Same sex parents

Won't Somebody Please Think Of The Children!

Anderson-Morley, Rhyian

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I TITLE PAGE

SAME-SEX PARENTS: WON'T SOMEBODY PLEASE THINK OF THE CHILDREN!

A Review Of Whether The Children Of Same-Sex Parents Are Afforded The Same "Best Interests" As Children To Heterosexual Parents Under Family Law.

RHYIAN ANDERSON-MORLEY*

*Rhyian Anderson-Morley is currently undertaking his Honours Research Paper as part of his Bachelor of Laws at Charles Darwin University, Australia. He is also known for being the first suburban and second ever Australian Rules Football player to come out as gay, which he did through a front-page article in The Age newspaper. He would also like to extend his gratitude to Felicity Gerry QC for her support and mentorship throughout this research paper. It will not be forgotten, or undervalued.

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III INTRODUCTION

In recent years, the legal recognition of same-sex couples has been increasingly prioritised, with the affording of rights to children of same-sex parents being somewhat incidental to the affording of rights to gay parents themselves. Conversely, the ideologies of the *United Nations Convention on the Rights of the Child*[1] ('UNCRC') describe the interests, rights and protections of a child as being paramount to any other consideration in all matters concerning a child. The UNCRC is primarily shaped by four fundamental principles;[2] the first two, and most relevant to the matters considered herein, being summarised[3] as:

> *Every child, everywhere: Children should neither benefit nor suffer because of their race, colour, gender, language, religion, national, social or ethnic origin or because of any political or other opinion; because of their caste, property or birth status or because they are disabled;*[4]
>
> *Best interests of the child: Laws and actions affecting children should put their best interests first and benefit them in the best possible way. All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and law makers.*[5]

The UNCRC ideologies have been universally accepted[6] as being the correct approach to children's rights in all matters. This paper will specifically assess these ideologies'

[1] *Convention on the Rights of the Child,* opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).
[2] *Convention on the Rights of the Child,* opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) arts 2, 3, 6, 12; UNICEF, *Rights under the Convention on the Rights of the Child* (7 August 2014) <http://www.unicef.org/crc/index_30177.html>.
[3] Early Childhood Australia, *United Nations Conventions on the Rights of the Child (CRC)* <http://www.earlychildhoodaustralia.org.au/learning-hub/educator-resources/childrens-rights/>.
[4] *Convention on the Rights of the Child,* opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) art 2; UNICEF, 'The Convention on the Rights of the Child. Guiding Principles: General Requirements for all Rights' (Discussion Paper, UNICEF, Updated 7 August 2014).
[5] UNICEF, above n 3; *Convention on the Rights of the Child,* opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) art 3.
[6] UNICEF, *Convention on the Rights of the Child* <http://www.unicef.org/crc/>.

applications within Australian law, and whether they have been equally offered to the children of same-sex parents.

This paper will undertake a review of the domestic historical progression of recognition and rights of gay people (generally and in Family Law matters). Next, it will review foreign jurisdictions' approaches to family units consisting of same-sex parents to ascertain a successful implementation of legal protections and rights. The current domestic approach will then be assessed through Legislation and case law in order to establish differential treatment of children of same-sex parents. Additionally, the paper will review psychological evaluations of the welfare and development of children of same-sex parents for the purpose of ensuring consistency between any established disadvantages and suggested recommendations. The paper will then summarise the current treatment of children of same-sex parents and how they differ from children of heterosexual parents. With consideration of a successful (foreign) approach to the implementation of equal rights and protections, the paper will then establish whether the current domestic approach is progressing in an ideal direction or how the direction should be refocused.

Finally, with consideration of all aforementioned topics, the paper will put forward some recommendations to progress the current direction of the law and/or change the legal direction towards an equal legal approach to children of same-sex parents, with a proactive approach to the rights of those children as opposed to the rights of the gay parents' themselves. The key topics of recognition of relationships/families, adoption, surrogacy and artificial insemination,[7] and the general children's best interests ideology will be the consistent considerations throughout the paper.

[7] Whilst surrogacy and artificial insemination laws regulate an adult's legal ability to conceive a child, the laws impact children insofar as legal disputes regarding parenthood and best interests in future legal disputes.

VII HISTORIC PROGRESSION OF RIGHTS AND RECOGNITION OF GAY PEOPLE AND FAMILIES

A *Basic Human Rights and Legal Acceptance of Gay People*

Prior to the 21st century, the rights and protections of gay and lesbian people in Australia were scarce[8] with the exception of the 1994 *Human Rights (Sexual Conduct) Act*,[9] which prohibited legal interference with private sexual activity between two consenting adults;[10] enforced so as to be consistent with the *International Covenant on Civil and Political Rights*[11] which is detailed in the *Australian Human Rights Commission Act*.[12] Although the States' individual decriminalisation of consensual sexual activity between same-sex people began in 1973 with legislative movement in the Australian Capital Territory,[13] the complete decriminalisation was not complete until 1997 with Tasmania's historic cases of *Toonen v Australia*,[14] *Croome v Tasmania*[15] and the *Criminal Code Amendment Act*[16] amending the existing *Criminal Code Act*,[17] repealing the crime of "sodomy".[18]

Same-sex marriage presents an interesting discussion as, historically, the *Marriage Act*[19] ('MA') used gender-neutral terms regarding peoples able to marry; the opposite gender requirement was alternatively drawn from the common law.[20] However, in 2004, the

[8] Melissa Bull, Susan Pinto and Paul Wilson, 'Homosexual Law Reform in Australia' (Trends and Issues No 29, Australian Institute of Criminology, January 1991) 2–8.
[9] *Human Rights (Sexual Conduct) Act* 1994 (Cth).
[10] Ibid s 4.
[11] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force 23 March 1976). Entered into force in Australia 13 November 1980.
[12] *Australian Human Rights Commission Act 1986* (Cth) sch 2.
[13] *Law Reform (Sexual Behaviour) Ordinance 1976* (ACT) delayed due to ACT not having self-governing powers resulting in the Act being second only to *Criminal Law (Sexual Offences) Amendment Act 1975* (SA).
[14]Communication No. 488/1992.
[15] [1997] HCA 5.
[16] *Criminal Code Amendment Act 1997* (Tas).
[17] *Criminal Code Act 1924* (Tas).
[18] Rodney Croome, *Gay Law Reform* (2006) The Companion to Tasmanian History <http://www.utas.edu.au/library/companion_to_tasmanian_history/G/Gay%20Law%20Reform.htm>.
[19] *Marriage Act 1961* (Cth).
[20] *Hyde v Hyde Woodmansee* (1866) LR 1 P. & D. 130, 133.

Marriage Amendment Act[21] ('MAA') was passed, expanding the definition of marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.[22] Additionally, foreign marriages inconsistent with the MA definition would not be recognised.[23]

Although the MAA passed through the senate (38 votes to 6),[24] the Act received various commentary and criticism. Opposition shadow Attorney-General Nicola Roxon supported the amendment on the theory that it did not modify the legal definition of marriage, rather it legislated what had previously been recognised at common law.[25] The Australian political party, The Greens, referred to the bill as the 'Marriage Discrimination Act,'[26] and were supported by another party, The Democrats, labelling it as 'hateful' and an 'absolute disgrace.'[27] Opposition MP Anthony Albanese (Australian Labor Party) described the Legislation as little more than "30 bigoted backbenchers who want to press buttons out there in the community".[28] The topic of same-sex marriage is still a political and social hot-topic with activists continually demanding an amendment to the exclusive definition of marriage so as to allow same-sex couples the ability to marry.

The relevance of same-sex marriage to a child's best interests is discussed in a 2003 study by the Committee on Psychosocial Aspects of Child and Family Health who, with endorsement of the American Academy of Pediatrics, stated that:

> *Scientific evidence affirms that children have similar developmental and emotional needs and receive similar parenting whether they are raised by parents of the same or different*

[21] *Marriage Amendment Act 2004* (Cth).
[22] Ibid s 3(1).
[23] Ibid s 3(3).
[24] Department of Parliamentary Services (Cth), *Senators Journals*, No 161 of 2004, 12 August 2004, 50.
[25] Department of Parliamentary Services (Cth), *Bills Digest*, No 5 of 2003-04, 20 July 2004.
[26] Ibid.
[27] Misha Schubert, 'Democrat pleads for rethink on gay marriage ban', *The Age* (Canberra, Australia), 14 August 2004, 1.
[28] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2004, 30551–30553 (Anthony Albanese).

> *genders. If a child has 2 living and capable parents who choose to create a permanent bond by way of civil marriage, it is in the best interests of their child(ren) that legal and social institutions allow and support them to do so, irrespective of their sexual orientation.*[29]

B *Family Law: Recognition of Same-Sex Parents and Their Children*

Historically, mothers' were considered the primary parent and that children would benefit greatest being placed with its mother. This is reflected in the opening comments in the 1956 case of *Malik v Malik* [30] that '[w]hile its mother had no special right to the custody of a child in tender years, it is usually in the interest of such a child to be looked after by its mother…' yet, this view has progressed significantly in recent years.

