at weekends, and in two couples both partners worked part time.[68] Sullivan concluded that the mothers in the equal sharing families, regardless of level of income and income disparities between the partners, made their decisions about the division of paid work and family responsibilities following "an egalitarian principle of self-conscious mutual understanding and sharing of both rewards and responsibilities".[69]

In Patterson's interviews with 34 lesbian-led families in the US (The Bay Area Families Study) all of the couples where a partner co-mothered regarded both women as mothers, and shared in participation of household labour, family decision-making and childcare. While the biological mother performed a slightly higher portion of childcare and the co-mother spent more time in paid employment there was a relatively even sharing of roles and a high level of relationship satisfaction. Household labour and family decision-making were shared evenly. Patterson concludes that the more evenly childcare is shared the

more positive adjustment is reported for both partners in their relationship and for their children.[70]

Tasker and Golombok compared the role of co-mothers in 15 British lesbian mother families with the role of resident fathers in two different groups of heterosexual families (43 where the child was conceived through donor insemination and 41 where the child was conceived without DI).[71] The comparison was based upon the birth-mothers' reports and the researchers' observations across a variety of scales (parenting load, parental coordination of discipline, affection to the child, play with the child etc). They found that co-mothers in lesbian-led families were more involved in parenting than fathers in the heterosexual DI family group and significantly more involved that fathers in families where children had been conceived without assistance (the ratings were 3.2 out of a possible 4 compared with 2.5 and 2 respectively for the fathers). There were no differences across the three groups concerning the affection, closeness and play between the co-mothers, fathers and children but there were very significant differences in caregiving. Birth-mothers reported that over 90% of the co-mothers were at least as involved as themselves in parenting, compared with 47% of fathers in DI families and 37% of fathers in non-DI families.[72]

There is therefore considerable evidence to demonstrate that lesbian co-parent families have a more even distribution of domestic labour and child care than heterosexual families, with positive results for the relationship between the partners and for the children they raise. This finding has important implications for the legal recognition of co-mothers if recognition is to be founded upon functional family roles, as it is clear that co-mothers are acting as equal parents from birth in most lesbian families.

It also appears that there is widespread support for equal recognition of co-mothers among lesbian families. 78% of respondents to a survey at the Sydney Lesbian Parenting Conference in 2000 reported that co-mothers should be recognised by the law for all purposes.[73] In McNair's Lesbian and Gay Families Project, 83% of prospective lesbian mothers anticipated that the child's "parents" would be the biological mother and her female partner.[74] The McNair study also asked both current and prospective parents to rank a series of statements about issues and events that can make parenting difficult with the result that,

> Lack of legal recognition as a parent (particularly towards the non-biological mother), and a lack of legal recognition as a family, were reported as being the most frequently applicable problems confronting them, and were also perceived as creating the most difficulty in parenting.[75]

In Sullivan's interviews with 34 lesbian families in the US, all of the mothers responded that the non-birth mother should be equally recognised as a second parent.[76] All of the couples who lived in jurisdictions where second parent adoptions were possible had "thought about, initiated, or completed" a second parent adoption at the time of the interview.[77] This finding is consistent with the second stage of the National Lesbian Family Study where all of the eligible co-mothers had legally adopted their children by Stage 2 of the study when children were 2 years old.[78] At Stage 3 of the study when children were 5 years old, 35 of the 73 original co-mothers had adopted their children.[79] This is not currently possible in any Australian jurisdiction.

Clearly, mothers and co-mothers are keen to use whatever available means there are to ensure recognition of co-mothers' relationships with their children. This recognition is important both socially and legally, and its impact on the co-mother's relationship with her child or children should not be underestimated. At Stage 3 of the US National Lesbian Families Survey, of the separated couples, where the co-mother had already completed a legal adoption of her child before separation she was far more likely to share custody and parenting after separation. Of the separated couples, in none of the cases where the birth-mother retained sole custody or primary custody had the co-mother adopted the child.[80]

How Babies are Conceived in Lesbian-Led Families

In many jurisdictions the legality or availability of fertility services may determine whether lesbian mothers conceive using anonymous donor sperm through a clinic, known donor sperm through a clinic (after testing and possibly also storage) or using a known donor through self insemination at home. Where fertility services discriminate against lesbians through law or practice, the first two options are not available to lesbian mothers (or to gay fathers who wish to donate generally or to a lesbian friend).[81] It is therefore not surprising to find that a high number of babies born into lesbian families are

conceived from a known donor, often through informal self-insemination. The following surveys and studies indicate a high level of known donors in Australia, Canada and the UK, with a much higher use of unknown donors in the USA (where, notably, there are well known fertility clinics that have provided non-discriminatory access for many years to women throughout the country, but also where self insemination may, in some states, give the donor legal status as a father).

In Maureen Sullivan's interviews of 34 lesbian-led families in the San Francisco bay area only 4 of the couples had used known donors with the remainder (88%) using clinic services where the identity of the donor would generally be available to the child when they reached 18.[82]

By contrast, in Fiona Nelson's survey of 30 lesbian mothers in Alberta, Canada, all of the dozen mothers who had DI babies had self inseminated (though some of the donors were known only to intermediators, and not to the women themselves).[83]

In Tasker and Golombok's study of 15 lesbian-led families in the UK, of the 14 couples who had conceived their child through DI, 79% of them did so through self-insemination.[84] Likewise, in Dunne's Lesbian Household Project in the UK, of the 28 (of 37) households where the child was conceived through DI, "almost all" organised this informally, and did not use clinics or hospitals; rather meeting donors through friendship networks.[85]

In a survey of 84 women at the Sydney Lesbian Parenting Conference in 2000 self-insemination was by far the most popular method of conceiving. 68% of respondents used self-insemination with a known donor and a further 8% used an unknown donor to self inseminate.[86] Of the Victorian women who responded to the McNair Lesbian and Gay Families Project; those who had a child through donor insemination had almost all self-inseminated.[87] This is unsurprising given that access to fertility services was restricted by legislation in Victoria. Of more interest is the reasons given by the respondents for their choices. While 50% of those who self inseminated reported that they did so because they could not access fertility services in Victoria, 96% reported that they did so because of their desire for the child to know all biological parents.[88] This finding suggests that while accessible fertility services may influence some women to chose anonymous donor insemination through clinics, this is not

necessarily the only determining factor. Of women who did manage to access clinic insemination services, 80% reported that they did so for health reasons and 60% wanted the donor to be anonymous.[89]

The accessibility of fertility services is clearly a major issue in Australia. Fertility services can provide screening to ensure that semen is safe, whether from an anonymous or known donor. Anonymous semen is also important to women who wish to form a family without the uncertainty of negotiating a relationship with a known donor.

Gay Fathers

Like lesbian mothers, gay fathers may have children from a previous heterosexual relationship. They may also adopt or foster children as a "single" adult after having come out. Male partners may act as co-parent or step-parent to such children. Men who come to parent a child of a male partner who has had that child in the context of a previous relationship are referred to here as step-fathers.

If a gay man has a biological child after having come out, it is increasingly likely that he will have done so with a lesbian woman or couple, one of whom has borne the child. Biological fathers who have chosen to have children with lesbian mothers may undertake a variety of roles from unknown donor or known donor, to having occasional contact with the child, regular contact or undertaking a sharing of residence and parental responsibility with the mother/s. The terms "donors", "donor dads" and "dads" are used here to indicate a range of increasing involvement in child-raising.[90]

There is relatively little information on gay father-led families with resident children.

The Role of Gay Donors/Gay Dads in Lesbian Mother Families

In the US National Lesbian Family Study, which surveyed 84 lesbian families, all of the children were conceived through DI. In the first stage of the study 47% of the women preferred that the donor be unknown and 45% wanted to know the identity of the donor. Of those who chose to know the donor's identity, 51% anticipated that he would have some involvement and 49% thought he would have no involvement in parenting the child.[91] Interestingly,

of those who wanted a known donor, only around half actually had done so by Stage 2 of the study: which revealed that 25% of the children were born through a known donor. In the follow up second stage of the study, when the children were 2 years old, almost all of these known donors had some contact with the child. The donor was actively involved in parenting 12% of the children and had some involvement in a further 13% of children's lives.[92] By the time the children were 5 the intensity of the contact had decreased somewhat. Of the 21 children with known donors, 71% had occasional contact and 29% had regular contact with their biological father.[93]

In Patterson's Bay Area Families Study, in 46% of the 34 families, the child had been conceived with anonymous donor sperm through a clinic, in 27% a known donor was used, and 8% of children were adopted.[94] Where the biological father was known, he mostly "enacted the role of family friend rather than that of father", with only 2 of the men acknowledged as a father and assuming a non-residential father role.[95]

In Dunne's Lesbian Household Project in the UK, 86% of the women who had used DI to conceive responded that they wanted to know the donor.[96] In 40% of the households, the donors had regular contact with the children. Donors were generally gay men and all of the men who took a role as co-parents were gay. The most frequent term used by respondents to describe what Dunne refers to as the "fairly limited yet enthusiastic relationship between a donor and his child or children" was "uncle" or "kindly uncle".[97] In three partnerships in the Dunne study (8%), donor-dads were actively co-parenting from separate households. In one household, where the two mothers shared child care with the non-resident dad (who lived around the corner) one of the mothers laughingly described herself and her partner as, "the envy of the mother and toddler group".[98]

In a survey of 84 women at the Sydney Lesbian Parenting Conference in 2000, the majority of respondents with DI children reported that their relationship with the donor was one of friendship; the donor had no parenting responsibilities or decision making role (66%). A further 21% had no contact with the donor, and 12% reported a sharing of parental responsibilities with the donor-dad. In terms of the child's contact with their biological father: 31% had no contact, 33% had "some" contact, 22% had "regular" contact (including birthdays and babysitting) and 13% had "extensive" contact with the dad

relating to the child as a non-residential parent.[99] The McNair Lesbian and Gay Families study in Australia found that 40% of donors were "involved" with their children, 26% were known but uninvolved and around 35% were unknown.[100] That study found that levels of satisfaction with the relationship between mothers and donor-dads was high, with 60% of respondents very satisfied and 22% quite satisfied.[101]

Catherine Donovan discusses the Dunne study, as well as the Families of Choice Project, a UK a survey of 100 non-heterosexual women and men, to conclude that lesbian-led families negotiate fatherhood and family concepts in a multitude of flexible forms. Donovan, like Dunne, notes the tendency for donors in lesbian families to be gay men. Some of the participants in the "Families of Choice Project" co-parented children with gay donors — and such co-parenting itself included a wide range of possibilities from "Sunday fathers" who played with the child from time to time, to men who undertook child care regularly or had the child stay in their home on a weekly basis.[102] Interestingly few, if any, of the men who co-parented undertook equal responsibility for care, or engaged in decision making regarding the child. This was seen as the domain of the "primary parents" (the lesbian parents). In much rarer instances, gay fathers act as equal co-parents with lesbian mothers and raise children in a four parent family.

