CRITIQUE AND COMMENT

REDEFINING FAMILY: SHOULD LESBIANS HAVE ACCESS TO ASSISTED REPRODUCTION?

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[The recent Federal Court decision in McBain v Victoria, *which rendered inoperative a Victorian law that restricted assisted reproductive technology to married or heterosexual de facto couples, has raised the issue of whether lesbians should have access to such technology. This article provides an overview of State laws currently regulating lesbian access to assisted reproduction in Australia. It then explores the growing body of empirical research indicating that the welfare of children raised in lesbian households does not differ in any significant respect from the welfare of children raised in comparable circumstances by heterosexual parents. This research undermines the view that children raised by lesbian parents are likely to become lesbian or gay, develop inappropriate gender roles, suffer social stigma or experience hardship caused by the lack of a 'father figure'. The 'welfare of the child' rhetoric has in fact been used to mask the marginalisation of 'alternative' family forms, and the reluctance to extend assisted reproductive technology to lesbians is underpinned by a deep-rooted fear of undermining the traditional heterosexual nuclear family.]*

CONTENTS

I INTRODUCTION

The recent Federal Court decision in *McBain v Victoria*[1] in July 2000 rendered the *Infertility Treatment Act 1995* (Vic) ('the Victorian Act') inoperative to the extent that it restricted assisted reproductive technology ('ART')[2] to married or heterosexual de facto couples.[3] The decision therefore paved the way for single

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1 (2000) 99 FCR 116 ('*McBain*').

2 This includes a range of methods to circumvent human infertility including in-vitro fertilisation ('IVF'), embryo transfer, gamete intra-fallopian transfer and artificial insemination.

3 Section 8 of the Victorian Act provides that a woman who undergoes infertility treatment must be married, or living with a man in a de facto relationship.

women and lesbians to access IVF and medically administered donor insemination.

The case arose following a request for IVF services by a single woman to a medical practitioner specialising in reproductive technology. The practitioner considered that the woman was suitable for the treatment, but was precluded from providing the treatment under the Victorian Act. The practitioner applied to the Federal Court for a declaration that s 8 of the Victorian Act was inoperative due to inconsistency[4] with s 22 of the *Sex Discrimination Act 1984* (Cth), which outlaws discrimination on the basis of marital status. The State of Victoria and the minister responsible for the Victorian Act chose neither to assert nor deny inconsistency. The Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church appeared as amici curiae, opposing the application. Although Sundberg J treated the case purely as a matter of statutory interpretation, the decision has raised important issues about how society defines the parameters of 'the family'.

In response to the *McBain* decision, Prime Minister John Howard publicly declared that a child has a right to the care and affection of both a mother and a father.[5] To this end, the Federal Government introduced the Sex Discrimination Amendment Bill (No 1) 2001 (Cth), which, if passed, would allow State legislation that restricts access to infertility treatment on the basis of marital status.[6] This would effectively bring the impugned provision of the Victorian Act back into force. Concurrently with this development, the decision of Sundberg J is being challenged in the High Court by the Catholic Church, with a hearing date listed for September 2001.[7]

[4] Pursuant to s 109 of the *Australian Constitution*, which provides that where there is inconsistency between provisions of Commonwealth and State legislation, the State provisions are invalid to the extent of the inconsistency.

[5] Transcript of Press Conference, John Howard, Prime Minister (Canberra, 1 August 2000) <http://www.pm.gov.au/news/interviews/2000/interview351.htm> at 31 July 2001 (copy on file with author).

[6] The Sex Discrimination Amendment Bill (No 1) 2001 was passed by the House of Representatives on 3 April 2001 and introduced into the Senate on 22 May 2001. At the time of writing, it was unclear whether the Senate would pass the Bill. It is noteworthy, however, that the Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No 1) 2000* (2001) 37 found persuasive the argument that passage of the Bill would contravene Australia's obligations under the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13, 19 ILM 33 (entered into force 3 September 1981) and 'undermine Australia's strong record in the advancement and protection of human rights'. For discussion of the Bill, see Kristen Walker, '1950s Family Values vs Human Rights: In Vitro Fertilisation, Donor Insemination and Sexuality in Victoria' (2000) 11 *Public Law Review* 292, 299–304; Belinda Bennett, 'Reproductive Technology, Public Policy and Single Motherhood' (2000) 22 *Sydney Law Review* 625, 630–1.