Initially, the *Family Law Act*[31] ('FLA') considered the welfare of a child to be the over-arching concern in proceedings regarding a child,[32] but was amended in the 1995 *Family Law Reform Act*[33] ('FLRA') where the term 'welfare' was replaced with a general 'best interests'[34] practice which included consideration of "care, welfare and development."[35] However, the different terminology was not intended to alter the considerations when determining a child's best interests or welfare.[36] The FLRA, whilst effectively implementing reform to such areas as the requirements of mediation,[37] caused confusion with regards to the 'best interests' theory and its application. Justice Chisholm expressed uncertainty,

[29] Committee on Psychosocial Aspects of Child and Family Health, 'Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian' (2013) 131(4) *Pediatrics* 827, 827 [1].
[30] TASStRp22; [1957] Tas SR 5.
[31] F*amily Law Act 1975* (Cth).
[32] Ibid s 64(1).
[33] *Family Law Reform Act 1995* (Cth).
[34] Ibid s 31.
[35] Ibid s 30; *KAM v MJR; JIG (Intervener)* (1999) FLC92-847, 5.1.1–5.1.5.
[36] Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 1991, 4455.
[37] *Family Law Reform Act 1995* (Cth) ss 5–24.

particularly regarding the purpose of the change of terminology[38] and the ability of a Court to decide what the best interests of a child may be under the amended legislation.[39]

Similarly, in the 1990s, the Courts application of the law began to expand in accepting family ties that extended beyond traditional means. The 1990 case of *Stevens and Lee*[40] recognised that the termination of a 'long and well-established relationship with a person other than the parent' would result in the child suffering a detriment and the continuation of that relationship should be given consideration.[41] However, these relationships would be assessed differently from relationships between child and custodial parent, in the sense that 'the Court does not necessarily commence from the assumption that access is going to be good for the child.'[42] 8 years later, the matter of *Re C and D*[43] referred to the matters of *Rice and Miller* (1993)[44] and *Re Evelyn* (1998)[45] to find that 'the biological parent does not stand in any preferred position and that fact does not in any way impinge upon the principle that the best interests of the child are paramount.'[46] In accepting the best interests' principle, the court found that '[p]ersons significant to the life of a child are not confined to those who are biologically related to the child, in the same way that the existence of a family is not determined by biological considerations."[47] The 1996 matter of *B v J*[48] described these children as being born "…out of non-traditional circumstances and into non-traditional families."[49] Whilst the 1990's progression cannot be taken as specifically beneficial for same-sex couples/families, the era provided significant advancements in accepting that family units

[38] Richard Chisholm, 'Assessing the impact of the Family Law Reform Act 1995' (1996) 10 *Australian Journal of Family Law* 177.
[39] Australian Law Reform Commission, Parliament of Australia, *Seen and heard; priority for children in the legal process* (1997) 84, 16.
[40] (1990) FLC 92-201.
[41] Ibid 78.
[42] *Stevens and Lee* [1990] FLC 92-201, 384.
[43] [1998] FamCA 98, 10.10; *Harris & Calvert* [2013] FCCA 955, 116-118.
[44] 16 Fam LR 970, 15; [1994] FLC 92-415.
[45] 23 Fam LR 53; FLC 92-807.
[46] *Re C and D* [1998] FamCa 98, 10.10.
[47] Ibid 4.3; *Halifax & Fabian & Ors* [2009] FMCAfam 972, 54–58.
[48] [1996] FLC 92-716.
[49] Ibid 83, 621.

and relationships significant to a child's best interests may extend beyond the child's biological connections.

These advancements are consistent, in the sense of being progressive whilst uncertain, with the FLRA. Later in this paper, the *Family Law Amendment (Shared Parental Responsibility) Act*[50] ('FLASPRA') will discuss how these uncertain terms have been sought to be clarified with a richer meaning and broader approach to the best interests' principle.

VII INTERNATIONAL APPROACH

The United Nations' vision for matters involving children is expressed in the aforementioned UNCRC's fundamental principles; children should not suffer discrimination on any grounds and their best interests should hold paramount consideration in all matters concerning them.[51] This paper will now look at South Africa, the United States of America and the Netherlands, as three international jurisdictions' who have undertaken different approaches towards achieving the legal ideologies set out in the UNCRC.

A *South Africa*

Whilst South Africa would, prima facie, appear to offer equal legal protections for gay people, the circumstances surrounding the implementation of these laws require discussion.

The leading 2002 case of *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*[52] involved a same-sex couple who sought to have their relationship recognised as a marriage despite the Legislation[53] not allowing same-sex marriage. The Constitutional Court referred

[50] *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth).
[51] *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) arts 2, 3.
[52] [2005] ZACC 19 (Constitutional Court).
[53] *Marriage Act* 1961 (South Africa).

to the South African Constitution[54] and held it to guarantee full legal protections and equality; no South African person(s) would suffer discrimination or not have complete enjoyment of all rights and freedoms.[55]The courts ruled that gay people were to be included in those legal protections with the profound statement:

> *The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples*.[56]

The Constitutional Court found that the current law[57] contradicted those rights under the Constitution[58] and instructed the Government to rectify this legislated discrimination within one year; otherwise the courts would read down the legislation to allow same-sex marriages.

The decriminalisation of consensual sexual activity between same-sex adults was, similarly, a result of judicial activism in the 1997 matter of *S v Kampher*[59] where the High Court found the crime of sodomy to be inconsistent with the same constitutional protections[60] discussed

[54] *Constitution of the Republic of South Africa Act 1996* (South Africa).
[55] Ibid s 9.
[56] *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19, 71 (Constitutional Court).
[57] *Marriage Act* 1961 (South Africa).
[58] *Constitution of the Republic of South Africa Act 1996* (South Africa).
[59] (1997) 2 SACR 418 (High Court).
[60] *Constitution of the Republic of South Africa Act 1996* (South Africa) s 9.

above. The crime of commission of an unnatural sexual act and the "men at a party" crime of the *Sexual Offences Act*[61] (originally known as the *Immorality Act*)[62] was similarly taken to be unjust in the matter of *National Coalition for Gay and Lesbian Equality v Minister of Justice*[63] leading to their repeal from the Constitutional Court.

The South African approach would be summarised as reactive; the legislature have been reluctant to progress the law resulting in continuous judicial activism. This approach, whilst assisting South African same-sex attracted people, is not ideal for Australia due to the social implications and education of any rights offered under an amended legal scheme. A further issue that may arise upon relying on judicial activism is that the activism may be driven by opinion as opposed to legal interpretation, as was the case in the Family Court of England where a Magistrate, Richard Page, objected to a child being placed with a gay couple, stating that it would be in a child's best interests to place that child with a mother and a father[64] despite same-sex couples being legally permitted to adopt children.[65]

B *United States of America*

The United States of America present an interesting evaluation; with individual State legislative powers, it would be expected that some level of inconsistent laws would be present.

The inconsistency between the States can be seen in the process for decriminalisation of sexual activity. The State of Texas, with the 2003 case of *Lawrence v Texas*,[66] decriminalised same-sex sexual activity between two consenting adults. Whereas the process commenced in

[61] *Sexual Offences Act* 1957 (South Africa).
[62] *Immorality Act* 1957 (South Africa).
[63] [1999] ZACC 17 (High Court).
[64] Duffy, N 'Family Court Magistrate Suspended After Objecting to Gay Parents' *Pink News* (London, Britain) 18 January 2015, [1].
[65] *Adoption and Children Act 2002* (UK) c 38, s 50.
[66] , 539 U.S. 558 (2003).

1962 with the drafting of the *Model Penal Code*[67] in the State of Illinois by implementing the recommendations and removing the crime of sodomy.[68]

The issues of gay people's ability to adopt children have found similar discrepancies. The State of California allows for joint applications of a singular gay person,[69] joint applications of a same-sex couple[70] and for a same-sex step parent.[71] The State of Kansas is a less precise; whilst allowing for an individual application,[72] same-sex step-parent adoption is not permitted[73] and there is no laws regarding a joint application of a same-sex couple. The State of Ohio similarly permits an individual to apply for an adoption order[74] but have no laws regarding a joint application or for a step-parent adoption.

The legality of surrogacy arrangements highlights great discrepancy regarding State laws. An example can be found when comparing the States of California and Michigan; California allows for altruistic surrogacy arrangements[75] whilst not only does Michigan not permit those arrangements, they are classified as a felony with a sentence of up to 5 years imprisonment and a fine of up to $50,000 (USD).[76]

Same-sex marriage again highlights the various and inconsistent State laws; many States, like California,[77] permit same-sex marriages whilst some states, like Alabama, [78] do not. Another

[67] *Model Penal Code*, 5788 USC (1962).
[68] *Criminal Code of 1961*, 11 ICS (1961).
[69] *Family Code*, 13 CFC ch 3 § 8802 (1992).
[70] Ibid.
[71] Ibid ch 5 § 9000(b).
[72] *Kansas Adoption and Relinquishment Act*, 59 KSA § 2113 (2014).
[73] Ibid.
[74] *Ohio Revised Code*, 31ORCA ch 7 s 3 (1953).
[75] *Family Code*, 12 CFC §§ 7960–7962 (1992).
[76] *Michigan Compiled Laws*, 722 MCL § 857.7(1)–(2) (2014).
[77] *Family Code*, 3 CFC §§ 300–310 (1992).
[78] *Alabama Code*, 30 AL tit 1 § 19 (1975).

approach can be found in Kansas, where some jurisdictions permit licences to be granted to same-sex couples[79] although the State itself does not recognise them.[80]

It is not only the inconsistency, but the confusion which would demonstrate the United States of America to not be an ideal model of progressions for Australian law. For a consistent law, one would need to assess an individual State within the USA. However, this paper is looking to the Federal law of Australia for further amendments and would alternatively look to a foreign jurisdiction which had a stream-lined legislative approach.