Australian women, like English women, appear more likely to self inseminate than use anonymous donor sperm (in contrast to women in the US). Surveys seem to indicate that this is only party a result of clinic (in)accessibility and that the choice of self insemination is a result of the decided preference of around 70-80% of mothers in the UK and Australia to have a known donor. Of known donors, it seems that over half have contact with the children, with a small but significant proportion having regular contact. With as many as 10% of donors sharing some parental responsibility it is clear that options for the recognition of such non-nuclear family forms need to be thought through.

The legal position of biological fathers has received increased attention in Australia since a judge suggested that known donors ought to be recognised as legal fathers in a Family Court decision on a contact dispute between a gay biological father and two lesbian mothers (this case is discussed further below).[103] However it does not appear that such a move would reflect the intentions or wishes of many lesbian mothers. In Fiona Nelson's 1991 survey of

30 lesbian mothers in Alberta, Canada, all of the dozen mothers who had DI babies felt that the donors should never assert paternal rights over the children.[104] Respondents to the survey in the Sydney Lesbian Parenting Conference in 2000 were divided about the legal role of the donor, with just under half responding that the donor should not have legal recognition under any circumstances while an equal number reported that legal recognition may be justified in some circumstances. Only 3% responded that the donor should be recognised in all situations.[105]

In summary, research that has been undertaken to date on lesbian and gay family forms has found that:

- Up to 10% of gay men and 20% of lesbians are parents.
- The majority of lesbians now having babies are doing so through donor insemination.
- Most, but not all, lesbian mothers are having children in a lesbian couple (around 85%).
- Lesbian couples who have children often exchange roles as biological mother and co-mother.
- Biological mothers and co-mothers share child care and home responsibilities almost equally in most families and see themselves as equal parents.
- Lesbian mothers appear to be heavily in favour of equal recognition of co-mothers.
- Most lesbian mothers having children through donor insemination do so with a known donor (between 50-70%).
- Most, but not all, known donors are gay men.
- Most gay known donors have some contact with the child (between 50-65%).
- Around half of the known donors who have contact with children have regular contact (so of the children born to lesbian families through

donor insemination up to 20–25% have regular contact with their biological father).

- A small but significant group of gay men who have children through donor insemination have frequent contact and some degree of responsibility in their child's life.
- Virtually all families were lesbian-led families in that the lesbian mothers were the primary parents, having residence of the child, giving primary care and exercising parental responsibility by making all important decisions about the child.

The following section discusses the results of sociological and psychological studies of children from lesbian and gay families.

II. Social Science and Psychological Research on the Children of Lesbians and Gay Men

Over the past 25 years a great deal of research has been conducted to find out what, if any, effect a parent's sexual orientation has on the welfare and development of their children. Richard Green's small study was published in 1978, and since that time a body of work has appeared in the USA and UK, with increasing sample sizes and methodological rigour.[106] This body of work remains under-utilised in Australian social policy and legal forums. For example, such data is rarely referred to or relied upon in Family Court decisions concerning lesbian or gay parents.[107] Nor did any of this research appear to be considered by the Senate Inquiry on access to fertility services.[108]

Charlotte Patterson, of the University of Virginia, has published a number of comprehensive reviews of the available studies of the children of gay and lesbian parents, as well as initiating a number of her own studies of lesbian families in the US. Patterson concludes:

> ...central results of existing research on lesbian and gay couples and families with children are exceptionally clear. Beyond their witness to the sheer existence of lesbian and gay family lives, the results of existing studies, taken together, also yield a picture of

> families thriving, even in the midst of discrimination and oppression. Certainly, they provide no evidence that psychological adjustment among lesbians, gay men, their children, or other family members is impaired in any significant way. Indeed, the evidence suggests that relationships of lesbian and gay couples are just as supportive and that home environments provided by lesbian and gay parents are just as likely as those provided by heterosexual parents to enable psychosocial growth among family members.[109]

In a 1996 overview, Mike Allen and Nancy Burrell gathered together data from 18 earlier studies from the USA and UK which spanned 1978 to 1995 with the aim of generating a single comparative set of figures for children of lesbian and gay parents and children of heterosexual parents.[110] The research only included quantitative statistical data where there was a comparative group of children from heterosexual parents, and did not include qualitative data (thus excluding many studies). The data included both children's self reports and parents' and teachers' reports of children across a wide variety of standard social and psychiatric testing procedures (Iowa Parent Behaviour Inventory, Bem's Sex Role Inventory, Coopersmith Self-Esteem Inventory, Weschler Intelligence Scale for Children etc).[111]

The data was entered into a meta analysis model to produce a single set of comparative figures for the children of heterosexual and homosexual parents across a variety of indicators. This analysis found that there were no discernible differences in the adults' reports of the children regarding:

- children's sex role identification;
- level of happiness; and
- level of social adjustment.

The analysis found that there were no measurable differences in the children's self reports regarding:

- sexual orientation;
- satisfaction with life; and
- moral and cognitive development.

The authors argue that their statistical analysis indicates sufficient power to determine large or medium effects. Allen and Burrell conclude that:

> The results, taken as a whole, indicate no difference between homosexual and heterosexual parents when taken together or individually. The results fail to support the assumption of widespread differences, or any differences on the basis of the particulars studied, between parents on the basis of sexual orientation.[112]

Religious right groups and "pro-marriage" (or anti-gay marriage) scholars such as Lynn Wardle have refused to accept the results of such studies on the basis that they are methodologically flawed.[113] In an article where he proposed a legal presumption against lesbian or gay parents in child custody disputes, Wardle argued that the available research is not reliable.[114] Wardle pointed to small sample sizes, lack of comparator groups in some studies and a widespread use of self-select subjects. Wardle also claimed researcher bias.[115]

On the question of bias, Stacey and Biblarz respond:

> We depart sharply from the views of Wardle ... on the merits and morals of lesbigay parenthood as well as on their analysis of the child development research. We agree, however, that ideological pressures constrain intellectual development in this field. In our view, it is the pervasiveness of social prejudice and institutionalized discrimination against lesbians and gay men that exerts a powerful policing effect on the basic terms of psychological research and public discourse on the significance of parental sexual orientation. The field suffers less from the overt ideological convictions of scholars than from the unfortunate intellectual consequences that follow from the implicit hetero-normative presumption governing the terms of the discourse — that healthy child development depends upon parenting by a married heterosexual couple. While few contributors to this literature personally subscribe to this view, most of the research asks whether lesbigay parents subject their children to greater risks or harm than are confronted by children reared by heterosexual parents. Because anti-gay scholars seek evidence of harm, sympathetic researchers defensively stress its absence.[116]

In a lengthy refutation of Wardle's arguments, Carlos Ball and Janice Pea point out that researchers in the area have in fact been very mindful of the methodological limits of their work and modest about their assertions.[117] Carlos and Pea point out that random sampling is not a viable research method on this issue (nor would it be for many family issues).[118] It is notable, as will be seen in detailed discussion below, that in the past decade far more studies have included appropriate comparator groups. Sample sizes have increased, as has the ability to draw meaningful comparisons through meta-analysis of several studies, and the ability to undertake longitudinal analysis.