[7] The Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church have applied for writs of certiorari and mandamus against Sundberg J under s 75(v) of the *Australian Constitution*. The State of Victoria is not a party to the application. The Women's Electoral Lobby, which opposes the application, has been granted leave to intervene: Transcript of Proceedings, *Australian Catholic Bishops Conference: Re Justice Sundberg* (High Court of Australia, Gummow J, 30 April 2001). See Women's Electoral Lobby, 'IVF High Court Case Hearing Dates Set' (2001), Women's Electoral Lobby Inc, <http://www.wel.org.au/announce/index.htm#ivf> at 31 July 2001 (copy on file with author). The Commonwealth has also announced that it will intervene, arguing that the *Sex Discrimination Act 1984* (Cth)

This article is concerned with the issue of whether lesbians should have access to ART. While much of the opposing case has been couched in terms of the 'welfare of the child',[8] fears about the physical and emotional wellbeing of children raised in lesbian households do not appear to be supported by the available research. The central premise of this article is that, in reality, the rhetoric of the 'welfare of the child' has been used to mask the marginalisation of 'alternative' family forms and is largely based on assumptions and prejudice rather than hard evidence.

The issue will be addressed in three parts. Part II of this article sets out the legal position with respect to access to ART in each State. Part III explores the question of whether allowing lesbians to access ART is contrary to the welfare of any children born as a result of the technology. Part IV assumes that opposition to lesbians accessing ART cannot be sustained on the basis of 'the welfare of the child' and suggests that what is really underpinning reluctance to extend ART to lesbians is a deep-rooted fear of undermining the traditional heterosexual nuclear family.

II ACCESS TO ART — CURRENT STATE OF THE LAW

At present, only Victoria, Western Australia and South Australia have legislation regulating access to ART.[9] In all three of these States, heterosexual couples — whether married or de facto — have access to IVF and donor insemination on the basis of infertility or risk of transmitting a genetic abnormality.[10] The conception of infertility within the statutes is limited to so-called 'medical infertility' where the couple has unsuccessfully attempted to conceive through heterosexual sex for a specified period of time.[11]

Following the case of *Pearce v South Australian Health Commission*[12] in 1996, single women and lesbians in South Australia have been able to access ART. The case is very similar to *McBain* in its facts and result. It arose out of a refusal by a clinic to provide fertility treatment to a single woman on the basis that she failed to qualify for the services under the *Reproductive Technology Act 1988* (SA). The woman successfully applied for a declaration that s 13(3) and (4) of the *Reproductive Technology Act 1988* (SA), which prevented single women accessing artificial fertilisation treatment, were inconsistent with s 22 of the *Sex*

does not override the Victorian Act: Daryl Williams, Attorney-General, *Commonwealth Intervenes in High Court Challenge to McBain Case*, Press Release (6 August 2001).

8 See Susan Golombok, *Parenting: What Really Counts* (2000) 13.

9 Victorian Act; *Human Reproductive Technology Act 1991* (WA); *Reproductive Technology Act 1988* (SA).

10 Victorian Act s 8(3); *Human Reproductive Technology Act 1991* (WA) s 23(a); *Reproductive Technology Act 1988* (SA) s 13(3)(b).

11 Usually 12 months. It is beyond the scope of this article to discuss the validity of the distinction between 'medical' and 'social' infertility and whether infertility treatments should be limited to 'medically' infertile women, if in fact a clear line can be drawn between medical and social infertility. The author acknowledges that there is a further debate on whether the state should subsidise 'non-medical' fertility treatment but this is also beyond the scope of this article. For discussion of these issues, see Robert Jansen, 'Reproductive Medicine and the Social State of Childlessness' (1997) 167 *Medical Journal of Australia* 321.

12 (1996) 66 SASR 486.

Discrimination Act 1984 (Cth) and, therefore, invalid by virtue of s 109 of the *Australian Constitution*.[13] Although single women in South Australia cannot be excluded from accessing services by virtue of their marital status, they must still meet the eligibility criteria of being (medically) infertile or being at risk of transmitting a genetic disease to their offspring.[14] In Victoria, prior to the *McBain* case, access to IVF and donor insemination was restricted to married or de facto heterosexual couples.[15] Interestingly, the Victorian Act effectively prohibits self-insemination by single women,[16] although the task of policing this provision presents obvious practical difficulties.[17] Similarly, in Western Australia IVF is restricted to heterosexual couples, but there are no limitations on donor insemination.[18] In the wake of *Pearce v South Australian Health Commission* and *McBain*, the Western Australian provisions limiting IVF to married or heterosexual de facto couples are presumably also open to challenge.[19]