C *The Netherlands*

The Netherlands is known for its progressive approach and as a generally gay-friendly country,[81] due to being the first country world-wide to legalise same-sex marriage in 2001.[82] As a reference point for the human rights focus that is held in the Netherlands, the decriminalisation of same-sex activity began as early as 1811,[83] and has only been interrupted during World War Two, with Nazi Germany making same-sex activity illegal[84] however this was repealed at the end of the war.

The Netherlands has one legislative voice, being the *Burgerlijk Wetboek*[85] (the Dutch Civil Code). Each amendment or legislative provision regarding Family Law and children's rights

[79] Brad Cooper 'Patchwork of Same-Sex Marriage Law Starts Unfolding Across Kansas', *The Kansas City Star* (Kansas, USA) 13 November 2014.
[80] *Constitution of the State of Kansas*, 15 KSL §16(a) (1857).
[81] Mark McDaid, *The Netherlands is one of Europe's most gay-friendly nations* (20 May 2013) I am Expat <http://www.iamexpat.nl/read-and-discuss/expat-page/news/netherlands-one-of-europes-most-gay-friendly-nations>; Rebecca Baird-Remba, *These 13 Countries Are More Gay Friendly than America* (24 March 2013) Business Insider Australia <http://www.businessinsider.com.au/worlds-most-gay-friendly-countries-2013-3?op=1#the-netherlands-was-the-first-country-to-legalize-gay-marriage-in-2000-1>.
[82] *Burgerlijk Wetboek Boek 1 Personen- en familierecht* [Dutch Civil Code Book 1] (Netherlands) 1992 Title 5 art 30.1 [Dutch Civil Law trans, *Dutch Civil Code Book 1 Law of Persons and Family Law* <http://www.dutchcivillaw.com/civilcodebook01.htm>].
[83] *Nepoleonic Code 1804* [Civil Code] (France).
[84] *Strafgesetzbuch 1871* [Penal Code] (Germany) s 175.
[85] *Burgerlijk Wetboek Boek 1 Personen- en familierecht* [Dutch Civil Code Book 1] (Netherlands) 1992 [Dutch Civil Law trans, *Dutch Civil Code Book 1 Law of Persons and Family Law* <http://www.dutchcivillaw.com/civilcodebook01.htm>].

are found within *Boek 1* (Book 1) translated to 'Law of Persons and Family Law'.[86] The first book is broken into 20 titles (sections) including marriage,[87] adoption,[88] surrogacy and artificial insemination arrangements.[89]

The wording of the Dutch Civil code is simple and inclusive; the comparison of a de facto relationship is found in *Titel 5A Het geregistreerd partnerschap* (Title 5 Registered Partnership) which finds that '[a] person may, at the same time, only be united in a registered partnership with one other person, either of the same or of another gender.'[90] Additionally, the considerations and abilities of a court to classify a relationship according to a Governmental definition is significantly less; requirements and considerations of a registered partner are restricted only to the parties' place(s) of residence and the current and previous marital statuses.[91]

Titel 5 *Het huwelijk* (Title 5 Marriage) of the *Burgerlijk Wetboek* finds that 'A marriage may be entered into by two persons of a different or of the same gender (sex).'[92] The remainder of Title 5 is similar in provisions to Australia's MA,[93] with gender terms being interchangeable. Similarly, the *Burgerlijk Wetboek* allows an adoption resulting from 'a joint request of two persons or upon a request of one person alone'.[94] The eligibility criteria of those seeking to

[86] Ibid.
[87] Ibid title 5.
[88] Ibid title 12.
[89] Ibid title 11 arts 198–199.
[90] *Burgerlijk Wetboek Boek 1 Personen- en familierecht* [Dutch Civil Code Book 1] (Netherlands) 1992 title 5A art 80a.1 [Dutch Civil Law trans, *Dutch Civil Code Book 1 Law of Persons and Family Law* <http://www.dutchcivillaw.com/civilcodebook01.htm>].
[91] Ibid title 5A art 80a.4.
[92] *Burgerlijk Wetboek Boek 1 Personen- en familierecht* [Dutch Civil Code Book 1] (Netherlands) 1992 title 5 art 30.1 [Dutch Civil Law trans, *Dutch Civil Code Book 1 Law of Persons and Family Law* <http://www.dutchcivillaw.com/civilcodebook01.htm>].
[93] *Marriage Act 1961* (Cth).
[94] *Burgerlijk Wetboek Boek 1 Personen- en familierecht* [Dutch Civil Code Book 1] (Netherlands) 1992) title 12 art 227.1 [Dutch Civil Law trans, *Dutch Civil Code Book 1 Law of Persons and Family Law* <http://www.dutchcivillaw.com/civilcodebook01.htm>].

adopt are simply that the persons 'have lived together for at least three consecutive years immediately preceding the filling of the request.'[95]

A simplified approach to Legislation with interchangeable gender terms has been effective in ensuring legal protections but additionally in the social interpretations of the laws, highlighted though the Netherlands reputation as a gay friendly country.[96] The Netherlands successful approach will be given subsequent consideration throughout this paper, particularly in making recommendations in its concluding stages.

VII CURRENT DOMESTIC APPROACH

A *Legislation*

1 *Establishing Same-Sex De Facto Relationships and Same-Sex Parents*

The FLA recognises a de facto partner if they are in a de facto relationship,[97] as defined in the *Acts Interpretation Act 1901* (Cth)[98] (AIA); A person is found to be in a de facto relationship with another person if they are not legally married to each other,[99] are not related by family[100] and are living together as a couple on a genuine domestic basis.[101] In determining whether or not the people are living as a couple on a genuine domestic basis, the courts are to consider things such as the duration of the relationship,[102] the nature of the common residence,[103] the sexual activity,[104] financial dependence or independence,[105] use and ownership of property,[106]

[95] Ibid title 12 art 227.2.
[96] Mark McDaid, above n 78; Rebecca Baird-Remba, above n 78.
[97] *Family Law Act 1975* (Cth) s 60EA.
[98] *Acts Interpretation Act 1901* (Cth) s 2F.
[99] Ibid s 2F(1)(a).
[100] Ibid s 2F(1)(b).
[101] Ibid s 2F(1)(c).
[102] Ibid s 2F(2)(a).
[103] Ibid s 2F(2)(b).
[104] Ibid s 2F(2)(c).
[105] Ibid s 2F(2)(d).
[106] Ibid s 2F(2)(e).

commitment to a shared life,[107] the care of any children[108] as well as the reputation and public aspects of the couple.[109]

The FLA finds that a child of a person who is in (or has been in) a de facto relationship, is a child of both the person and the de facto partner.[110] Prima facie this appears to be similar in recognition to that of a child to a husband and wife, being that the child is a child of the marriage (and of those married people)[111] regardless of conception through artificial insemination[112] or surrogacy arrangements[113] and whether or not the marriage is terminated.[114] However, when determining whether or not two people are in a de facto relationship, and subsequently whether or not a child is a child of that de facto relationship and partners, there are several aforementioned considerations in which the court will investigate; requiring an in-depth enquiry into a private relationship and the into the child's life. Furthermore, it is likely that in any legal dispute involving children and the recognition of their parents, the children may be required in establishing some of the aforementioned considerations, including the problematic "intended parent"[115] consideration discussed below.

2 *Alternative Means of Creating a Family*

(a) *Artificial Insemination*

The FLA finds, that when a child is born to a woman who is in a de facto relationship[116] and that the those de facto partners agree, with the party providing the other genetic material, that

[107] Ibid s 2F(2)(f).
[108] Ibid s 2F(2)(g).
[109] Ibid s 2F(2)(h).
[110] *Family Law Act 1975* (Cth) s 60HA(1)(a); *Reiby & Meadowbank & Anor* [2013] FCCA 2040, 130; *Lusito & Lusito* [2011] FMCAfam 55, 57; *Mathers & Mathers* [2008] FamCA 856, 23.
[111] *Family Law Act 1975* (Cth) ss 60F(1)–(2).
[112] Ibid s 60H.
[113] Ibid s 60HB.
[114] Ibid s 60F(2)(a).
[115] *Family Law Act 1975* (Cth) s 60H(1)(a).
[116] Ibid.

the birth mother and their de facto partner are the intended parents,[117] then those two people will be the legally recognised parents.[118] Additional to the aforementioned de facto relationship considerations found in the AIA,[119] the intended parents must be able to prove that they were in agreement with the other party providing the genetic material that the birth mother and her de facto partner were to be the intended parents. This highlights differences when comparing same-sex parents and their children with their heterosexual counterparts as intention does not generally come into consideration in determining parentage of opposite-sex parents. . The example of a child conceived accidentally emphasises this discrepancy; neither parent is intended to be a parent when there is no intention to create a child. However, in a heterosexual relationship, the parents are generally still found to be legally recognised under the FLA's "child of the marriage"[120] or "child of a de fact relationship"[121] definitions. Given the inability of a same-sex couple to marry or to genetically create a child, their family unit is disadvantaged as a result of a) having to prove intention and b) the ability of a difference of opinion regarding intentions resulting in a non-parent finding (detailed below in case law).