In 2001 Judith Stacey and Timothy Biblarz undertook a meta analysis of 21 studies to date (11 of which were also included among the 18 examined by Allen and Burrell). Stacey and Biblarz stated that,

> Because we personally oppose discrimination on the basis of sexual orientation or gender, we subject research claims by those sympathetic to our stance to a heightened degree of critical scrutiny and afford the fullest possible consideration to work done by scholars opposed to parenting by lesbians and gay men.[119]

For this reason, they selected only studies that included a comparison group of heterosexual parents and children, assessed differences between groups in terms of statistical significance and included findings directly relevant to children's development. Stacey and Biblarz confirm that there is indeed "no difference" in children's psychological well-being, cognitive functioning, mental health and social adjustment, nor in parenting styles and investment with children. However Stacey and Biblarz take issue with the overall "no difference" conclusion of Allen and Burrell and others. They argue rather that children from lesbian and gay families,

> do differ in modest and interesting ways...Most of these differences, however, are not causal, but are indirect effects of parental gender or selection effects associated with heterosexist social conditions under which lesbigay-parent families currently live.[120]

In particular, they note that some studies found that children from lesbian-mother households are more open to non-traditional gender roles, and as

adolescents and adults may be more open to same-sex attractions (although they were no more likely than the children of heterosexual parents to identify as lesbian, bisexual or gay.) While writers such as Wardle conclude from such findings that children are harmed, because, inter alia, they are less likely to express an ambition to marry, less likely to live gender-stereotyped lives, and more likely to have pre-marital sex,[121] this is clearly a value judgment based upon the author's own view of what the world, and the families in it, ought to be. By way of contrast, Lisa Saffron reported as a *positive* finding from her qualitative interviews with 17 children and adults in the UK who had been raised by lesbian mothers that:

> According to the people I interviewed, there may well be meaningful differences in moral and social development. Respondents suggested that children raised by lesbian mothers have the potential to develop more accepting and broad-minded attitudes towards homosexuality, women's independence, the concept of the family, and social diversity than children from families which conform more closely to the norm.[122]

In their review of the studies to date, Stacey and Biblarz conclude that:

> Most of the differences in the findings ...cannot be considered deficits from any legitimate public policy perspective. They either favour the children with lesbigay parents, are secondary effects of social prejudice, or represent "just a difference" of the sort democratic societies should respect and protect.[123]

A more detailed comparative analysis of the available research into different family forms follows.

Children of Lesbian Mothers who have Separated from a Father

In 1991, Tasker and Golombok in the UK[124] and in 1992, Patterson in the USA[125] published comprehensive summaries of the many dozens of studies that had been undertaken to that time, most of which compared children in households headed by a lesbian mother with families headed by a heterosexual single mother, with the children in both types of families having been through the experience of parental separation and divorce.

The results across a range of issues found lesbian and heterosexual women were routinely similar in their parenting styles and skills and that their children showed no important differences. Specifically, the children showed no differences in:

- gender role or gender identity (and Patterson notes that in the more than 300 children studied there was absolutely no evidence of gender identity disorder);
- psychiatric state;
- levels of self esteem; and
- quality of friendships, popularity, sociability or social acceptance.

Of the studies that looked at lesbian mothers and their interactions with their children, they found that lesbian mothers were equally as child oriented and warm and responsive as heterosexual mothers.

Patterson concluded from her review that a child's adjustment is higher when a lesbian mother lives with her partner, when the mother's sexuality is acknowledged to the child before adolescence, and when the child has contact with children from other lesbian-led families.

Several studies found that lesbian mothers were in fact *more* concerned than heterosexual women that their children should have contact with men and positive male role models.[126]

In 1996, Tasker and Golombok published a summary of the results of their longitudinal study that spanned 16 years comparing the children of lesbian single mothers with the children of heterosexual single mothers. This study is extraordinary in that it focused on parents' reports of the children when they were around 9 or 10 years of age, and then followed up with interviews of the children as 25 year old adults.[127] They found that lesbian mothers and heterosexual mothers were equally likely to have lived with a romantic partner post divorce. The children of lesbian mothers in this study had more positive step-parent relationships with the partner, both as adults and during adolescence, than did the children of heterosexual women.

In addition to confirming the findings of many other studies mentioned above, Tasker and Golombok found that the children of lesbian mothers were no more likely than children of heterosexual mothers to:

- be teased or ostracised;
- experience anxiety or depression; or
- feel unhappy or embarrassed about their mother being physically affectionate with a partner.

Further, they were no more negative about their family identity as children than the children of heterosexual mothers — and in fact as adults they were *more positive* about their family identity.

Tasker and Golombok conclude:

> Children brought up by a lesbian mother not only showed good adjustment as young children but also continued to function well as adolescents and as young adults, experiencing no detrimental long-term effects in terms of their mental health, their family relationships, and relationships with peers and partners in comparison with those from heterosexual mother families.[128]

Tasker and Golombok also found that the more open, positive and political the mother was about her lesbian identity, the more likely it was that her children were accepting and positive about their family identity.

Children of Gay Fathers

Compared to the research available on lesbian mothers, there are relatively few quantitative studies comparing the children of gay fathers with those of heterosexual fathers. In part this reflects the fact that children of divorced parents generally reside with their mothers.

Several of the studies summarised in the Allen and Burrell survey and the Stacey and Bilbaz analysis include children living with divorced gay fathers with children living with heterosexual couples (as well as divorced heterosexual parents). In addition to that information, Patterson and Chan note that gay

male parents, like lesbian parents, are more likely to share parenting tasks evenly that heterosexual parents.[129] They review other studies to note that:

> A study of gay couples choosing parenthood was conducted by McPherson (1993) who assessed the division of labor, satisfaction with division of labor, and satisfaction with couple relationship among 28 gay and 27 heterosexual parenting couples. Consistent with the evidence from lesbian parenting couples, McPherson found that gay couples reported a more even division of responsibilities for household maintenance and child care than did heterosexual couples. Gay couples also reported greater satisfaction with their division of child care tasks.[130]

Patterson's work on the children of lesbian mothers demonstrates that shared parenting and household labour has a positive impact on the relationship between partners and on the child's well-being.

Patterson and Chan cite a 1982 study by Scallen and a 1989 study by Bigner and Jacobsen, both of which asked gay and heterosexual fathers to self report on their own behaviour with their children. Both studies sampled around 60 men, all of whom were divorced. No differences were reported across areas such as problem solving, providing recreation and encouraging children's autonomy. Both studies found, however, that gay fathers placed more importance on nurturing and less importance on their role as an economic provider for the children than the heterosexual fathers did.[131]

Much early research on gay fathers focused upon the sexual identity of their children. This reflects a persistent misconception that homosexual parents raise homosexual children, which is genuinely silly given the number of lesbians and gay men with heterosexual parents. There is no basis in any of the research to support the claim that gay and lesbian parents are significantly more likely than heterosexual parents to raise lesbian or gay children.[132] Such claims are implicitly or explicitly premised on the belief that it is undesirable to grow up gay or lesbian, which many lesbians and gay men and their families find deeply offensive.

Children Born into Lesbian Relationships

In recent years, studies have been undertaken of children *born into* lesbian families. Golombok, Tasker and Murray[133] in the UK and Chan, Raboy and Patterson[134] in the US compared lesbian single and couple households with heterosexual mother and heterosexual couple households — all of whom were raising children born as a result of donor insemination.

Golombok, Tasker and Murray compared the adults and children in 30 lesbian families (15 single and 15 couples) with 42 families headed by a single heterosexual mother and 41 two parent heterosexual families. The lesbian and single mother families had all parented a child without a father from the first year of the child's life. The study used parent interviews and questionnaires, teacher questionnaires and data from the children using a series of standardised assessments. The children were aged 3—9, with an average age of 6. This study found that children in the families with no father were no more likely to develop behavioural problems, and felt just as accepted by their mother and by peers as children in families where the father lived in the home. There were also no differences in the development of the children between the lesbian and heterosexual mother headed families.

Chan, Raboy and Patterson undertook a comparative study of the children of 80 families, all of whom had conceived children from a single sperm bank in the US. The study compared parents' and teachers' reports of children's social competence, adjustment and behaviour using standardised forms. It also collected data on parents' levels of happiness, stress and relationship satisfaction with their partners. There were 55 families headed by lesbian and 25 families headed by heterosexual parents. 50 of the families were headed by couples (34 lesbian and 16 heterosexual) and 30 by a single mother (21 lesbian, 9 heterosexual). The average age of the children was 7. The aim of the study was to compare the well being of children of families based on sexual orientation and family structure. This study concluded that it is family processes, not family structure, that determine children's welfare — that is, parenting stress and conflict are the determining factors in indicating children's disfunction, and these were completely unrelated to the family structure:

> There were no significant differences in child adjustment as a function of parental sexual orientation or the number of parents in the home.[135]

There is also increasing information as to the breadth and extent of support systems and extended family networks being built by lesbian families. In the US National Lesbian Family Study, 84 families are being periodically interviewed in a longitudinal study. In the second stage, when the children were aged 2 years old, the researchers found that for 69% of the mothers, having a child had enhanced their own relationship with their parents and for 55% of them, contact had increased with their parents. In 38% of the families close friends had been incorporated into the extended family network.[136] By the time of the third stage of the study when children were 5 years old, 63% of the grandparents were "out " about the fact that their grandchild was from a lesbian family.[137]

In Patterson, Hurt and Mason's study of 37 lesbian-led families in San Francisco they measured the level of contact which children had with other adults and relatives and tested that against the child's self reported well-being. They found that although there was no significant relation between the child's well being and contact with grandparents or other relatives, there was a significant relationship between the child's frequency of contact with other adults and sense of well being.[138] They concluded that:

> The children of lesbian mothers in this study were described as having regular contacts with several different adults, in addition to members of the children's own households, and as having occasional contacts with an even larger circle. These adults included grandparents, other relatives, and unrelated people (eg family friends) both male and female. The findings are not consistent with stereotypes of lesbian mothers and their children as isolated from kinship networks, or as living in single-sex social worlds. The results do, however, confirm earlier anecdotal reports of considerable social contact between children of lesbian mothers and their grandparents and other adults.[139]

The major issue that arises in the qualitative studies and interviews with lesbian mother families is the extent to which the co-mother is excluded by social norms and treated as a non-mother, indeed as an extra "hanger on" or stranger. Many co-mothers discussed the difficult question of what she should be called by the child but principally they felt excluded by other adults' responses to them. As Louise reported in Dunne's study:

> There's a thing that if you want to be acknowledged as a parent, you just had to 'come out'. It's the only way to explain that you're a parent. And even that is a very hard way to explain that you're a parent...Because as soon as people found out you weren't the mum, they'd just — it was like 'who the hell are you then?'[140]

As noted earlier, the vast majority of co-mothers in the US who were able to undertake second parent adoptions of their children (because such measures were available in their states), did in fact do so. They reported a stronger feeling of belonging and security with their child as a result, as well as increased recognition of their role from family and outsiders.