The remaining States do not have legislation but are guided by a web of State and federal policy, as well as individual hospital or clinic policy and informal practice. The most influential guidelines to service-providers are those set out by the National Health and Medical Research Council ('NHMRC').[20] The NHMRC is the main funding body for medical research in Australia and issues ethical guidelines concerning medical research and some controversial areas in which research has moved into practice, such as reproductive technology. Prior to their 1996 revision, the NHMRC guidelines advised that donor insemination should be provided only to those in 'accepted family relationships', which were generally interpreted to mean heterosexual relationships.[21] The guidelines are now silent on the criteria for eligibility. Although compliance with the guidelines is voluntary, there are a number of sanctions which the NHMRC may impose for breaches of the guidelines, including withdrawal of research funding.[22] It is

[13] See Helen Szoke, 'Regulation of Assisted Reproductive Technology: The State of Play in Australia' in Ian Freckelton and Kerry Peterson (eds), *Controversies in Health Law* (1999) 247.

[14] *Reproductive Technology Act 1988* (SA) s 13(3)(b).

[15] Victorian Act s 8.

[16] Victorian Act s 7.

[17] Ruth McNair et al, 'Access to Fertility Services in Victoria' (Discussion Paper, Women's Health Victoria, 2000).

[18] *Human Reproductive Technology Act 1991* (WA) s 23.

[19] See Stella Tarrant, 'Western Australia's Persistent Enforcement of an Invalid Law: Section 23(c) of the *Human Reproductive Technology Act 1991* (WA)' (2000) 8 *Journal of Law and Medicine* 92, 97.

[20] NHMRC, *Ethical Guidelines on Assisted Reproductive Technology* (1996). The NHMRC is given the power to issue guidelines under s 7 of the *National Health and Medical Research Council Act 1992* (Cth).

[21] NHMRC, 'Statement on Human Experimentation' in NHMRC, *First Report by NHMRC Working Party on Ethics of Medical Research: Research on Humans* (1982), supplementary note 4, 26.

[22] NHMRC, *Conditions for the Award for Project Grants Commencing in 2001* (2001) state that assistance under the 'Medical Research Endowment Account' (set up under the *National Health and Medical Research Council Act 1992* (Cth)) must not be provided unless the recipient agrees to comply with the ethics guidelines issued by the NHMRC. See Anita Stuhmcke, 'Lesbian Access to In Vitro Fertilisation' (1997) 7 *Australasian Gay and Lesbian Law Journal* 15, 25.

worth noting that there are clinics in States without prohibitive legislation which have adopted openly non-discriminatory policies with respect to lesbians.[23]

III WELFARE OF THE CHILD

The appropriate framework for considering whether lesbians should have access to ART is the welfare of any child born as a result of the technology. This is the stated policy of the Victorian Act[24] and the NHMRC guidelines.[25] Although the test is not defined in either the guidelines or the Victorian Act, guidance as to how the test might apply can be sought from custody cases under the *Family Law Act 1975* (Cth), which provides that the Court must take the 'best interests of [the] child' as the paramount consideration.[26] Prior to 1995, the 'welfare of the child' was the standard applied in custody cases. The change in terminology does not appear to have had any substantive effect on the operation of the principle. Rather, it seems to have been motivated by a desire to bring the terminology into line with the United Nations *Convention on the Rights of the Child*.[27]

The primary objective of the 'best interests' test under the *Family Law Act 1975* (Cth) is that children receive 'adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children'.[28] In determining what is in the child's best interests, the Court must have regard to, among other things, 'the capacity of each parent ... to provide for the needs of the child, including emotional and intellectual needs.'[29] Hence, if it can be shown that children born into lesbian families would not have their emotional and intellectual needs fulfilled, there may be justifiable grounds for refusing lesbians access to ART. It should be pointed out here that, at least in the context of custody cases, the threshold for the welfare test has been set relatively low. In the case of *In the Marriage of Horman*, it was held that the court should not interfere with differing social styles and attitudes unless they would seriously offend 'even the most elastic views of conventional morality'.[30]

Notwithstanding the dicta in the case of *In the Marriage of Horman*, the broad discretion inherent in the welfare test still leaves open the possibility of the test being used to disguise highly subjective views about how the family *should* be. In relation to the 'best interests' test, Professor Ian Kennedy has argued that 'although it is said to be a test, indeed *the* legal test for deciding matters relating to children, it is not really a test at all. Instead, it is a somewhat crude conclusion