(b) *Adoption*

A 2009 report[122] from the Law and Justice Committee of New South Wales found that allowing same-sex couples to adopt would be in the best interests of the potentially adopted child.[123] This recommendation led to New South Wales amending[124] Legislation[125] to permit

[117] Ibid s 60H(1)(b)(i); *Re J & M – Residence Application* [2004] FMCAfam 656, 14–17.
[118] *Family Law Act 1975* (Cth) s 60H(1)(c); *Mathers & Mathers* [2008] FamCA 856, 23; *Reiby & Meadowbank & Anor* [2013] FCCA 2040, 130; *Lusito & Lusito* [2011] FMCAfam 55, 57.
[119] *Acts Interpretation Act 1901* (Cth) s 2F.
[120] *Family Law Act 1975* (Cth) s 60F.
[121] Ibid s 60HA.
[122] Standing Committee on Law and Justice, Report No 39 to New South Wales Parliament Legislative Council, *Adoption by Same-Sex Couples*, 8 July 2009; Staff Writers, 'Adoption Inquiry Backs Same-Sex Couples', *The Star Observer* (Sydney, Australia) 9 July 2009, 1.
[123] Standing Committee on Law and Justice, above n 119, 128[6.40].
[124] *Adoption Amendment (Same-sex Couples) Bill 2010 (No 2)* (NSW).
[125] *Adoption Act 2000* (NSW); *Anti-Discrimination Act* 1977 (NSW).

not only for the joint application of a same-sex couple to adopt a child but also to permit a known step-parent (of the same gender as the other parent) to file for the adoption of that child. Earlier, Western Australia, Tasmania and the Australian Capital Territory similarly amended[126] their existing Legislation[127] for similar allowances.

Victoria,[128] Queensland[129] and South Australia[130] do not permit same-sex couples the ability to jointly apply to adopt a child however do allow for an adoption order to be made for an individual in extreme circumstances. Each of these States does however permit adoption orders to be made so as to allow heterosexual couples to jointly adopt a child.[131] This highlights not only differential treatment for same-sex couples compared to heterosexual couples but also for couples in different States. The Northern Territory[132] has taken a different approach, beings silent on matters of same-sex adoption rather than expressly forbidding it.

(c) *Surrogacy*

Commercial surrogacy, being in exchange for payment, is illegal in all States of Australia.[133] This paper discusses altruistic surrogacy, which is the only legally recognised arrangement, which includes reimbursement of any costs associated with the pregnancy. The Australian Capital Territory,[134] New South Wales,[135] Queensland,[136] Tasmania[137] and Victoria[138] all

[126] *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA); *Adoption Amendment Act 2013* (Tas); *Relationships Act 2003* (Tas); *Parentage Act 2004* (ACT).
[127] *Adoption Act 1994* (WA); *Adoption Act 1988* (Tas); *Adoption Act 1993* (ACT).
[128] *Adoption Act 1984* (Vic) s 11(3).
[129] *Adoption Act 2009* (Qld) s 76(g)(ii).
[130] *Adoption Act 1988* (SA) s 12(3)(b).
[131] *Adoption Act 1984* (Vic) s 11(1); *Adoption Act 2009* (Qld) s 68; *Adoption Act 1988* (SA) s 12(1).
[132] *Adoption of Children Act 1994* (NT) s 14.
[133] *Fisher-Oakley & Kittur* [2014] FamCA 123, 21; *Green-Wilson & Bishop* [2014] FamCA 1031, 9–10.
[134] *Parentage Act 2004* (ACT) ss 19, 26.
[135] *Surrogacy Act 2010* (NSW) ss 12, 18.
[136] *Surrogacy Act 2010* (Qld) s 22.
[137] *Surrogacy Act 2012* (Tas) ss 16, 22.
[138] *Assisted Reproductive Treatment Act 2008* (Vic) ss 39–45.

permit male couples to enter into altruistic surrogacy arrangements with a female surrogate where the non-biological male couple are legally recognised as the parents at birth.

Altruistic surrogacy arrangements for male same-sex couples in South Australia[139] and Western Australia[140] are not permitted whilst being legal for married or de facto heterosexual couples.[141] Again, the Northern Territory is silent on matters relating to same-sex surrogacy arrangements. Similar to the adoption laws, differential treatment is not only evident when comparing same-sex couples to opposite-sex couples but also when comparing couples in one State to those in another.

3 *Marriage Discrimination*

As previously discussed, the MA does not allow for same-sex couples to become married to each other.[142] However, it is not just the gay/human rights advocates suffering from the inability to marry; under the FLA there are presumptions regarding children of a marriage. A child is taken to be a child of the marriage (and of those married people)[143] regardless of conception through artificial insemination[144] or surrogacy arrangements[145] and whether or not the marriage is terminated.[146] Subsequently, the courts are able to decide on parentage without interference of circumstances of birth and conception which may result in orders inconsistent with a child's best interests but also inconsistent with orders made for married parents; this is clear differential treatment as children of married parents enjoy presumptions under the law, which are not available to children of same-sex parents.

[139] *Family Relationships Act 1975* (SA) s 10HA; *Statutes Amendment (Surrogacy) Act 2009* (SA).
[140] *Surrogacy Act 2008* (WA) s 17.
[141] Ibid; *Family Relationships Act 1975* (SA) s 10HA.
[142] *Marriage Amendment Act 2004* (Cth) s 3(1); *Hyde v Hyde Woodmansee* (1866) LR 1 P. & D. 130, 133.
[143] *Family Law Act 1975* (Cth) s 60F(1)–(2).
[144] Ibid s 60H.
[145] Ibid s 60HB.
[146] Ibid s 60F(2)(a).

4 *The Best Interests Principle*

The aforementioned FLASPRA appeared, through title and initial schedule to merely introduce the concept of shared parental responsibility,[147] however it accomplished significantly more with regards to clarifying[148] the implementation of considerations to a child's best interests.[149] Initially, shared parental responsibility forms part of the previous definition of custody,[150] and focuses on the responsibilities of parents in the decision making and influence in a child's life.[151] The other aspect under the previous custody theory is how much time the child is to spend with each parent upon separation; a child has the right to a meaningful relationship[152] with both parents.[153] These decisions can, and often are independent,[154] as a child can live primarily with one parent but both parents be found to have equal and shared parental responsibility.[155] The concepts of shared parental responsibility and time to be spent with focuses on a child's best interests rather than ownership of a child through awarding rights to the children and responsibilities to the parents, giving greater depth to the theory of a child's best interests being paramount in all considerations of legal matters concerning children.[156] Furthermore, the theory of a child's best interests is consistent throughout not only other implementations of the FLASPRA but in

[147] Australian Law Reform Commission, above n 37, 16.
[148] Richard Chisholm, above n 36, 186.
[149] The Honourable John Faulks, 'In the Best Interests of the Children' (Speech delivered at the Shared Parental Responsibility in Australian Family Law and the Impact on Children Seminar, Adelaide, South Australia, 13–15 April 2008).
[150] Susan Butler (ed), *Macquarie Dictionary* (Macmillan Publishers Group Australia, 6th ed, 2013); The Free Dictionary, *Legal Dictionary* (2014) http://legal-dictionary.thefreedictionary.com/Child+Custody>; 'The legal guardianship of a child'; 'care control, and maintenance of a child, which a court would award to one parent following a separation or divorce'.
[151] *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth) sch 1 ss 8(1)(a), 8(1)(d), 8(2)(c), 8(2)(d).
[152] *Godfrey & Sanders* [2007] FamCA 102, 36.
[153] Ibid sch 1 ss 8(1)(c), 8(2)(a)–(b).
[154] Patrick Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers' (2006) 20(2) *Australian Journal of Family Law* 179, 179–180.
[155] *Goode & Goode* (2006) 93–286, 80, 894.
[156] Richard Chisholm, ''Less Adversarial' Proceedings in Children's Cases' (2007) 77 *Family Matters* 28, 28–32.

other pieces of legislation such as *Children's Protection Act 1993* (SA)[157] and *Community Services Act 1970* (Vic).[158]

The implementation of an Independent Children's Lawyer (ICL) repeals the previous definition of a child representative[159] and replaces it with a lawyer[160] representing the child's interests in proceedings regarding that child;[161] The ICL is not the child's legal representative,[162] and must act independently[163] of any instructions from the child[164] or any other party to the proceeding.[165] The extensive role(s) of the ICL require the best interests of the child to be the core consideration in all aspects; even insofar as to minimise the trauma associated with legal proceedings.[166]

Additionally, the FLASPRA introduced a new child-focused theory being "grandparent's rights."[167] In particular, a child has the right to spend regular time and have communication with not only their parents but other people found to be significant to their care, welfare and development, including grandparents and other relatives.[168] Consideration is given to the relationship between child and grandparents[169] including consequences resulting from termination of that relationship.[170] A grandparent's contribution to the emotional and intellectual needs of a child[171] is given consideration in deciding time to be spent with in a

[157] *Children's Protection Act 1993* (SA) s 4.
[158] *Community Services Act 1970* (Vic) s 41.
[159] *Family Law Act 1975* (Cth) s 4(1).
[160] *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth) sch 5 s 3.
[161] Ibid sch 5 s 2.
[162] Ibid sch 5 s 68LA(4)(a).
[163] Ibid sch 5 ss 68LA(2)(a)–(b).
[164] Ibid sch 5 s 68LA(4)(b).
[165] Ibid sch 5 s 68LA(5)(a).
[166] Ibid sch 5 s 68LA(5)(d).
[167] The FLASPRA affords rights to the child, which may include the right to have a meaningful relationship with people such as grandparents, however the rights lay with the child and other people inherit only responsibility.
[168] *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) sch 1 s 8(2)(b).
[169] Ibid sch 1 s 9(3)(b)(ii).
[170] Ibid sch 1 s 9(3)(d)(ii).
[171] Ibid sch 1 s 9(3)(f)(ii).

preferred wide network of love and support. The focus being on a meaningful relationship[172] as opposed to an optimum one and one that is reasonably practical.[173]

Another commitment of the FLASPRA is to prevent the exposure to family violence,[174] including consistency between orders made under the amended act and existing family violence orders.[175] The definition of "family violence" is also widened[176] to include threats towards people or property which could result in a person being reasonably fearful for their wellbeing. The desire to protect children from family violence, neglect or physical and/or psychological harm is also given in deciding parental responsibility and time spent with in recognition of a child's best interests.[177]

Some concern was expressed in the initial stages of the amendments regarding its flexibility and potential uncertainty.[178] Upon assessing the application of the FLASPRA amendments within case law (below), the flexibility of the FLASPRA holds the potential to allow the courts to think beyond obstinate definitions in pursuit of providing orders consistent with a child's best interests regardless of circumstances which may prove contradictory to the best interests of a child.