III. Implications for Social and Legal Policy

There are many policy implications from this research. The first section below discusses the general implications of the finding that sexual orientation and parental fitness are unconnected. The second section discusses implications of the developing literature on lesbian and gay family forms.

Access to fertility services, eligibility for adoption and the "best interests of the child" standard in Family Law

There is now a wealth of credible data that demonstrates lesbian and gay families are "like" heterosexual parents in that their children do not demonstrate any important differences in development, happiness, peer relations or adjustment. It is family *processes* and not family *structures* that are determinative of children's well being. The number of adults and the sex of the adults in a household has no significant bearing on children's well being — one adult or two, female or male, heterosexual or homosexual — whereas the happiness of the *relationship between adults* in the household, and the openness of warmth and communication *between the adult/s and the children* do have a major impact on the child. Children are not harmed, or disadvantaged, through being raised by lesbian mothers or gay fathers.

This research has important implications for social and legal policy development in Australia. It is no longer possible to formulate or defend discriminatory regimes — such as restricting access to fertility services or

adoption — on the basis that it is in children's best interests to do so. This position is simply unsupportable in any empirical sense. Nor should a parent's sexual orientation be a relevant factor in residence or contact disputes between a lesbian or gay parents and their partner from a former heterosexual relationship.

Discussion and debate must move away from the current "should they/shouldn't they be allowed to have children" focus. This debate is futile and unconstructive, as same-sex couples already have, and will continue to form, families regardless of whether they are approved of by government or the public at large. Children are increasingly being born into lesbian households, regardless of the accessibility of fertility services, as informal networks are utilised and gay men, particularly, are acting as donors. These families have a huge range of unmet needs.

Parenting Recognition and Reform

While adoption and access to fertility services are high profile and emotive topics, there are many other areas where lesbians, gay men and their families are adversely affected by legal and social policies that do not recognise their existence and needs.[141] The relationships of children with their non-biological mothers are largely unrecognised across Australia and this may cause significant disadvantage to children and parents. For instance, if a co-mother dies, her child is not eligible to automatically inherit her estate, superannuation, or worker's compensation. If a biological mother dies, the co-mother has no automatic right to maintain residence of the child and continue to parent him or her. This is so despite major legislative reforms in NSW,[142] Victoria,[143] (and, to a lesser extent, Queensland[144]) that have granted same-sex de facto couples many of the same rights and responsibilities as different-sex de facto couples. The bulk of these reforms have focused upon the recognition of partner relationships and most have barely touched upon the relationships of lesbians and gay men with their children.[145] Western Australia is the first state to extend legal recognition to a range of parental rights.[146]

As lesbians and gay men increasingly have children in same-sex relationships, and in lesbian-led families with gay fathers as contact parents, there will be also be disputes between such parents when relationships break down. If a co-mother and mother separate, and the children remain living with the mother, it is very expensive and difficult for a mother to claim child maintenance from a

co-mother.[147] Conversely, if the children remain living with the co-mother it is simple and cheap for her to seek maintenance from the mother. This situation is anomalous, confusing and unfair for both the children and the parents who must cope with it.

If mothers separate, or if the relationship between mothers and biological father breaks down, residence and contact disputes can be litigated in the Family Court of Australia. The Family Court can make orders on the initiative of, or in favour of, any person who has a close emotional relationship with a child. However the Court's work is premised upon a two parent, mother-father separating couple model that simply is not applicable to lesbian and gay families. How, for instance, would the Court deal with a situation where a co-mother has been the primary parent and wanted residence of the child? In such a case the Court may be reluctant to give residence to a legal "stranger". What of disputes where a known donor seeks contact, residence or joint responsibility? In such a case the man is biologically a father, yet legally a "stranger", while socially he will often be the equivalent of a much loved family friend. How will the Court cope with this new kind of father; one who does not fit any of the type of roles that it is familiar with?

In 2002 a bitter and much publicised Family Court dispute was decided; *Re Patrick*.[148] The case involved two lesbian mothers who sought to restrict the contact of a gay man who was the known donor for their child. The child was, by the time of judgment, 2 years old. The Court refused the orders sought by the mothers on the basis that it was in the child's best interests to maintain regular contact with his biological father, and put in place orders to gradually increase the amount of contact as the child grew older. The biological mother of the child subsequently killed both herself and the child.

I have been reluctant to write about this case for a number of reasons, not least of all because it was such a terrible and tragic one for all concerned. The decision has been a very divisive one for lesbians and gay men who are parenting together in a range of new family forms where everyone's role must be invented and negotiated. As a result of media interviews I did on the case as well as the issue of parenting more generally, a number of mothers and fathers wrote to or telephoned me directly to express their views through 2002. This was unprecedented in my professional experience and I think that this very high level of concern, as well as the specifics of parent's concerns, is worth noting.

Several mothers expressed the view that the Court prioritised fathers, and co-mothers in particular felt sidelined by the focus in the decision upon the child's biological parents.[149] Notably, the Court suggested that legal reform was needed to recognise the role of biological fathers in such families, but did not make any such recommendation about co-mothers who are primary residential parents.[150] Lesbian mothers were very concerned that their family forms would not be respected by the law, or by biological fathers, as complete in-tact and functioning families. Some women expressed the view that as a result of the decision donors now have "access rights". Gay fathers were fearful that women would deny contact (including through relocation) or would refuse to acknowledge their role as the biological fathers of the children. Two men who contacted me were involved in contact disputes with mothers, and both were very apprehensive about the role of the legal system if such disputes escalated. Mothers and father were united in a deep sense of uncertainty and a conviction that the legal system would favour the biological parent of the other sex.

In part such views are based upon a misunderstanding of the nature of the Family Court's jurisdiction and of the impact of such cases as precedent. Firstly, all decisions about children turn very much on their own facts, and generalisations about "precedent" in child-related matters are not really helpful.[151] There are no presumptions in favour of mothers or fathers. Substantively, the decision does not mean that all known donors will automatically have contact, nor did it alter the legal position of known donors regarding contact. Although biological fathers of children born through donor insemination are not legal parents, they, like co-mothers, have always been eligible to apply for residence or contact orders (both in the case of disputes, and on the basis of consent) if they have a close and on-going relationship with the child. Likewise counselling and mediation services provided through the court should be accessible to anyone who is in dispute over children.[152]

This case and its aftermath highlights a number of important issues for lesbian and gay families that have not been thoroughly explored. At present no discussion of the case has noted that discriminatory laws and a lack of legal recognition of lesbian and gay parenting relationships are deeply implicated in how this family was formed and how and why it dissolved.

The harm caused to lesbian and gay families by non-recognition may not always be directly apparent. The very crux of the dispute was around the mothers' and

the biological father's conflicting expectations of what their family form would be. The father thought he would be an active and involved parent; he expected to be present at the birth and to have contact with the child twice weekly. The mothers thought that he would be a "donor" who was not part of their family, but would see the child occasionally. Both the mother and the father were advancing in years (37 and 47 respectively at the time of conception) and it seems to me that both of them wanted a child so much that they were willfully blind to the other's very different vision of family. Their choice to form a family with each other was severely constrained by the legal environment around them. What if Victorian law had permitted same-sex couples to adopt children? What if Victorian law had permitted lesbian couples to access fertility services? In a non-discriminatory legal system, perhaps the mothers would have used an anonymous donor, perhaps the father would have adopted a child. This is by no means certain, but the parents would have been faced with a far greater range of choices and may have elected to follow one that more closely fitted their needs. The judge himself acknowledged that if fertility services in Victoria had been accessible to the parties, they would at least have had the benefit of the routine counselling that such services require and provide prior to insemination.[153] Such a process would have helped to clarify expectations and avoid what followed.

In the judgment, the co-mother's fears about the law and status of the father's relationship with the child were repeatedly characterised as "unreasonable" and "unfounded".[154] The Court seemed incapable of understanding how a pervasive lack of legal (and social) recognition would make co-mothers feel that their relationship with children they have raised from birth is extremely precarious in relation to *both* biological parents. What if Victorian law had recognised the co-mother as a legal parent, either from birth (as is now the case in WA) or through a process of co-parent adoption? If it had done so it is much less likely that the co-mother would have felt threatened and defensive at the biological father's assertion of his importance to the child and his pursuit of contact (and, initially, joint parental responsibility) through the legal system.

All parties in this dispute felt their own position to be a vulnerable one and were defensive about a lack of social or legal recognition of their role. All parties suffered through the uncertainty that surrounded their family form in addition to the misapprehensions they were under about their expectations for the future. What if the parties could have recorded their intentions in advance in a way that was not permanent or binding but which nevertheless acted to

establish a legal status quo? Registrable parenting plans have been available under the *Family Law Act* since 1995.[155] They allow parents to record their agreement and register them such that they have force as an order of the court. They can be revoked by consent or varied by a later order of the court. These plans are confined to agreements between "parents" and so would not cover agreements between biological fathers who are not legal parents, nor would they include co-mothers.[156] These plans, if made accessible, could be used to pre-empt disputes and also to provide a clear sense of what family form was contemplated in the case of later disputes.[157]

In my view, *Re Patrick* is a stark exemplar of the violence of non-recognition. It also highlights a desperate need for accessible and appropriate dispute resolution mechanisms for lesbian and gay families. Such mechanisms, whether through a specialist arm of the Family Court (for instance a select number of judges who were specially trained) or another body, must be sensitive to and aware of, the range and diversity of lesbian and gay family forms[158] and the very real constraints that they face. A dispute resolution mechanism where all parties feel they will be treated fairly and with respect would provide a far greater likelihood of matters being resolved.