[23] See, eg, Misha Ketchell, 'Crossing the Divide for a Family of Their Own', *The Age* (Melbourne), 3 August 2000, 6.
[24] Section 5.
[25] NHMRC, *Ethical Guidelines*, above n 20, 1.
[26] Section 68E(1).
[27] Opened for signature 20 November 1989, 1588 UNTS 530, 28 ILM 1448 (entered into force 16 January 1991). See Butterworths, *Australian Family Law*, vol 1 (at 1324.6), ¶s 68F.9.
[28] Section 60B(1).
[29] Section 68F(2)(e).
[30] (1976) 5 Fam LR 796, 797 (Fogarty J).

of social policy.'[31] Even the courts themselves have acknowledged the subjective nature of such tests. In *Marion's Case*, Brennan J said 'it must be remembered that, in the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision-maker.'[32] Similarly, in *CDJ v VAJ* the High Court acknowledged that inquiring into the best interests of the child would 'necessarily involve predictions and assumptions about the future which are not susceptible of scientific demonstration or proof' and that '[p]erceptions, predictions and even intuition and guesswork can all play a part.'[33] It is arguable that in the context of ART the welfare test is even more speculative than in custody disputes because the child has not yet even come into existence. Ultimately though, the adjudicators must not let their own views or biases override the empirical evidence. The court 'must act upon evidence, not upon assumption or theory'.[34]

A *The Empirical Evidence*

There is a growing body of empirical research on children brought up in lesbian households[35] that consistently indicates that the outcome for these children does not differ in any significant respect from that for children raised in comparable circumstances by heterosexual parents.[36] Fears that they may suffer from poor mental health or inappropriate gender identity, suffer public stigma or have increased likelihood of becoming homosexual have not been substantiated by the studies to date. Not only does the research indicate that the children of lesbians are as well adjusted as their peers from heterosexual families,[37] but the studies

31 Ian Kennedy, 'Patients, Doctors and Human Rights' in Robert Blackburn and John Taylor (eds), *Human Rights for the 1990s: Legal, Political and Ethical Issues* (1991) 81, 90 (emphasis in original).

32 *Department of Health and Community Services v JWB* (1992) 175 CLR 218, 271.

33 (1998) 197 CLR 172, 218 (Gaudron, McHugh and Callinan JJ).

34 Chief Justice Alastair Nicholson, 'The Changing Concept of Family: The Significance of Recognition and Protection' (1997) 6 *Australasian Gay and Lesbian Law Journal* 13, 28, citing *In the Marriage of Brook and Brook* [1977] FLC ¶90-325 (Lindenmayer J).

35 Most of the studies have involved children who were born into heterosexual relationships where the mother has subsequently entered into a lesbian relationship. While it is necessary to caution against applying these results to children born into lesbian relationships, some of the children in the studies were in fact born into lesbian families and the data shows no evidence of pathology in those children: Nancy Polikoff, 'This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families' (1990) 78 *Georgetown Law Journal* 459, 563, fn 568.

36 See, eg, Charlotte Patterson, 'Children of Lesbian and Gay Parents' (1992) 63 *Child Development* 1025; Susan Golombok and Fiona Tasker, 'Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Families' (1996) 32 *Developmental Psychology* 3; Fiona Tasker and Susan Golombok, 'Children Raised by Lesbian Mothers: The Empirical Evidence' (1991) 21 *Family Law* 184; Fiona Tasker, Susan Golombok 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; 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.

37 See, eg, Susan Golombok, Ann Spencer and Michael Rutter, 'Children in Lesbian and Single Parent Households: Psychosexual and Psychiatric Appraisal' (1983) 24 *Journal of Child Psychology and Psychiatry and Allied Disciplines* 551. See also Polikoff, above n 35, 562.

have found that lesbian and heterosexual women are routinely similar in their parenting styles and skills.[38] The following discussion does not purport to encompass all research on children brought up in lesbian households, however it demonstrates that there is considerable evidence to challenge assumptions about the alleged detrimental effect of lesbian parenting.[39]