B *Case Law*

1 *Establishing a De Facto (Same-Sex) Relationship*

Opposing examples of how the Courts have been able to recognise children with same-sex parents and who have not been conceived via traditional methods, holding simple biological

[172] *Godfrey & Sanders* [2007] FamCA 102, 36.
[173] *Sampson & Hartnett (No 10)* [2007] FamCA 1365, 41.
[174] *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) sch 6 s 1(aa); *Family Law Act 1975* (Cth) s 60B.
[175] *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) sch 6 s 1(a).
[176] Ibid sch 1 s 3.
[177] Ibid sch 1 ss 8(1)(b), 9(2)(b).
[178] Janet L Dolgin, 'Why has the best interests standard survived?: The historic and social context' (1996), 16 *Children's Legal Rights Journal* 1, 2; Australian Law Reform Commission, above n 37, 16.

ties to each parent, can be found in the 2011 matters of *Yanders & Jacklin*[179] and *Aaron & Aaron*.[180]

In *Yanders & Jacklin,*[181] a female same-sex de facto relationship of 2 years created a child via natural insemination with the assistance of a male acquaintance. With Jacklin as the biological mother, the child was raised in a family unit consisting of both women as the parents. Whilst the relationship was found to be de facto,[182] a dispute regarding the terms of conception resulted in this child not being found to be a child of the relationship.[183] The dispute regarding conception centred around whether the pregnancy was planned or resulted from a once-off sexual encounter; should it have been planned, Yanders would have been the "other intended parent" as per the FLA.[184] Whilst it was found that both women were viewed as the parents,[185] under the law, the child could not be deemed a child of the relationship resulting in the presumption of shared parental responsibility not being applied.[186]

The matter of *Aaron & Aaron*[187] highlights the ideal way in which the flexibility of the FLASPRA can be applied. A and B (same-sex relationship) each conceived a child via insemination with the assistance of the other party's brother; resulting in the children biologically being cousins but being raised by A and B as a family and the children viewing each other as sisters.[188] Upon separation of the parties, a dispute regarding how much time is to be spent with each parent and whether the children live with their biological mother's separately would be appropriate arose. Turner FM found the children to be children of the de

[179] [2011] FMCAfam 57.
[180] [2011] FMCAfam 80.
[181] [2011] FMCAfam 57.
[182] Ibid 13.
[183] Ibid 79.
[184] *Family Law Act 1975* (Cth) s 60H(1).
[185] *Yanders & Jacklin* [2011] FMCAfam 57, 110.
[186] Ibid 111.
[187] [2011] FMCAfam 80.
[188] *Aaron & Aaron* [2011] FMCAfam 80, 10–13.

facto relationship;[189] matters such as shared parental responsibility and time to be spent with the child were dealt with consistent with matters involving opposite-gendered parents.

2 *Children of Separating Same-Sex Parents*

After the implementation of the FLASPRA we see specific progression with children of same-sex couples having their best interests recognised. The 2007 case of *Potts & Bims and Ors*[190] sought to interpret the new amendments by differentiating between parents and non-parents and attempted to establish the weighting each of the applications had on a child's best interests.[191] The 2009 case of *Aldridge & Keaton*[192] applied this new law and found that:

> *Children who have been brought up in these new forms of family may be children who fall within s 60H. There will also be children who, while not conceived with the consent of the co-parent (or as described in the legislation the "other intended parent"), have effectively been treated as a child of the relationship of a same-sex couple. Such children may be the biological child of one parent born, before the same-sex relationship commenced, but whose substantial parenting experience has been from each of the same-sex "parents". More commonly, they may have been conceived as the result of a private agreement with a known donor and without formal consent documentation. These children's best interests are the paramount consideration to be taken into account, not the circumstances of their conception or the sex of their parents.*[193]

The Court then summarised that the relevant Legislation allowed a parenting application to be bought forth by a person interested in the care, welfare or development of the child and that the decision whether to make, or not make, that parenting order would be based on the child's

[189] Ibid 103; *Simpson & Brockmann* [2010] FamCAFC 37, 33–34.
[190] [2007] FamCA 394.
[191] Ibid 8.
[192] [2009] FamCAFC 229.
[193] Ibid 78; *Halifax & Fabian* [2010] FamCA 1212, 1, 21; *Connors & Taylor* [2012] FamCA 207, 89–90.

best interests.[194] This was a significant advancement as the matter specifically recognises that surrogacy or adoption arrangements may not be legally recognised in a State, but that formality as well as the circumstances of conception should not hold any weight if they would provide for an outcome inconsistent with the child's best interests.[195]

The two recent aforementioned matters of *Aaron & Aaron*[196] and *Yanders & Jacklin*[197] provide not only a comparative summary of the courts inconsistent findings regarding parentage of children of same-sex parents, but also provide examples of orders made upon separation of parents regarding parental responsibility and time to be spent with. Both of these matters contained orders similar to what one would expect should the parents have been of opposite sex, including parental responsibility as a whole as well as specifically during time spent with the child,[198] significant time spent with the parent whom the child was not to live with primarily[199] as well as time spent with for public holidays,[200] school holidays[201] and birthdays.[202] Matters such as child support arrangements and payments to be made to the primary care giver of the child are additionally included in such cases.[203]

3 *Third Party Intervention into Family Units Including Same-Sex Parents*

The 2010 case of *Wilson and Anor & Roberts and Anor*[204] highlights difficulties that same-sex parents may face regarding a third party's interference into their family unit. This case involved two women (A and B) who had a child with the assistance of a sperm donor (X). The child grew up with his mothers' (A and B) for the first two years, having some ongoing

[194] *Aldridge & Keaton* [2009] FamCAFC 229, 79.
[195] *Re Mark: an application relating to parental responsibilities* [2003] FamCA 822, 94.
[196] [2011] FMCAfam 80.
[197] [2011] FMCAfam 57.
[198] *Aaron & Aaron* [2011] FMCAfam 80 order 3; *Yanders & Jacklin* [2011] FMCAfam 57 order 2.
[199] *Aaron & Aaron* [2011] FMCAfam 80 order 4; *Yanders & Jacklin* [2011] FMCAfam 57 order 4.
[200] *Aaron & Aaron* [2011] FMCAfam 80 order 4 (t)–(v).
[201] *Yanders & Jacklin* [2011] FMCAfam 57 orders 4(j), 4(f)–(i).
[202] *Aaron & Aaron* [2011] FMCAfam 80 order 4(s).
[203] *Kemble & Ebner* [2008] FamCA 579, 14.
[204] *Wilson and Anor & Roberts and Anor (No. 2)* [2010] FamCA 734.

contact with X and his partner (Y). A and B then informed X and Y that they would need to limit their contact resulting in X seeking to be placed on the child's birth certificate, to have equal shared parental responsibility with A and that the child live primarily with X and Y. It was found that although X and Y should have a loving relationship with the child, the amount of time requested would compromise the family unit of A, B and the child,[205] nor should X and Y be able to restrict the ability of A and B to relocate. Furthermore, it is then stated that:

> *I do not accept the ICL's proposal for E to ultimately spend each alternate week-end from Friday to Monday and half school holidays with the men. At the same time, I do want to ensure that E has the benefit of enjoying a loving relationship with these men who clearly adore him, and the capacity to know his biological father. But he is a little boy who through circumstances is and will be ensconced in his household with the women who are two loving parents to him.*[206]

The child's parents are recognised as A and B, which includes parental responsibility,[207] however X and Y, not being recognised in parental terms, are permitted to spend a significant amount of time spent with the child on a fortnightly basis and on public holidays including around Christmas Day. Confusingly, the orders also include Father's Day to be spent with the men.[208] Furthermore, X and Y are permitted other parental-like access to information such as school reports.[209] It is peculiar that the child's parents and family unit be recognised as A and B[210] including sole parental responsibility[211] but then allow X and Y parental-like access such as Father's Day,[212] Christmas,[213] regular blocks of significant time[214] and access to school

[205] Ibid 336.
[206] Ibid 337.
[207] *Wilson and Anor & Roberts and Anor (No. 2)* [2010] FamCA 734, 4.
[208] Ibid order 4(i).
[209] Ibid order 14.
[210] Ibid order 336.
[211] Ibid order 3.
[212] Ibid order 4(i).
[213] *Wilson and Anor & Roberts and Anor (No. 2)* [2010] FamCA 734 orders 4(k)–(l).
[214] Ibid order 4(k).

reports.[215] Compare this to the pre-FLASPRA case of *Re Patrick*[216] where a sperm donor sought to be recognised as the parent of the child resulting from his donation, being the child of a lesbian couple, where it was found that a sperm donor did not fall within the definition of 'parent' and subsequently was not a parent under the Act.[217] When compared to a case prior to the modern and flexible attempts at amending the laws so as to place a child's best interests above such things as the child's conception, the case of *Wilson and Anor & Roberts and Anor*[218] provides a confusing precedence creating uncertainty regarding not only parentage but the ability of non-parents to intervene into family units which involve same-sex parents.