This paper highlights that a broad range of law reform options, at both state and federal level, need to be evaluated in order to even begin addressing the unmet needs of lesbian and gay families. While New South Wales, Victoria and Tasmania are currently considering law reform on parenting issues in lesbian and gay families,[159] they appear to be focused upon a fairly narrow range of options — centring discussion upon the expensive and relatively inaccessible avenue of step-parent adoption[160] rather than more comprehensive, appropriate and accessible options such as those passed recently in Western Australia.

Conclusion

Available information conclusively demonstrated that sexual orientation and parental fitness are unconnected. A new body of research into lesbian and gay parents shows a burgeoning community of new family forms, with largely unmet legal needs. The needs of lesbian and gay families and the children they raise must be more closely considered in Australia to form a reasoned and well informed basis for policy development now and in the future.

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Fiona Tasker and Susan Golombok, *Growing Up in a Lesbian Family*, Guilford Press, NY, 1997.

Endnotes

1 Judith Stacey and Timothy Biblarz, "(How) Does the Sexual Orientation of Parents Matter?" (2001) 66 *American Sociological Review* 159 at 159–160.

2 In 1983 the Family Court of Australia considered a custody dispute involving a lesbian mother by introducing a list of 8 matters "which a Court must take into account in arriving at its decision". These included: "1. Whether children raised by their homosexual parent may

themselves become homosexual, or whether such an event is likely ...3. Whether a homosexual parent would show the same love and responsibility as a heterosexual parent; 4. Whether homosexual parents will give a balanced sex education to their children and take a balanced approach to sexual matters; 6. Whether children need a parent of the same-sex to model upon ...8. The attitude of the homosexual parent to religion": *L and L* (1983) FLC 91-353 at 78,363. This approach was adopted in a 1992 custody case concerning a gay father as "an extremely handy check list" of "matters which a court must take into account in arriving at its decision where a homosexual is seeking custody or access to children": *Doyle* (1992) 15 Fam LR 274 at 277. In a 1995 decision regarding a lesbian mother, the check list was not referred to but the Full Court of the Family Court upheld the decision of a trial judge granting custody of a child to the heterosexual father on the grounds that a male "role model" was needed to "balance" the influence of a lesbian mother: *A and J* (1995) FLC 92-619. For an excellent empirical analysis of the treatment of sexual orientation in Family Court counsellors reports see Even Tauber and Lawrie Moloney "How is the issue of Lesbian and gay Parenting addressed in Family Reports" (2002) 16 *Australian Journal of Family Law* 185.

3 However, lesbians and gay man are eligible to apply as individuals. This means that, for example, a gay man may adopt a child whom he raises with a partner, but the child is given only one legally recognised parent, the one whose name appears on the adoption papers. More commonly, a lesbian couple may conceive a child through donor insemination with only one woman having a legally recognised relationship with the child. In this situation the child has no legal father and the other woman is unable to adopt the child so that the child can thereby have two legal parents. "Second parent adoptions" as they have become known, are available in many jurisdictions in the USA: see Nancy Polikoff, "The deliberate construction of families without fathers: is it an option for lesbian and heterosexual mothers?" (1996) 36 *Santa Clara Law Review* 375; and critically discussed in Julie Shapiro, "A Lesbian-Centred Critique of Second-Parent Adoptions" (1999) 14 *Berkeley Women's Law Journal* 17; Ruthann Robson, *Sappho Goes To Law School*, Columbia UP, NY, 1998 at 185–88.

4 In 1997, the NSW Law Reform Commission recommended that gay and lesbian couples be eligible to jointly adopt, but the NSW Government rejected the proposal almost immediately. See: NSW Law Reform Commission, *Review of Adoption of Children Act 1965 (NSW)*, Report 81, NSWLRC, Sydney 1997 paras 6.104–6.123; Janet Fife-Yeomans and David Nason, "Minister rejects gay case for adoptions" *The Australian*, 26 July 1997. When the legislation was comprehensively overhauled and replaced by the *Adoption Act* 2000 (NSW) same-sex couples were omitted.

5 This places the female de facto partner of a mother in exactly the same position that a male de facto partner would be. See *Acts Amendment (Lesbian and Gay Law Reform) Act* 2002 s 6A.

6 *McBain v Victoria* [2000] FCA 1009. See Kristen Walker, "Equal Access to Assisted Reproductive Services: The Effect of *McBain v Victoria*" (2000) 25 *Alternative Law Journal* 288 and in more detail, "1950s Family Values Vs Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria" (2000) 11 *Public Law Review* 292. See also, Belinda Bennett, "Reproductive Technology, Public Policy and Single Motherhood" (2000) 22 *Sydney Law Review* 625.

7 Section 8 (1) of the *Fertility Treatment Act* 1995 (Vic) restricted access to fertility treatment to a woman who was either (a) "married and living with her husband on a genuine domestic basis", or (b) "living with a man in a de facto relationship as defined in s 3(1) of the State Act". The Federal Court held that this "marriage requirement" was inconsistent with s 22 of the *Sex Discrimination Act* 1984 (Cth), and that it was therefore inoperative: *McBain v State of Victoria* [2000] FCA 1009. For a discussion of the preceding cases in Australia see: Bronwyn Statham, "(Re)producing Lesbian Infertility: Discrimination in Access to Assisted Reproductive Technology" (2000) 9 *Griffith Law Review* 112.

8 Despite the fact that Ms Meldrum was herself heterosexual, *all* major news reports around the case mentioned lesbian access to fertility services. Most reports talked about "single women and lesbians", but some conflated the two groups, describing all lesbians as though they were "single" (presumably by virtue of the fact that they were women

not partnered with a man). See eg: "Plans to give single women, including lesbians, greater access to fertility treatment in Victoria have been deferred after public outcry": Gabrielle Costa, "Backdown on Psychological Infertility" *The Age*, 21 November 2001. Another article canvassed the possibility that access might now become available to "women who for psychological reasons cannot have normal sexual intercourse". The article quoted Helen Szoke, head of the Infertility Treatment Authority as saying, "We're trying to emphasise that this is not like going to the 7-Eleven to buy milk" and continued: "[Premier Steve] Bracks denied any lesbian would be able to argue, solely on the basis of her sexuality, she was unable to have sexual intercourse: 'It'll only be available to single women if they happen to have psychological damage assessed by a doctor'": "Door opens to baby help for lesbians" *The Age*, 15 November 2001.

9 A Senate Inquiry was held into the Bill and the Committee concluded that the Bill ought not to proceed as it would contravene Australian's international obligations (the *Convention on the Elimination of Discrimination Against Women* in particular) and erode Australia's human rights record: see, Senate Legal and Constitutional Legislative Committee, *Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No 1) 2000*, SPU, Canberra, 2000. The future of the Bill remains unclear. For a discussion of the political rhetoric around the Bill, see Carol Johnson, "Heteronormative Citizenship: The Howard Government's Views on Gay and Lesbian Issues" (2003) 38 *Australian Journal of Political Science*, 45–62.

10 David Marr, "High Court Blasts Government on IVF" *Sydney Morning Herald*, 5 September 2001.

11 (2002) 188 ALR 1. For discussion see eg: Michele Rabsch, "The Fallout From McBain" (2002) July *Law Society Journal* 54.

12 See Kerry Petersen, "The Regulation of Assisted Reproductive Technology: A Comparative Study of Permissive and Prescriptive Laws and Policies" (2002) 9 *Journal of Law and Medicine* 483.

13 See eg, Kris Walker, "1950s Family Values Vs Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria" (2000) 11

Public Law Review 292. Note also the criticism offered by the Parliamentary Library Report on this issue. Noting that many lesbian couples "choose assisted insemination because they do not want to violate their fidelity by sleeping with a man, nor [do they want to] introduce a third party into their family plans", the report continued: "And, in case there is some residual doubt about the suggested alternative, the question can be asked as to why the same option should not also be expected of heterosexual women whose male partners are infertile. If it were to be expected of lesbian couples but not heterosexual ones, that one partner should just sleep with someone else, in what would the medically relevant difference consist?" Department of Parliamentary Library, Research Paper No 23, *Is it Medically Legitimate to Provide Assisted Reproductive Treatments to Fertile Lesbians and Single Women?* (Canberra: Department of the Parliamentary Library, 2000) at 9-10, cited in *Lesbian and Gay Law Reform: Report of the Ministerial Committee*, June 2001, s 8.2.2: "Socially Infertile?" at 98. Online at: http://www.ministers.wa.gov.au/Feature_stories/GayLesbian/LesbianLawReform.pdf (accessed 17 November 2003).

14 In Western Australia, a Ministerial Committee advised that a ban on lesbians and single women accessing fertility procedures effectively "encourages women to proceed with potentially unsafe practices," as any such ban "does not prevent single women and lesbians from self-inseminating or accessing potential unsafe or unlawful fertility service[s]". The Committee noted that forcing women to proceed without "adequate medical assistance or advice" can leave "both the inseminating woman and her unborn child open to the risk of infection and miscarriage." Other diseases that can be passed on by unscreened semen include: hepatitis B, syphilis, chlamydia and gonorrhea. *Lesbian and Gay Law Reform: Report of the Ministerial Committee*, June 2001, s 8.2.3: "Health Risks" at 93.