B *Gender Roles and Sexual Identity*

A review by Patterson of the studies conducted up to 1992 concluded that the development of gender identity, gender role behaviour and sexual preference among offspring of gay and lesbian parents was unanimously found to fall within 'normal' bounds.[40] Tasker and Golombok found that, although children from lesbian families were more likely to explore same-sex relationships, the large majority of children who grew up in lesbian families identified as heterosexual.[41] The researchers concluded that the commonly held assumption that children of lesbian mothers would be more likely to grow up homosexual was not supported.[42] However, even if the evidence points to a greater likelihood of homosexuality in the offspring of lesbians, there is no evidence to suggest that homosexuals are any worse off psychologically or emotionally.[43] Treating homosexuality as a negative outcome assumes that homosexuality in itself is undesirable. This position presupposes, without rational basis, that children are harmed if they grow up lesbian or gay.[44] This unsubstantiated opinion has been evident in the judicial system. In a considerable number of cases involving access to or custody of children, courts have attempted to 'minimise' the perceived harm to the child associated with the mother's lesbianism by imposing restrictions on the mother's openness about her sexuality.[45] However, recent studies indicate that imposing such conditions may in fact be antithetical to the welfare of the child, as the clinical data demonstrates that the more open and honest the parent, the better adjusted the child will be.[46]

C *Social Stigma*

Concerns about the impact of social stigma upon children of lesbian parents also appear to be unfounded. In a longitudinal study published by Tasker and

[38] Tasker and Golombok, 'Children Raised by Lesbian Mothers', above n 36, 187; Tasker, Golombok and Murray, above n 36, 784; Patterson, above n 36, 1028.

[39] Cf Lynn Wardle, 'The Potential Impact of Homosexual Parenting on Children' [1997] *University of Illinois Law Review* 833. But see Carlos Ball and Janice Pea, 'Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents' [1998] *University of Illinois Law Review* 253.

[40] Patterson, above n 36, 1032.

[41] Golombok and Tasker, 'Do Parents Influence the Sexual Orientation of Their Children?', above n 36, 8.

[42] Ibid.

[43] Empirical studies have shown that in terms of emotional health and social adjustment there is no difference between heterosexuals and homosexuals: Stuhmcke, above n 22, 38.

[44] Polikoff, above n 35, 545.

[45] See, eg, *In the Marriage of A v J* (1995) 19 Fam LR 260, 263; *Campbell v Campbell* (1974) 9 SASR 25, 28–9 (Bright J); *In the Marriage of Spry* (1977) 3 Fam LR 11,330, 11,337–8 (Murray J); *In the Marriage of Cartwright* [1977] FLC ¶90-302, 76,600–1 (Smithers J).

[46] Polikoff, above n 35, 565.

Golombok in 1997, where children of lesbian single mothers were compared with children of heterosexual single mothers over a period of 15 years, the researchers found that the children of lesbian mothers were no more likely to be teased or ostracised.[47] Even a small study conducted in the mid-1980s, a time when prejudice based on sexuality might be thought to have been more widespread than today, found that children of lesbian mothers assessed their popularity amongst their classmates similarly to children of heterosexual mothers.[48]

In recent times, courts in custody cases have largely discredited the public stigma argument. For example, Pawley J remarked in *Re R*, '[t]here is no evidence before me that [the children] are being subject to taunts at school or elsewhere because of the conduct of their mother and I think that sometimes too much emphasis can be placed on that possibility in a rapidly changing world.'[49] Furthermore, in the Canadian case of *Re K*, Nevins J stated that concern about the consequences of possible stigma on children should be regarded in the same way as stigma arising from other impermissible grounds of discrimination, such as race and ethnicity.[50] This recognises that accepting the validity of the public stigma argument would effectively allow discrimination to perpetuate itself and would run the risk of legitimating homophobia.

As Polikoff has stated, the relative psychological wellbeing of children of lesbian mothers suggests that concern about public stigma is overstated or that such harassment causes no special adjustment difficulties.[51] Exposure to mild forms of public stigma may even have a character-strengthening effect on the children of lesbians. As Bateman argues, it is reasonable to expect that the children of lesbians may be better equipped to search out their own standards of right and wrong based on reason and tested knowledge.[52] A similar argument was expressed by a US superior court in the case of *MP v SP*, where it was held that the children may emerge 'better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.'[53] Thus, the experience of growing up in a lesbian family may encourage the development of children who are more tolerant of differences, whether due to sexuality, race, class or disability.[54] It is important to remember, however, that these arguments are merely speculative.

47 Fiona Tasker and Susan Golombok, *Growing Up in a Lesbian Family* (1997) 149–50.

48 Richard Green et al, 'Lesbian Mothers and Their Children: A Comparison with Solo Heterosexual Mothers and Their Children' (1986) 15 *Archives of Sexual Behaviour* 167, 178.

49 (Unreported, Family Court of Australia, Pawley J, 26 October 1979) 8. See also Margaret Bateman, 'Lesbians, Gays and Child Custody: An Australian Legal History' (1992) 1 *Australian Gay and Lesbian Law Journal* 47, 52.