VI WELFARE & DEVELOPMENT

A *Welfare*

The mental health and wellbeing of children of same-sex parents has been a topic of interest for psychologists and academics prior to any legal progression. In 1989 a psychological study found that 'daughters of lesbian mothers did not significantly differ from adult daughters of heterosexual mothers on gender identity, gender role, sexual orientation and social adjustment'[219] and in 1992 it was found 'there to be no evidence to support that children with gay parents suffer in comparison to children of heterosexual parents.'[220]

[215] Ibid order 14.
[216] FamCA 193.
[217] Ibid 6.
[218] *Wilson and Anor & Roberts and Anor (No. 2)* [2010] FamCA 734.
[219] Julie Schwartz Gottman, 'Children of gay and Lesbian Parents' (1989) 14(3–4) *Marriage & Family Review* 177, 177[1].
[220] Charlotte J Patterson, 'Children of Lesbian and Gay Parents' (1992) 63(5) *Child Development* 1025, 1026–1042.

In 2002 a summary of studies[221] on children of gay parents from the years of 1978 to 2000 summarised all the studies as finding that:

> *Children raised by lesbian mothers or gay fathers did not systematically differ from other children on any of the outcomes. The studies indicate that children raised by lesbian women do not experience adverse outcomes compared with other children. The same holds for children raised by gay men, but more studies should be done.*[222]

A 2008 study by Jennifer Wainwright and Charlotte Pattison assessed the relationships that children of same-sex parents build, assessing not only data that was self-reported but also data that was peer-reported and similarly found there to be no discrepancy between children with same-sex parents and those with opposite-sex parents. This highlights that it is not only the children themselves that are conditioned into the feelings of a normal life, but demonstrates that their peers do not view them as different, nor their behaviour and stability of friendships.[223]

A 2012 study at the University of Amsterdam compared several measures to form an overall quality of life assessment of children of same-sex couples and children to opposite-sex couples and summarised that adolescent children in gay families showed no differences in their quality of life compared to adolescents raised by heterosexual families.[224]

[221] Norman Anderssen, Christine Amlie and Arling André Ytterøy, 'Outcomes for Children with Lesbian or Gay Parents. 'A review of Studies from 1978 to 2000' (2002) 43(4) *Scandinavian Journal of Psychology* 335.
[222] Simon Crouch, 'Don't believe the hype: kids of same-sex parents are well adjusted', *The Conversation* (online) 15 May 2012, <https://theconversation.com/dont-believe-the-hype-kids-with-same-sex-parents-are-well-adjusted-6998>; Elizabeth Short et al, 'Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families' (Literature Review, The Australian Psychological Society, August 2007).
[223] Jennifer L Wainright and Charlotte J Patterson, 'Peer Relations among Adolescents with Female Same-Sex Parents' (2008) 44(1) *Developmental Psychology* 117, 120.
[224] Loes van Gelderen et al, 'Quality of Life of Adolescents Raised From Birth by lesbian Mothers: the US National Longitude Family Study' (2012) 33(1) *Journal of Developmental and Behavioural Pediatrics* 17, 20–21.

B *Development*

A 2010 study[225] on children of lesbian mothers compared development to that of children of heterosexual parents and found that the children scored similarly in most developmental and social behaviours. Interestingly, the children of same-sex parents scored higher in some measures, including self-esteem/confidence and academically. Additionally, they were less prone to behavioural problems including rule-breaking and aggression.[226]

Another study[227] gathered information from the United States of America Census and concluded 'children of same-sex couples generally developed at the same rate as children to heterosexual parents; the major factors influencing a child's development and success is the education and income of their parents.'[228] Accepting that, we look to a 2013 report from the Australian Institute of Family Studies which compared the income and education of males and females in homosexual relationships to that of males and females in heterosexual relationships.[229] Income wise, a higher percentage of males and females in a homosexual relationship earned over $52,000 and less percentage earning under $10,400 compared to that of people in a heterosexual relationship.[230] Regarding education, a higher percent of people in a homosexual relationship held a degree or higher education when compared to people in a heterosexual relationship.[231] Based on these figures, it is apparent that those core factors influencing a child's development are actually higher for Australian's in a homosexual relationship.

[225] Nanette Gartrell and Henry Bos, 'US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents' (2010) 123(1) *Pediatrics* 28.
[226] Ibid 31–33.
[227] Michael J Rosenfeld, 'Non Traditional Families and Childhood Progress Through School' (2010) 47(3) *Demography* 755.
[228] Ibid 772–773.
[229] Australian Institute of Family Studies, Australian Government, *Same-sex couples* (2013) 7 <http://www.aifs.gov.au/institute/pubs/diversity/07samesex.pdf>.
[230] Ibid 85.
[231] Ibid 84.

To summarise all of these studies, this paper will look to a 2006 article[232] which found '[m]ore than two decades of research has failed to reveal important differences in the adjustment or development of children or adolescents reared by same-sex couples compared to those reared by other-sex couples.'[233]

It is not only the depth of studies and research which supports the theory that children of same-sex couples do not suffer any psychological anguish or detriment as a result of their parents being the same-sex, it is also the breadth available in modern research; the combination of less social stigma attached to homosexual relationships, peer-reporting and lengthier studies assessing the welfare of people raised by same-sex parents who have now entered adulthood allow us to conclude that children of same-sex parents have not simply been conditioned into accepting their parents. Subsequently, the best interests of a child regarding their welfare and development cannot be taken as being negatively impacted as a result of having same-sex parents.

VII SUMMARY OF THE CURRENT APPLICATION & DISADVANTAGES

A *Legislative Disadvantages/Inconsistencies*

1 *Inconsistent Adoption and Surrogacy Laws Across Australia*

Several of the States have progressed with amendments[234] over the past 15 years, to allow children to be adopted by same-sex parents, however there are blatant discrepancies[235]

[232] Charlotte J Patterson, 'Children of Lesbian and Gay Parents' (2006) 12(5) *Current Directions in Psychological Science* 241.
[233] Ibid 241 [1].
[234] *Adoption Amendment Act 2013* (Tas); *Adoption Amendment (Same-sex Couples) Bill 2010* (NSW); *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA); *Parentage Act 2004* (ACT).
[235] Kemal Atlay, 'Adoption for Gay Couples in South Australia may Soon be Legalised', *The Star Observer* (Sydney, Australia) 24 July 2014, 3.

regarding the inconsistent treatment that children in each State receive.[236] Additionally, there is the aforementioned differential treatment regarding potential adoptive parents on the basis of their gender. It has been established from the aforementioned 2009 findings of the Law and Justice Committee of New South Wales,[237] and the similar 2003 Tasmanian report,[238] that the amending of existing Legislation to allow children to be adopted by same-sex couples (and for those same-sex couples to legally adopt) would be in the best interests of the children potentially being adopted.[239]

Regarding the legal validity of surrogacy arrangements, similar to adoption laws, differential treatment is not only evident when comparing the legal ability of same-sex couples compared to that of opposite-sex couples, but also in the inconsistent recognition of children in one State compared to those in another State.

2 *Recognition of Relationships and Family Units*

Commencing in the early 2000's the laws governing same-sex relationships and their families progressed towards equality[240] through removing discrimination throughout State and Commonwealth Legislation.[241] The greatest progression with regards to the rights of children of same-sex couples came with the above-discussed FLASPRA, with additional support from

[236] Anna Brown, 'Same Sex Adoption: When is it Victoria's Turn?' G*ay News Network, Melbourne Community Voice* (online), 6 June 2014 <http://gaynewsnetwork.com.au/viewpoint/same-sex-adoption-when-is-it-victoria-s-turn-14073.html>; Farrah Tomazin, 'Labor Votes in Favour of Same-Sex Adoption', *The Age* (Victoria, Australia) 18 May 2014, 1–4.
[237] Staff Writers, above n 119, 1.
[238] Tasmania Law Reform Institute, Submission No 2 to the Attorney-General, *Adoption by Same Sex Couples,* May 2003, 46.
[239] Ibid.
[240] Graham Carbery, 'Towards Homosexual Equality in Australian Criminal Law: A Brief History' (Report 2nd ed, Australian Lesbian and Gay Archives Inc., 2010 (revised 2014)).
[241] See, eg, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth); *Sex Discrimination Act 1984* (Cth).

intertwined Commonwealth and State Legislation which has independently and harmoniously progressed in wide reaching topics relating to children of same-sex parents.[242]

When a child's parents are husband and wife, the child is taken to be a child of that marriage[243] regardless of whether or not conception occurred prior to[244] or after the marriage occurs. Furthermore, the manner by which conception occurred, being naturally or through surrogacy and artificial insemination is also irrelevant.[245] This is notably different from a) the formalities of establishing a de facto relationship and b) the "open-for-interpretation (-and-inconsistent-prone)" procedure for establishing parenthood in a same-sex de facto relationship, and the subsequent rights and responsibilities associated with a child of a same-sex couple. Whilst the law has progressed greatly since the original days of the FLA and cases such as *Malik v Malik,*[246] there are still discrepancies regarding the establishment of parentage and whether a child's best interests outweighs the circumstances of its conception and birth, as suggested in *Aldridge & Keaton.*[247]

The inconsistencies are highlighted in the matters of *Aaron & Aaron*[248] and *Yanders & Jacklin*[249] where opposite findings of parentage were found as a result of a strict application of the FLA despite being heard in the same year by the same Judge. Additionally the case of *Wilson and Anor & Roberts and Anor*[250] found a third party to the family unit, being the biological father of the child, was able to impede on a family unit and be awarded some time