15 The terms of reference include provisions that prohibit self insemination and those that effectively prohibit sperm donation by gay men. See Victorian Law Reform Commission, Assisted Reproduction and Adoption Terms of Reference: http://www.lawreform.vic.gov.au (accessed 18 February 2003).

16 Michelle Grattan, "PM wants fathers in IVF picture" *Sydney Morning Herald*, 20 April 2002.

17 *Ibid.*

18 Simon Johanson, "Church attacks IVF ruling" *The Age*, 28 July 2000.

19 Senator Harradine referred to the "creation of a new stolen generation" in his dissenting report of the Senate Inquiry. He went on to say that, while the term has been "most widely discussed in relation to Aboriginal children, it is not limited to them." Senate Legal and Constitutional Committee, *Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No 1) 2000* – "Dissenting Report by Senator Brian Harradine", available online http://www.aph.gov.au/Senate/committee/legcon_ctte/sexdisreport/Contents.htm (accessed 12 February 2003). Senator Harradine also appeared on television in tears over the issue, and stated publicly that the decision marked "one of the nation's blackest days": David Marr, "Babytalk" *The Sydney Morning Herald*, 1 September 2001; [No author given], "The Baby Maker" *The Sun Herald*, 13 May 2001.

20 For a critique see Danny Sandor, "No Mr Muehlenburg, There's no sex with labradors" (2002) online at www.dci-au.org/muehlenberg.pdf (accessed 11 February 2003). Sandor notes the consternation of the High Court bench when these papers were included in the Catholic Bishop's Appeal book in *McBain*.

21 The AFA submission relied upon second hand reports of the work of anti-gay advocates such as Joseph Nicolosi and Paul Cameron. Cameron was also relied upon by the Festival of Light, Submission 102.
Nicolosi is a major advocate of "reorientation therapy and the prevention of homosexuality" and is closely associated with Exodus, an American christian group which aims to convert lesbians and gay men to heterosexuality. The motto of Exodus is, "Freedom from homosexuality through the power of Jesus Christ" (see http://www.exodusnorthamerica.org/). Nicolosi formed the National Association for Research and Therapy of Homosexuality (NARTH) an inter-faith pro-conversion professional organisation: see http://www.narth.com (accessed 18 February 2003).

Cameron's views on the correlation between homosexuality and crimes such as murder and paedophilia have been has published widely in the US and he is equally widely discredited there. In the 1980s, Cameron was expelled by both the American Psychological Association and the American Sociological Association for unethical and misleading research practices: see Stacey and Biblarz, note 1. In the US judicial system Cameron's views were discredited many years ago in: *Baker v Wade* 106 FRD 526 (1985) and *Gay Student Services v Texas A & M University*, 737 F2d 1317, 1330 (5th Cir 1984). Nonetheless Cameron's views are still heavily relied upon by Lynn Wardle who cites to several of his works as support for his claims that the children of lesbians and gay men are at "heightened risk" of "being drawn into homosexual behaviour themselves", that lesbians and gay men die younger than heterosexuals, are exposing their children to "some serious risk factors" including sexual molestation because of their "sexual irresponsibility": Lynn Wardle, "The Potential Impact of Homosexual Parenting on Children" (1997) *University of Illinois Law Review* 833, at 852, 865, 866. Wardle is a Professor at Brigham Young, a Mormon university in the US, and is currently the Secretary-General of the International Society of Family Law. Wardle is a respected and influential figure in US and international Family Law (Stacey and Bilbarz note for instance that Wardle drafted laws passed in Utah, based upon his article, to restrict adoption and foster care placements to married couples: Stacey and Biblarz, note 1, at 106). Wardle also appears to support conversion therapy for lesbians and gay men: see his 1999 address to a NARTH Conference, available online at: http://www.narth.com/docs/wardle.html (accessed 18 February 2003). Through Professor Wardle, Cameron has found a new influence as Wardle's 1997 article was relied upon by the Alabama Supreme Court to deny custody to a lesbian mother on the basis that children raised by same-sex couples are "deprived of an extremely valuable developmental experience and the opportunity for optimal individual growth and interpersonal development" and the "range of potential harm is enormous": *Ex Parte JMF*, 730 So 2d 1190 (Ala 1998) at 1196; followed in DWW, 717 So 2d 793 (Ala 1998).

22 See eg Gay and Lesbian Rights Lobby (NSW), Submission 42 and 42A. See also Australian Institute of Family Studies, Submission 49 and

submissions from academics: Kristen Walker, Submission 26; Stella Tarrant, Submission 51. All submissions are to the *Inquiry*, note 9.

23 *Inquiry*, note 9, para 3.30.

24 For example the scope and operation of relationship and property division laws are currently under review in New South Wales. See NSWLRC, *Review of the Property (Relationships) Act 1984 (NSW)*, Discussion Paper 44, April 2002. The paper raises a number of questions such as accessibility of second-parent adoption, presumptive recognition of co-mothers in lesbian families, and liability for child support.

25 Also, the Attorney General's Department of South Australia has recently released a discussion paper into same-sex relationship recognition in that state: "Removing Legislative Discrimination Against Same-Sex Couples", Discussion Paper, 2003, available online at http://www.sacentral.sa.gov.au/agencies/agd/index.htm (accessed 17 February 2003).

26 The NSWLRC in a recent discussion paper assumes for the purposes of property division that, "the roles of the partners in a lesbian family are likely to be similar to those usually apparent in heterosexual relationships. That is, one of the partners might stay at home and take on all or most of the child care responsibilities while the other works in some form of paid employment": Discussion Paper 44, note 24, para 4.35. In fact, all of the available research, discussed in this article, demonstrates the opposite: that the majority of lesbian couples with children share paid and unpaid labour equitably.

27 See eg, Jenni Millbank, *And then the Brides Changed Nappies: Lesbian Mothers, Gay Fathers and the Legal Recognition of Our Relationships with the Children We Raise*, A Community Law Reform Document, GLRL, Final Report April 2003 online at http://www.law.usyd.edu.au/staff/JenniMillbank/NappiesApril2003.pdf (accessed 17 November 2003).

28 See eg, "Potshot Two and IVF: The State of Play" *Sydney Morning Herald* 15 August 2000.

29 Benjamin Haslem, "PM champions child's right to both parents" *Weekend Australian* 20 April 2002.

30 Louise Silverstein and Carl Auerbach, "Deconstructing the Essential Father" (1999) 54 *American Psychologist* 397.

31 These arguments are also made forcefully by many others: see eg Stacey and Biblarz, note 1; Fiona Tasker and Susan Golombok, *Growing Up in a Lesbian Family*, Guilford Press, NY, 1997; Susan Golombok, Fiona Tasker and Clare Murray, "Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers" (1997) 38 *Journal of Child Psychology, and Psychiatry and Allied Disciplines* 783; Susan Golombok, *Parenting: What Really Counts?*, Routledge, London, 2000.

32 Silverstein and Auerbach, note 30.

33 Golombok, Spencer and Rutter (1983) found that the children of divorced lesbian mothers were more likely to have contact with their fathers than children of divorced heterosexual mothers: discussed below. More recently see the findings of McNair, Dempsey, Wise and Perlesz which report high levels of mother satisfaction at the child's contact with fathers and donors, and note that, "With very few exceptions, when there was a difference between the participant's relationships with the donor or father and her child's relationship with him, the participant tended to take the child's point of view when rating her level of satisfaction": Ruth McNair, Deborah Dempsey, Sarah Wise and Amaryll Perlesz, "Lesbian Parenting: Issues, Strengths and Challenges" (2002) 63 *Family Matters* 40 at 45. In the US National Lesbian Families Study, most of the families involved did not have involved donor-fathers, with more than half of the children born through anonymous donor insemination. Yet 63% of participants reported that children need good male role models, while only 10% thought that this was unnecessary: see Gartrell, Hamilton, Banks, Mosbacher, Reed, Sparks, Bishop, "The National Lesbian Family Study: 1. Interviews with prospective mothers" (1996) 66 *American Journal of Orthopsychiatry* 272 at 277.

34 Gillian Dunne, "Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship" (2000) 14 *Gender and Society* 11 at 31.

35 Charlotte Patterson and Raymond Chan, "Families Headed by Lesbian and Gay Parents" in Michael Lamb (ed), Parenting and Child Development in 'Nontraditional' Families, Erlbaum, New Jersey, 1999 at 167, 168; see also Charlotte Patterson, "Families of the Lesbian Baby Boom: Parent's Division of Labor and Child Adjustment" (1995) 31 *Developmental Psychology* 115.

36 Charlotte Patterson, "Family Lives of Children Born to Lesbian Mothers" in Patterson and D'Augelli, *Lesbian, Gay and Bisexual Identities in Families*, OUP, NY, 1998, at 161–2.

37 Victorian Gay and Lesbian Rights Lobby, *Everyday Experiments: Report of a Survey into Same-Sex Domestic Partnerships in Victoria*, VGLRL, 2001, available online at http://home.vicnet.net.au/~vglrl/reports/everyday.pdf (accessed 19 February 2003).

38 Charlotte Patterson and Raymond Chan, "Gay fathers" in Michael Lamb, *The Role of the Father in Child Development*, 3rd ed, Wiley, NY 1997 at 249.

39 This study was of 695 men who had gay sex, but not all of them necessarily identified as gay. Rodden et al, *Regional Differences Among Homosexually Active Men in Sydney, Newcastle and Wollongong*, HIV AIDS & Society Publications, Sydney, 1996.