50 (1995) 15 RFL (4th) 129, 143–6. See Danny Sandor, 'Same-Sex Couples Can Adopt in Ontario: The Canadian Case of *Re K* and Its Significance to Australian Family Law' (1997) 11 *Australian Journal of Family Law* 23, 30.

51 Polikoff, above n 35, 568.

52 Bateman, above n 49, 68.

53 404 A 2d 1256, 1263 (NJ Super Ct App Div, 1979) (Antell JAD, Halpern PJAD concurring).

54 Susan Boyd, 'What Is a "Normal" Family? *C v C (A Minor) (Custody: Appeal)*' (1992) 55 *Modern Law Review* 269, 274.

D *Need for a 'Father Figure'*

Another factor which emerges from the courts' interpretation of the 'best interests of the child' test in custody cases is the concern that children need a father figure.[55] This issue is often raised in connection with assertions that children, particularly males, need a male role model in order for them to develop appropriate gender roles. However, as the available studies have shown, being brought up in a lesbian household does not appear to impair the child's ability to adopt an appropriate gender identity. A preliminary study by Green revealed that '[t]he children [of lesbians] were able to verbalize the atypical nature of their parents' lifestyles and to view that atypicality in the broader perspective of the cultural norm.'[56] It is important to remember here that a child's environment extends beyond the immediate family environment.[57] Furthermore, some studies have found that lesbian mothers are in fact *more* concerned than heterosexual women that their children should have contact with men.[58] A study by Tasker, Golombok and Murray concluded that children raised in fatherless families from birth or early infancy are not disadvantaged in terms of their emotional wellbeing.[59] The researchers further suggested that the results of studies revealing poor outcomes for children in father-absent families resulting from divorce may be more attributable to the impact of divorce than the absence of a father.[60]

Clearly, the evidence does not support the argument that allowing lesbians to have access to ART would be contrary to the welfare of the child. As Pearn states, 'if the deciding issue is the welfare of potential children, then the decision to exclude lesbian couples is clearly discriminatory.'[61] If the restriction is to be justified, its basis must come from a source other than the welfare of the child test.

In Part IV, I explore arguments that extending ART to lesbians would undermine the family. However, as will be seen, these arguments also rest on unstable foundations. Even if these objections *were* based on more solid foundations, the fact remains that the welfare of the child is stated in both the Victorian Act and the NHMRC guidelines to be the primary consideration.

IV FEAR OF UNDERMINING 'THE FAMILY'

Quite apart from the need to protect the welfare of any child born as a result of ART, arguments against lesbians having access to the technology often focus on the need to preserve 'the family'. However, there is no clearly defined notion of 'family' in law. Despite the absence of a clear understanding of the meaning of

[55] See, eg, *In the Marriage of L and L* [1983] FLC ¶91-353, 78,363–4 (Baker J).

[56] Richard Green, 'Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents' (1978) 135 *American Journal of Psychiatry* 692, 696. See also ibid.

[57] Green, above n 56, 696.

[58] Jenni Millbank, 'Same Sex Couples and Family Law' (Paper presented at the Third National Family Court of Australia Conference, Melbourne, 23 October 1998) 10.

[59] Tasker, Golombok and Murray, above n 36, 788.

[60] Ibid.

[61] John Pearn, 'Gatekeeping and Assisted Reproductive Technology: The Ethical Rights and Responsibilities of Doctors' (1997) 167 *Medical Journal of Australia* 318, 319.

'family', the central importance of the family is explicitly recognised in s 43 of the *Family Law Act 1975* (Cth). This section provides that the court must have regard to the need to give the 'widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children'. Clearly, the importance of the family as the 'basic unit of society' centres around its function of child-rearing.[62] In a public address in 1996, Chief Justice Nicholson of the Family Court stated that 'society will always have ... an interest in recognising and protecting the family unit, because it is the natural environment for children to be nurtured and developed.'[63] In addition, the Australian Family Association has defined family as 'the prime agency for the total development of children' whose role it is to provide the 'transmission of moral, ethical and cultural values' as well as 'primary delivery of nurturing, education, health and welfare'.[64]

Regulating access to ART enables policy-makers to limit the technology to what society deems to be the 'ideal family', that is, the heterosexual nuclear family. McNair and her co-authors have aptly described the restrictions as 'a clumsy exercise in social determinism'.[65] Judicial decisions, particularly in custody disputes, have reflected this 'ideal' hetero-nuclear family. For example, in *C v C (A Minor) (Custody: Appeal)*, Glidewell LJ proclaimed that:

> I regard it as axiomatic that the ideal environment for the upbringing of a child is the home of loving, caring and sensible parents, the father and the mother. ... When the court is called upon to decide which of two possible alternatives is preferable for the child's welfare, its task is to choose the alternative which comes closest to that ideal.[66]

Again, in the case of *In the Marriage of Doyle*, Hannon J stated that '[t]here is no doubt that in a perfect society children would be reared in a household which comprises heterosexual parents living in a harmonious and stable relationship.'[67]

Despite the courts' insistence that the traditional family is the ideal environment in which to raise a child, the reality is that many traditional families are far from ideal. One only has to reflect upon the endless number of cases of neglected, abandoned or abused children that appear before the courts to realise

[62] Some commentators have argued that 'family' does not necessarily involve children at all (see, eg, Rebecca Melton, 'Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family"' (1990) 29 *Journal of Family Law* 497), but for present purposes it is appropriate to focus on the child-rearing functions of the family.

[63] Nicholson, above n 34, 24.

[64] Australian Family Association, 'The Definition of Marriage and Family' <http://www.family.org.au/afaabout.htm> at 9 July 2001 (copy on file with author).

[65] McNair et al, above n 17.

[66] [1991] FCR 254, 260.

[67] (1992) 15 Fam LR 274, 279. Hannon J held, however, that homosexuality per se did not disqualify a parent from having custody of a child. In the result, the Court ordered that the husband, who was living in a homosexual relationship, have sole custody of the two children from his earlier marriage to the applicant. *In the Marriage of Doyle* was later cited by the Full Court of the Family Court in support of the proposition, endorsed by the Full Court, that, in custody disputes, 'the nature of a party's sexual relationships is relevant to the court's proceedings only to the extent that it affects parenting abilities or the welfare of a child in a particular case': *Re K* (1994) 17 Fam LR 537, 556 (Nicholson CJ, Fogarty and Baker JJ).

this fact.[68] It may even be the case that such problems are less likely to occur in lesbian families, especially as children born to lesbians are always born as a result of conscious decisions[69] and are highly desired.

A *Prioritising Function over Form*

The central importance of the family essentially derives from its function, rather than its structure. In the Canadian case of *Re K*, Nevins J found that the 'most important element in the healthy development of a child is a stable, consistent, warm and responsive relationship between a child and his or her caregiver.'[70] Being a fit and proper parent is not about slotting into a social or sexual template. It is about being responsible and able to provide long-term commitment, care, love and guidance. There is no evidence to suggest that lesbians are any less capable of having a quality relationship with their children than heterosexual parents. This point was explicitly acknowledged by the Family Court in the case of *In the Marriage of Brook and Brook*, where Lindenmayer J observed that 'there is no basis upon which it could be suggested that the Court should judicially notice that a practising homosexual parent cannot provide as good and healthy an upbringing for his or her children as a heterosexual one.'[71] Research has shown that lesbian mothers are just as child-oriented, nurturing and confident as heterosexual mothers.[72] In fact, one study has found that lesbian couples show more parenting awareness than a comparison group of heterosexual couples.[73] This could possibly be explained by the degree of thought and preparation that necessarily goes into lesbians conceiving children compared with the relatively simpler process of conception for many heterosexual couples.

The compulsion among some elements of society to resist the broadening of the definition of 'family' is fuelled by fears that such developments signal a disastrous breakdown in the fabric of society with the disintegration of family values.[74] For example, Chipman argues that devaluing the traditional family will lead to valuing nothing:

> The ultimate practical implication of cultural relativism is in fact not equality, but nihilism. This means valuing literally nothing from a social point of view ... We need to be clearer about what makes a bunch of individuals into a family ... but that doesn't mean that family means whatever any minority wants it to mean.[75]

68 Sandor, above n 50, 32.

69 E Donald Shapiro and Lisa Schultz, 'Single-Sex Families: The Impact of Birth Innovations upon Traditional Family Notions' (1986) 24 *Journal of Family Law* 271, 277.

70 (1995) 15 RFL (4th) 129, 143. See Sandor, above n 50, 30.

71 [1977] FLC ¶90-325, 76,710.

72 Tasker, Golombok and Murray, above n 36, 784.

73 Ibid.

74 Janet Dolgin, *Defining the Family: Law, Technology and Reproduction in an Uneasy Age* (1997) 29.

75 Professor Lauchlan Chipman, School of Humanities and Social Sciences, Bond University, previously published statement confirmed in personal correspondence, 30 July 2001 (copy on file with author).