[242] Jenni Millbank 'Recognition of Lesbian and Gay Families in Australian Law – Part Two: Children' (2006) 34(2) *Federal Law Review* 205.
[243] *Family Law Act 1975* (Cth) s 60F.
[244] Ibid s 60F (1)(b).
[245] Ibid s 60F (1)(c).
[246] [1956] TASStRp 22; [1957] Tas SR 5.
[247] [2009] FamCAFC 229, 111.
[248] [2011] FMCAfam 80.
[249] [2011] FMCAfam 57, 78.
[250] *Wilson and Anor & Roberts and Anor (No. 2)* [2010] FamCA 734.

spent with the child in a fatherly capacity, despite being recognised as neither parent to or as part of the child's family unit.[251]

II MOVING FORWARD

A *The Apparent Direction of Progression*

It is clear that the legal rights and recognition of same-sex couples has progressed similarly with the findings that those same-sex couples can meet and provide a family unit consistent with a child's best interests. The subsequent legal abilities to create (and protections to sustain) family units is progressing towards a complete equality for children of same-sex parents. Additionally, the laws are progressing towards an application which places a child's best interests above the circumstances of their conception and/or birth as well as the gender and/or orientation of their parents. The comments of Ryan J in the matter of *Mason & Mason and Anor*[252] discuss the Parliament's intention to legislate in ways which place a universal approach to parentage (and best interests) approach to legal matters concerning children which will operate, despite differential State and Territory law, to treat all children born through alternative arrangements equal not only to children in other States but also to their heterosexual-parented peers.[253] However, the aforementioned inconsistencies highlighted in *Aaron & Aaron*[254] and *Yanders & Jacklin*[255] as well as differential treatment discussed in *Wilson and Anor & Roberts and Anor*[256]are still prevalent.

Subsequently, the apparent direction of Australia's approach to children of same-sex parents would be as summarised as heading towards a complete equality of paramount consideration of a child's best interest; however there are still several problems.

[251] *Vankatesan & Pawar* [2007] FMCAfam 1109, 9.
[252] [2013] FamCA 424.
[253] Ibid 28.
[254] [2011] FMCAfam 80.
[255] [2011] FMCAfam 57, 78.
[256] *Wilson and Anor & Roberts and Anor (No. 2)* [2010] FamCA 734.

B *The Ideal Direction of Progression*

It can be summarised that the professional, psychological and social views regarding a child's best interests is to afford it, and its parents, with complete equality and that those best interests be placed above all other considerations.[257] Whilst, the progression in the field of law is perceived as heading in the correct direction towards an equal best interests approach, it is time for the law to complete this overdue journey to offer all children, and our future, with the protection and support needed to best create environments susceptive to a positive, educated and prosperous society.

Drawing from the above summaries with consideration of the various professional opinions discussed throughout this paper; in particular two of the founding principles[258] of the UNCRC[259] being 'non-discrimination',[260] and 'best interests of the child',[261] this paper would conclude that the ideal direction of the law would be to attain a legal protection for all children regardless of their location, conception and/or birth circumstances or the gender of their parents.

C *Recommendations*

This paper's recommendations will look to and consider Dutch law given not only the progressive legal approach that the Netherlands have adopted but also as a reference point for how another jurisdiction has successfully implemented equal protections and rights.

[257] Sarah Wise, 'Family structure, child outcomes and environmental mediators: an overview of the Development in Diverse Families Study' (Research Paper No 30, Australian Institute of Family Studies, Jan 2013) 26–27; Simon Robert Crouch et al, 'ACHESS – The Australian Study of Child Health in Same-Sex Families: Background Research, Design and Methodology' (2012) 12 *BMC Public Health* 646, 652.
[258] *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) arts 2, 3, 6, 12; UNICEF, above n 1.
[259] *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).
[260] Ibid art 2.
[261] Ibid art 3.

1 *Streamlining the Jurisdictional Inconsistencies*

The inconsistent regulation of children born to same-sex parents is impractical not only in the sense that the rights and protections of families in different States vary, but also in the sense that each of the children conceived through various legal and illegal conception circumstances are dealt with under the same Commonwealth Legislation, being the FLA.[262] The Commonwealth Legislation has accepted the responsibility in incorporating the moral theory of a child's best interests being paramount into its Legislation[263] as per Ryan J's statement in the case of *Mason & Mason and Anor*[264] finding that Parliament intended to adopt a scheme that operates in the States and Territories which declare parentage for children born through alternative arrangements.[265] However, the individual State Legislations vary in their political and legal advancements. In the interest of a child's best interests being paramount to all other matters, including State pride, a uniform approach would prove to not disadvantage a child as a result of its location and provide it with equal best interests as a child from another state in a) recognising it's conception and b) its best-interest-rights in legal matters post-birth. For this to be accomplished, the State's would be required to effectively relinquish their legislative rights on these matters to the Commonwealth. The Commonwealth could then either amend the FLA to include these matters or they could enact a "Parentage Act" to make uniform the recognition of not only a child conceived through means such as surrogacy arrangements, artificial insemination and adoption procedures but also the legally recognised parents of children conceived through these means or who have been accepted into an existing family and/or given a new family through an adoption process.

[262] *Re Mark: an application relating to parental responsibilities* [2003] FamCA 822, 94.
[263] *Mason & Mason and Anor* [2013] FamCA 424, 27–28; *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) ss 60H, 60HB.
[264] [2013] FamCA 424.
[265] Ibid 28.

Having one jurisdiction legislating on human rights matters proved successful in the Netherlands as matters such as State pride or external pressure from other States is not a factor in determining the legalisation of human rights equality. *Boek 1* of the *Burgerlijk Wetboek*[266] allows all Dutch people the rights to marry,[267] adopt[268] and enter into surrogacy or artificial insemination arrangements[269] without the recognised differential treatment based on location, gender and/or orientation present in Australian law.

2 *Drafting of the Proposed Federal Legislation*

Provided that the aforementioned actions are enacted, and each State would allow a uniformed legislative approach to surrogacy, adoption and artificial insemination, the best available domestic reference point would be the State of New South Wales. Not only does New South Wales Legislation tick each request with complete equality in terms of adoption,[270] surrogacy and artificial insemination, the legislation itself is set out in terms which are easily understood, allowing for a free-flowing legal matter not hinged on definition or interpretational disputes and/or legal loop holes. Again, the Dutch Civil Code will be compared throughout the sub-sections.

(a) Adoption

The *Adoption Amendment (Same-sex Couples) Bill 2010* (NSW) amended the existing *Adoption Act 2000* (NSW) to allow for same-sex couples to apply for adoption. In the amended sections, the definitions of a "couple" (for the purposes of the Act) were amended to

[266] *Burgerlijk Wetboek Boek 1 Personen- en familierecht* [Dutch Civil Code Book 1] (Netherlands) 1992 [Dutch Civil Law trans, *Dutch Civil Code Book 1 Law of Persons and Family Law*] <http://www.dutchcivillaw.com/civilcodebook01.htm>].
[267] *Burgerlijk Wetboek Boek 1 Personen- en familierecht* [Dutch Civil Code Book 1] (Netherlands) 1992 title 5 art 30.1 [Dutch Civil Law trans, *Dutch Civil Code Book 1 Law of Persons and Family Law* <http://www.dutchcivillaw.com/civilcodebook01.htm>].
[268] Ibid title 12 arts 227.1–227.6.
[269] Ibid title 11 arts 198–199.
[270] Editorial, 'Exploring Gay Adoption', *Gay News Network* (Melbourne, Australia) 27 November 2012, [5].

mean two persons who are married to each other or are de facto partners of each other.[271] Furthermore, it specifically states that whether or not the people are of the same or different sex does is not a factor in defining a "couple".[272] Additionally, for complete clarity, the term "spouse" is widened[273] to mean a person who is married to[274] or is a de facto partner[275] to the person.

Similarly, the *Burgerlijk Wetboek* allows 'a joint request of two persons or upon a request of one person alone',[276] and the requirements for an adoption are simply that the persons 'have lived together for at least three consecutive years immediately preceding the filing of the request.'[277]

(b) Surrogacy

The *Surrogacy Act 2010* (NSW) is clearly defined with regards to sexual orientation or gender of parents in the sense that it is silent on these matters; the only time gender is referenced is regarding when a woman agrees to become pregnant with a child who is to be the child of another person or persons[278] or when a pregnant woman agrees that her unborn child will become the child of another person or persons upon birth.[279] Section 25 of the *Surrogacy Act 2010* finds that an Intended parent may be a single person or a member of a couple, which is defined[280] as a person and their spouse or de facto partner.[281]

[271] *Adoption Amendment (Same-sex Couples) Bill* 2010 (NSW) ss 1, 3.
[272] Ibid s 3(b).
[273] Ibid s 5.
[274] Ibid s 5(a).
[275] Ibid s 5(b).
[276] *Burgerlijk Wetboek Boek 1 Personen- en familierecht* [Dutch Civil Code Book 1] (Netherlands)1992 title 12 art 227.1 [Dutch Civil Law trans, *Dutch Civil Code Book 1 Law of Persons and Family Law* <http://www.dutchcivillaw.com/civilcodebook01.htm>].
[277] Ibid title 12 art 227.2.
[278] *Surrogacy Act 2010* (NSW) s 5(1)(a).
[279] Ibid s 5(1)(b).
[280] Ibid s 25(2).
[281] Given the definition, in s 4, found in *Interpretation Act 1987* (NSW) s 21C.