40 11,288 gay male couples reported to the 1996 Census: see McNair et al, note 33 at 40.

41 1,925 respondents to the National Lesbian Health Care Survey, cited in Cheryl Parks, "Lesbian Parenthood: A Review of the Literature" (1998) 68 *American Journal of Orthopsychiatry* 376 at 377.

42 3,255 lesbian couples reported to the 1996 NZ Census: Myra Hauschild and Pat Rosier, *Get Used to It! Children of Gay and Lesbian Parents*, Spinifex, Melbourne, 1999 at 14.

43 8,296 lesbian couples reported to the 1996 Australian Census: see McNair et al, note 33.

44 *Lesbians on the Loose*, LOTL Sydney, March 1996. There were 732 respondents.

45 See Significant Others, "Australian lesbians get used to being called mum", *Press Release*, 30 March 2000; data also reported in Chloe Saltua, "Study reveals a lesbian baby boom" *The Age*, 30 March 2000; "Lesbian mums on the rise and seeking IVF" *Sydney Morning Herald*, 2 August 2000.

46 Significant Others, *ibid.* There were 386 respondents.

47 It was noted in *Everyday Experiments* that the desire to have children was markedly higher in the younger participants in the survey: 63% under 30 wanted children, while 47% of those aged 30-39 did. Overall 41% of respondents said that they wanted to have children in the future: note 38 at 14. Although note that Stacey and Biblarz believe the number of lesbians and gay parents may in fact decline. They suggest that fewer lesbians and gay men in the future will feel pressured into marriage and therefore having children in heterosexual relationships, and argue that "intentional parenting" by self-identified lesbians, and in particular by gay men, may not increase sufficiently to compensate for this decline: Stacey and Biblarz, note 1.

48 Fiona Nelson, *Lesbian Motherhood: An Exploration of Canadian Lesbian Families*, University of Toronto Press, Toronto, 1996 at 14-15.

49 McNair et al, note 33 at 43. McNair also notes a 2001 study of health care experiences of 92 lesbian and gay families in which 57% of the children resulted from heterosexual relationships. See Mikhailovich, Martin and Lawton, "Lesbian and gay parents: Their experiences of Children's Health Care in Australia" (2001) 6 *International Journal of Sexuality and Gender Studies* 181.

50 McNair et al, note 33 at 43.

51 Dunne, note 34 at 15.

52 Charlotte Patterson, Susan Hurt and Chandra Mason, "Families of the Lesbian Baby Boom: Children's Contact with Grandparents and Other Adults" (1998) 68 *American Journal of Orthopsychiatry* 390 at 392.

53 Gartrell et al, "Study 1", note 33 at 274.

54 Nanette Gartrell, Amy Banks, Jean Hamilton, Nancy Reed, Holly Bishop and Carla Rodas, "The National Lesbian Family Study: 2. Interviews with Mothers of Toddlers" (1999) 69 *American Journal of Orthopsychiatry* 362 at 364.

55 Nanette Gartrell, Amy Banks, Nancy Reed, Jean Hamilton, Carla Rodas and Amalia Deck, "The National Lesbian Family Study: 3. Interviews with Mothers of Five Year Olds" (2000) 70 *American Journal of Orthopsychiatry* 542 at 543.

56 *Ibid* at 545.

57 *Ibid* at 545; 546.

58 Nelson, note 48, Chapter 5.

59 *Ibid* at 85.

60 Dunne, note 34 at 15.

61 Susan Golombok and Fiona Tasker, "The Role of Co-Mothers in Planned Lesbian-Led Families" in Gillian Dunne (ed), *Living Difference: Lesbian Perspective on Work and Family Life*, Harrington Park Press, NY, 1998 at 65.

62 Patterson and Chan, "Gay fathers", note 39 at 203.

63 Gartrell et al, "Study: 2", note 54 at 365.

64 Gartrell et al, "Study: 3", note 55 at 544.

65 Maureen Sullivan, "Rozzie and Harriet: Gender and Family Patters of Lesbian Coparents" (1996) 10 *Gender and Society* 747 at 756.

66 *Ibid.*

67 *Ibid* at 756.

68 *Ibid* at 757.

69 Patterson and Chan, "Gay fathers", note 39 at 167, 168; see also Patterson, "Families of the Lesbian Baby Boom", note 35.

70 Golombok and Tasker, note 61.

71 *Ibid* at 59.

72 *Report of the Lesbian Parenting Conference* 2000, Sydney 2000 at 11. 77% of the lesbian respondents in the Sydney Lesbian Parenting Conference saw a co-mother as the woman who had planned to have a child with the biological mother and was present from conception onwards. However it is interesting to note that 69% of respondents also saw a co-mother as a woman who may not have been present for conception but had lived with the child and treated the child as her own for some time.

73 McNair et al, note 33 at 45.

74 *Ibid* at 46–47.

75 Sullivan, note 65 at 753.

76 *Ibid.*

77 Gartrell et al, "Study: 2", note 54 at 367.

78 Gartrell et al, "Study: 3", note 55 at 544.

79 *Ibid* at 545.

80 Note that gay men face restrictions on donating being sperm in every Australian jurisdiction. See eg: *Human Tissue Regulation* 2000 Part 6, Schedule 2, in force under the *Human Tissue Act* 1983 (NSW). Such measures are due to restrictions put in place at the outset of the HIV/AIDS epidemic in the early 1980s. Advances in testing for HIV and other communicable diseases render these restrictions unnecessary and discriminatory.

81 Sullivan, note 65 at 755.

82 Nelson, note 48 at 19.

83 Golombok and Tasker, note 61 at 52.

84 Dunne, note 34 at 15.

85 *Report of the Lesbian Parenting Conference* 2000, Sydney 2000 at 10.

86 More than half of the respondents had conceived in a heterosexual relationship. No breakdown is given of those who did not. 28% of the total respondents had self-inseminated, 8% had used a clinic for donor insemination and a further 6% had used IVF/GIFT through a clinic.

87 McNair et al, note 33 at 43.

88 *Ibid.* 54% said that the cost of clinic services was also a factor.

89 Although note that there is no clear-cut donor/father line and usage reflect this. The McNair Lesbian and Gay Families Project found that, "Defining the child's biological father as a 'donor' did not mean he was anonymous or unknown to the children, nor did defining him as 'father' necessarily denote involvement': McNair et al, note 33 at 45.

90 Gartrell et al, "Study: 1", note 33 at 277.

91 Gartrell et al, "Study: 2", note 54 at 366.

92 Gartrell et al, "Study: 3", note 55 at 545.

93 Patterson, "Family Lives", note 36 at 164. 11% children were conceived through intercourse and for 8% the parents did not wish to disclose the method.

94 *Ibid* at 165.

95 Dunne, note 34 at 15.

96 *Ibid* at 16–18.

97 *Ibid* at 28.

98 *Report*, note 85 at 10.

99 McNair et al, note 33 at 44. Note these figures may be skewed by the use of "father" and "donor" in this study based on self definition rather than method of conception: some donors are recorded as "fathers" and their involvement recorded along with male ex-partners.

100 *Ibid* at 45.

101 Catherine Donovan, "Who Needs a Father? Negotiating Biological Fatherhood in British Lesbian Families Using Self Insemination" (2000) 3 *Sexualities* 149.

102 *Re Patrick* [2002] FamCA 193.

103 Nelson, note 48 at 47.

104 *Report*, note 85 at 10.

105 Richard Green, "Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents" (1978) 135 *American Journal of Psychiatry* 692.

106 See Jenni Millbank, "same-sex Couples and Family Law", Conference Paper Presented at the Third National Family Court Conference, Melbourne 24 October 1998, available at http://www.familycourt.gov.au/papers/html/same_sex.html (accessed 20 February 2003).

107 Senate Legal and Constitutional Legislative Committee, *Inquiry*, note 9.

108 Charlotte Patterson, "Family Relationships of Lesbians and Gay Men" (2000) 62 *Journal of Marriage and the Family* 1052 at 1064.

109 Mike Allan and Nancy Burrell, "Comparing the Impact of Homosexual and Heterosexual Parents of Children: Meta-Analysis of Existing Research" (1996) 32 *Journal of Homosexuality* 19.

110 Note that this analysis did not control for gender differences with lesbian and gay parents, nor for single parent/divorce factors — ie whether children of a lesbian divorcee were being compared with children of an intact heterosexual family, as later researchers such as Tasker, Golombok and Patterson argue is necessary.

111 Allan and Burrell, note 109 at 28.

112 See eg, Australian Family Association, Submission No 60 to the *Inquiry*, note 9, at 315; Wardle, note 21. Elsewhere Wardle refers to recent research as a "mud slide" and uses inverted commas around the words "scientific studies": Wardle, "A Reply to Warring with Wardle" (1998) *University of Illinois Law Review* 629 at 633.

113 Carlos and Pea point out that Wardle nonetheless relies upon these same studies to argue that children are harmed through gender non-conformity: Carlos Ball and Janice Pea, "Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents" (1998) *University of Illinois Law Review* 253 at 279–280.

114 Wardle, note 21 at 844–852.

115 Stacey and Biblarz, note 1 at 160.

116 "...the social science literature, despite its shortcomings, supports the rather limited proposition that gay and lesbian parents (or prospective parents) are entitled to be evaluated individually on the basis of their ability to be good parents instead of being assessed based on assumptions about their sexual orientation": Carlos and Pea, note 113 at 277.

117 They note further the irony that the large representative samples of open lesbian and gay parents Wardle requires in order to be convinced are unlikely to be forthcoming when Wardle's proposals would remove their children from them: *ibid* at 274. See also Stacey, "Gay and Lesbian Families: Queer Like Us" in Mary Ann Mason, Arlene Skolnick and Stephen Sugarman (eds), *All Our Families: New Policies for a New Century* (New York: OUP, 1998).

118 Stacey and Biblarz, note 1 at 161.

119 *Ibid* at 176.

120 See Wardle, note 21. Wardle draws from this that children's gender identity has been impaired: at 852. Ball and Pea retort, "Why then, if some lesbian women raise daughters who wear overalls and baseball caps

and want to be astronauts or engineers, or sons who like to cook, are we concerned about their gender identity? Are those families, from a gender identity perspective, any different from families where heterosexual fathers raise sons who think it is appealing to stay home and tend to children, or daughters who love baseball and want to be a lawyer like mommy? We suggest that, if traditional gender role and gender identity development in children is a valid public policy goal, it is threatened not only by lesbian and gay parents, but by primary caregiving fathers, dual earner families and heterosexual married people who are committed to non-sexist child rearing": Carlos and Pea, note 113 at 298.

121 Lisa Saffron, "Raising Children in an Age of Diversity – Advantages of Having a Lesbian Mother" in Gillian Dunne (ed), *Living Difference: Lesbian Perspectives on Work and Family Life*, Harrington Park Press, NY 1998 at 37.

122 Stacey and Biblarz, note 1 at 177.

123 Fiona Tasker and Susan Golombok "Children Raised by Lesbian Mothers: The Empirical Evidence" (1991) *Family Law* 184.

124 Charlotte Patterson, "Children of Lesbian and Gay Parents" (1992) 63 *Child Development* 1025.

125 Summarised in Patterson and Chan, "Families Headed by Lesbian and Gay Parents" in Michael Lamb (ed), *Parenting and Child Development in 'Nontraditional' Families,* Erlbaum, New Jersey, 1999. Kirkpatrick (1987) found that the children of lesbian mothers had more contact with adult male family members and friends than did children of heterosexual parents. These findings are also borne out in the studies of children born into lesbian families. Golombok, Spencer and Rutter (1983) found that children of divorced lesbian mothers had higher rates of contact with their fathers than those of heterosexual women.

126 Fiona Tasker and Susan Golombok, "Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Families" (1996) 32 *Developmental Psychology* 3; Tasker and Golombok, *Growing Up in a Lesbian Family,* note 31.

127 Tasker and Golombok, *Growing Up in a Lesbian Family*, note 31 at 145.

128 Patterson and Chan, "Gay fathers", note 38.

129 *Ibid* at 254–5.

130 *Ibid* at 252.

131 See discussion in Patterson and Chan, *ibid* at 256.

132 Susan Golombok, Fiona Tasker and Clare Murray, "Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers" (1997) 38 *Journal of Child Psychology, and Psychiatry and Allied Disciplines* 783.

133 Raymond Chan, Barbara Raboy and Charlotte Patterson, "Psychosocial Adjustment among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers" (1998) 69 *Child Development* 443.

134 *Ibid* at 448.

135 Gartrell et al, "Study: 2", note 54 at 366.

136 Gartrell et al, "Study: 3", note 55 at 545.

137 Patterson, Hurt and Mason, "Families of the Lesbian Baby Boom: Children's Contact with Grandparents and Other Adults" (1998) 68 *American Journal of Orthopsychiatry* 390 at 396.

138 *Ibid* at 396.

139 Dunne, note 34 at 22–3. See also discussion in Donovan, note 101.

140 For an overview see: Jenni Millbank and Wayne Morgan, "Let Them Eat Cake, and Ice Cream: Wanting Something "More" from the Relationship Recognition Menu" in Robert Wintemute and Mads Andenæs (eds), *Legal Recognition Of Same-Sex Partnerships: A Study of National, European, and International Law*, Hart Publishing Company, Oxford, 2001.

141 See Reg Graycar and Jenni Millbank, "The Bride Wore Pink....to the Property (Relationships) Act" (2000) 17 *Canadian Journal of Family Law* 227.

142 See *Statute Law Amendment (Relationships) Act* 2000 (Vic).

143 Mentioned briefly in Jenni Millbank and Kathy Sant, "A Bride In Her Every-Day Clothes: Same Sex Relationship Recognition in NSW" (2000) 22 *Sydney Law Review* 181.

144 The current inquiry in South Australia does not in fact mention children: "Removing Legislative Discrimination", note 25.

145 *Acts Amendment (Lesbian and Gay Law Reform) Act* 2002; and see www.equalityrules.info for a plain language guide to the Act and its practical effects (accessed 7 February 2003).

146 The *Child Support (Assessment) Act 1989* (Cth) only contemplates the liability of biological and adoptive parents. In NSW a parent may be able to claim maintenance for children (to the age of 12 only) in proceedings under the *Property (Relationships) Act* 1984 if the relationship ended after June 1999. Elsewhere in Australia, a claim of promissory estoppel is available under *W v G* (1996) 20 Fam LR 49. These are complex and expensive options.

147 *Re Patrick* [2002] FamCA 193.

148 The role of the co-mother is not given much attention in the judgment. It is notable that in an interview with the judge published in December of 2002, after the mother had killed the child and suicided it is not apparent anywhere in the piece that the child had a co-mother. The entire focus of the article was on the judge's concern about the biological father's relationship with the child and his subsequent loss ("When he [Guest J] thinks of what came to pass and the face that danced before him in court", he reminds himself "that the boy had the pleasure of laughing in his father's arms'"). I am not intending to negate the biological father's grief or loss, but am astonished that the co-mother, who had lost both her partner and her child was so wholly eradicated in

the piece. Kate Legge, "Patrick — A Case in the Life of a Family Court Judge" *Australian Magazine*, 7 December 2002.

149 For example, Guest J states that it is a "strange result" and "difficult to understand" the exclusion of the biological father from the definition of parent under the Family Law Act (para 301, 306), refers to expert evidence that the mothers are the child "parents" and adds that there is not a "similar and appropriate recognition" of the biological father (erroneously implying that the co-mother had some form of legal recognition: para 307). Later the judge suggests that the legislation was "intended to protect" a "traditional heterosexual model" of family and that "consideration should be given to review the definition of 'parent' in s 60H of the Act" (para 312) and again says the legislature needs to "reassess" the Act in light of donor participation in children's lives (para 330).

150 In this case much turned on the conflict of evidence over what contact the donor would have (his evidence was twice weekly, the mother's evidence was that it was to be a few times per year. The Court preferred the donor's evidence on all points of conflict.) Further the position of the donor was always a strong one by virtue of the fact that it was not the donor who was applying to the court for contact. Rather the mothers were trying to restrict a contract regime that they had previously agreed to and formalised in consent orders. Very different factors would operate if there had not already been a contract regime, and consent orders to that effect, in place at the time of the dispute Finally the mother's depressive illness and (what the court viewed as) her intransigent position may well have influenced the court to grant generous contact.

151 Formal eligibility, or accessibility, is important, but it is not truly helpful to lesbian and gay families unless there is both non-discriminatory treatment within the system, and a perception that there will be non-discriminatory treatment for those who have not yet attempted to enter it. One respondent to the McNair Lesbian and Gay Families Project reported, "I was the non-biological mother in my previous relationship. When this broke down I initially had our daughter half the week. My ex-partner slowly decreased this and then she refused me any contact.

I went through the family court and mediation but there was no law to protect my rights and the primary bond I had with my daughter. This is shocking, devastating and has to change!": McNair et al, note 33 at 47.

152 Note 147 at para 321.

153 Note 147 at paras 63, 94.

154 Introduced under the *Family Law Reform Act* 1995 (Cth).

155 See *Family Law Act* 1975 (Cth) ss 63A-H.

156 Guest J notes that such a change would be helpful: note 147 para 316.

157 While Guest J makes a considerable effort to understand the issues, the bulk of discussion around gay and lesbian families is located at the end of the judgment and appears to be almost an afterthought. Guest J also appears to contradict his statements on the particular forms and needs of lesbian and gay families when he states at one point that, "the issue concerning contact between the father and Patrick which I have addressed in thus judgment is not dissimilar from that arising in traditional heterosexual family disputes and decided daily by the Court. It is not unique" (para 326). Guest J also makes a number of interesting slips, including referring to the biological father as "the husband" (para 151) and the co-mother as a "co-partner" rather than a "co-parent" (para 314).

158 See NSWLRC, *Review of the Property (Relationships) Act 1984 (NSW)*, Discussion Paper 44, April 2002; Victorian Law Reform Commission, Assisted Reproduction and Adoption Terms of Reference: http://www.lawreform.vic.gov.au (accessed 18 February 2003); and Tasmania Law Reform Institute, *Adoption by Same Sex Couples*, Issues Paper 4, February 2003, Although note that the Tasmanian recommendations were considerably broader in the final reort: Tasmania Law Reform Institute, Adoption by Same Sex Couples, Final Report No 4, May 2003, online at http://www.law.utas.edu.au/reform/AdoptionFinRepEasyPrint.pdf (accessed 17 November 2003).

159 As is clear from the discussion earlier in this paper, lesbian co-mothers who are present as equal parents from the child's birth are *not* similarly situated to step-parents, who have come into the child's life at a later stage. Step-parent adoption provisions assume that a legal relationship with a parent is being severed in order to grant it to the adoptive parent, and legislation in many states therefore contains a presumption *against* such an order: see eg, *Adoption Act* 2000 (NSW) s 30.