(c) Artificial Insemination

As previously stated, the laws regulating artificial insemination are found in the FLA at section 60H which finds that when a child is born to a woman as a result of an artificial conception procedure and is married to or is the de facto partner of another person, that child is the child of the woman and the other intended parent.[282]

An Act(s) similar in phrasing to New South Wales Legislation(s) would encourage earlier acknowledgment of parental findings, and the subsequent presumptions, in legal disputes involving a child's best interest; assisting in circumstances regarding conception and birth not infringing on the child's best interests in matters. The below recommendations regarding legislative language to be gender-neutral and to lesser separation of marriage and de facto rights should be considered in conjunction with this recommendation

3 *Marriage Equality*

In re-iterating the above statement of the Committee on Psychosocial Aspects of Child and Family Health, there is no scientific evidence which demonstrates children of same-sex parents attaining any alternative measure of development or quality of life and that it is in their best interests[283] that social[284] and legal institutions allow and support their parents through allowing a civil marriage regardless of the gender or sexual orientation of their parents.[285]

If there are irrefutable scientific studies which find that it would be in the best interests of a child that their family unit be legally (and socially) recognised as including two married

[282] *Family Law Act 1975* (Cth) s 60H(1).
[283] David Popenoe, 'Married and Unmarried Parents' (Research Summary, Parenthood in America, University of Wisconsin-Madison General Library 1998) [2]–[4].
[284] For Your Marriage, *Why Married Parents Are Important for Children* <http://www.foryourmarriage.org/married-parents-are-important-for-children/>.
[285] Committee on Psychosocial Aspects of Child and Family Health, above n 27, 829 [5]–[6]; Sue Wilkinson and Celia Kitzinger, 'Same-Sex Marriage and Equality' (2005) 18 *The Psychologist* 290, 293–294.

parents, as well as the aforementioned presumptions and legal recognition of a child to married parents in comparison to those without, in the interest of children of same-sex parents, this paper recommends that marriage be made available to people of the same gender so that any existing or future children to that couple are not disadvantaged socially, developmentally or legally.[286]

Titel 5 *Het huwelijk* (Title 5 Marriage) of the *Burgerlijk Wetboek* is opened with an article stating that 'A marriage may be entered into by two persons of a different or of the same gender (sex).'[287] The remainder of Title 5 is similar in provisions to Australia's MA,[288] with gender terms being interchangeable. A similar approach would be recommended in Australia so as to allow a simple and completely consistent allowance of marriage to same-sex couples.

4 *Civil Unions*

Whilst this paper is adamant in its optimism and firm in its recommendations, it is also realistic that whilst a child's best interests should be held higher than political or personal opinion, precedence highlights the commitment to a complete, fair and paramount best interests of a child is conditional as highlighted in the aforementioned areas of Family Law. Should this history of political or social debate regarding same-sex marriage prove to be held of higher importance than that of a child's best interest, this paper would suggest the potential re-introduction and/or amendments of a civil union through Federal legislation; one which conferred all the presumptions, rights and recognition of a marriage without the title of

[286] *Convention on the Rights of the Child*, Open for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) art 2.
[287] *Burgerlijk Wetboek Boek 1 Personen- en familierecht* [Dutch Civil Code Book 1] (Netherlands)1992 title 5 art 30.1 [Dutch Civil Law trans, *Dutch Civil Code Book 1 Law of Persons and Family Law* <http://www.dutchcivillaw.com/civilcodebook01.htm>].
[288] *Marriage Act 1961* (Cth).

"marriage." Whilst this may not settle the "marriage-equality"[289] debate, nor would it resolve the scientific arguments found throughout this paper that it would be in a child's best developmental interests should their parents be permitted to marry,[290] it would resolve many of the recognised discrepancies in the recognitions and presumptions of parentage. Subsequently, the potential of a civil union may offer some progression when discussing the rights of a child. However, the drafting of the legislation would require words to the effect of essentially making the terms "marriage", "married couple" etc. and "civil union" and "civil partner" to be basically interchangeable in all existing legislation[291] so that children of civil partners would assume the same rights of children of married parents.

The comparison to a Civil Union in the *Burgerlijk Wetboek* is found in *Titel 5A Het geregistreerd partnerschap* (Title 5 Registered Partnership) which finds that '[a] person may, at the same time, only be united in a registered partnership with one other person, either of the same or of another gender.'[292]

5 *Amendments to the Family Law and Acts Interpretation Acts*

Regardless of whether same-sex marriage is legalised in the near future or whether the aforementioned temporary alternative of civil unions is enacted, this paper argues that amendments should be enacted for the AIA and the FLA.

Firstly, the AIA's definition of a de facto relationship should be amended so as to limit the courts ability and requirement to investigate the private life of a de facto couple; if a de facto

[289] Peter Tatchell, 'Why Marriage is the Only Answer', *The Star Observer* (Sydney Australia) 30 November 2010, [7]; Australian Marriage Equality, *Australian Civil Unions* <http://www.australianmarriageequality.org/australian-civil-unions/>.
[290] David Popenoe, above n 277, [2]–[4]; Committee on Psychosocial Aspects of Child and Family Health, above n 27, 829 [5]–[6].
[291] Bridie Jabour, 'What's the Difference Between a Civil Union and a Marriage' *The Age* (Brisbane, Australia) 1 December 2011.
[292] *Burgerlijk Wetboek Boek 1 Personen- en familierecht* [Dutch Civil Code Book 1] (Netherlands)1992 title 5A art 80a.1 [Dutch Civil Law trans, *Dutch Civil Code Book 1 Law of Persons and Family Law* <http://www.dutchcivillaw.com/civilcodebook01.htm>].

relationship is required to be registered (similar to a marriage), that should suffice as proof of the relationship as with marriage. This will award an equal recognition and requirement of establishment between couples that are married and those that are denied that title. Furthermore, it will remove the Courts requirement and ability to judge whether or not a couple meets a political sense of a defined relationship (such as length of relationship, financial and sexual activity). The *Burgerlijk Wetboek* requirements and considerations of a registered partner are restricted to only the party's place(s) of residence and the current and previous marital statuses.[293]

Secondly, the FLA should be amended to remove any reference to marriage or de facto and replace it with terms similar to "recognised relationship" which would be defined in the definitions section of the Act as to include a married, de facto or other recognised relationship such as an ordinary relationship without formal titles. Subsequently, the presumptions regarding a child to a marriage would be awarded to children of a de facto (including a same-sex) relationship. This would not only permit a free flowing case (with appropriate focus being a fair outcome based on a child's best interest), but would also limit the ability for family units, which include same-sex parents, to be interfered with by other parties or a court's decision based on black-letter definitions regarding a child's conception (or circumstances regarding that conception) or the gender of their parents.

IX CONCLUSION

In comparing the legal rights of children of same-sex parents with those of opposite gendered parents, there are several established discrepancies regarding a child's best interests holding paramount consideration. This paper has established the legal areas of adoption, surrogacy, artificial insemination, recognition of (and affording legal protections to) family units

[293] Ibid title 5A art 80a.4.

including children of same-sex parents as well as the application of that law in real life cases as areas displaying legal (and subsequent social) disadvantages towards children of same-sex parents. It has explored several cases where the rights, presumptions and protections not being afforded to children of same-sex parents has led to outcomes which would not only have been different should the parents in the matter have been of different genders, but also outcomes which appear inconsistent with what would be accepted as being in the child's absolute best interest.

Additionally, this paper has relied on a breadth of scientific research into what specifically the best interests of a child of same-sex parents are and whether or not they should be handled (legally or socially) differently than children of heterosexual parents. These scientific conclusions have universally stated that not only do children of same-sex parents not suffer in any terms as a result of the gender of their parents but they also found that it would be in the best interests of those children for their families to be awarded complete and equal legal and social recognition.

Consistent with the findings of these studies and with other established theories, such as that found in the UNCRC,[294] the paper has summarised the areas in which the children of same-sex parents do not enjoy the same rights and best interests approach that their heterosexual-parented peers do. It has subsequently made recommendations which, collectively, would rectify the recognised legal areas in need of progression, whilst individually would progress the relevant areas displaying a lack of consistent and equal rights and protections.

Recommendations were made for a uniform (and Federal) legislative approach so as to ensure equal and consistent treatment to all Australian children (including those of same-sex parents). New South Wales and Netherlands Legislations were discussed as a point of

[294] *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

reference for a gender-neutral approach to the areas of adoption, surrogacy and artificial insemination. Furthermore, it was recommended that same-sex marriages become legally available and recognised in the best interest of children of same-sex couples. The implementation of a Federal civil union is discussed as a potential secondary option which, whilst not resolving all recognised discrepancies, would rectify some discussed issues so as to ensure a better legal approach to children of same-sex parents. Finally, recommendations were made for the amending of the FLA and AIA to limit the courts requirement to delve into the private lives and relationships of same-sex couples; this in turn would ensure a more consistent and equal approach (and subsequent ideal results) to matters involving children of same-sex parents

The breadth and depth of social, psychological and legal research explored throughout this paper is but a footnote to the reputable domestic and foreign material available (including cases, studies, testimonies and treaties) which, when examined, compared and summarised, emphatically state that the best interests of children would be met when the legal recognition of children of same-sex parents, and the same-sex couples themselves, become equal to the rights of children of heterosexual parents and of those parents themselves. We are not yet there, but this paper has additionally demonstrated that the legal approach within Australia is heading towards an ideal approach to matters involving children of same-sex parents; an approach that could be summarised simply as recognising that children are not responsible for the circumstances surrounding their conception and birth, or the gender and orientation of their parents, nor should they be awarded a lesser status under law as a result of such matters that do not create interests different to children of traditional parents.

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