This line of argument is founded on a fallacy. Valuing a broader conception of family will not lead to valuing nothing, as the true value of the heterosexual nuclear family lies in its *function* rather than its form. If lesbian couples are capable of fulfilling the same function, recognising lesbian families does not undermine family values in any relevant sense. Once it is acknowledged that the function of the family is more important than its form, it is possible to accept that non-traditional family forms may equally advance true family values.[76]

One historical justification for prioritising the married family form over other models of family was the promise of stability and commitment. As the report of one Queensland advisory committee stated, '[i]t is assumed that the marriage commitment itself is evidence of stability'.[77] However, in light of the high rate of family breakdown, the assumption that marriage itself is evidence of stability no longer holds great sway. Furthermore, 'various studies [have indicated] that married couples may not, in fact, be much more likely to stay together than de facto ones.'[78] This is reflected in the extension of ART services to those in de facto relationships in recent years.[79]

A separate but related issue to the fear of undermining the family is concern that the social role of fathers will be undermined. Many opponents to lesbians having access to ART fear that the process will '[write] men out of the parenting equation'.[80] As one parliamentarian put it, '[t]he term "father" and all that it means to a child has been made redundant, reduced to a contribution of the sperm.'[81] To say that men will be written out of the parenting equation is grossly to overstate the prevalence of homosexual parent families. Lesbianism is a minority sexual orientation and the vast majority of children will continue to be born into heterosexual families where fathers will continue to play an important role. Rather than subordinate the role of fathers to mothers, legal sanctioning of lesbian families simply emphasises the role of *parents*, irrespective of gender. This is consistent with the findings of the empirical evidence, discussed above, which indicates that it is the quality of the parent–child relationship rather than the parents' gender or sexuality which is of primary importance.

B *Acknowledging the Reality of the Alternative Family*

Restricting access to ART to heterosexual couples not only assumes that lesbians are incapable of providing the love, support and commitment necessary to

[76] *Canada (Attorney General) v Mossop* [1993] 1 SCR 554, 634; 100 DLR (4th) 658, 712 (L'Heureux-Dubé J).

[77] *Report of the Special Committee Appointed by the Queensland Government to Enquire into the Laws Relating to Artificial Insemination, In Vitro Fertilisation and Other Related Matters* (1984) 58–9.

[78] Loane Skene, 'Why Legislate on Assisted Reproduction?' in Ian Freckelton and Kerry Peterson (eds), *Controversies in Health Law* (1999) 266, 268.

[79] The *Infertility Treatment (Amendment) Act 1997* (Vic) s 7 changed the eligibility provisions in s 8 of the Victorian Act, allowing access to services by both legally married and de facto heterosexual couples. See also *Human Reproductive Technology Act 1991* (WA) s 23; *Reproductive Technology Act 1988* (SA) s 13(4).

[80] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 August 2000, 18 874 (Kay Elson).

[81] Ibid.

raise a child, but ignores the reality of the growing number of alternative families. Social evolution has thus outpaced legal evolution.[82] As Chief Justice Nicholson proclaimed in his 1996 speech:

> Legal denial and intolerance achieve nothing but an insult to the dignity of recognition that every family treasures and has the right to expect in a country which supposedly supports tolerance for peaceful differences among its members.[83]

In spite of the ideal of the 'traditional' (heterosexual nuclear) family, a new picture of family life is emerging. The traditional family is being forced to share the stage with an ever-increasing proportion of step-families, blended families, sole parent families and, in more recent times, a growing number of same-sex parent families. In fact, according to a recent study conducted by KPMG, nuclear families now comprise just 19 per cent of Australian households.[84] In 1992, a survey of young lesbians in Sydney found that 43 per cent were considering having children in the future.[85] Furthermore, a 1995 readership survey by a Sydney lesbian magazine found that 19 per cent of the 732 respondents already had children, and a further 12.4 per cent wanted to become mothers.[86]

The increasing prevalence of alternative family forms exposes the heterosexual nuclear family as a cultural construct. The Aboriginal and Torres Strait Islander experience is illustrative of this point. Aboriginal societies are traditionally organised around a system of kinship and relationships — kinship being loosely defined as a confederation of family groups or a large group of kin-related people.[87] Children may therefore be cared for by a number of members of their kinship group. The Court in *Re CP* acknowledged the difficulties of applying the *Family Law Act 1975* (Cth) to such circumstances, explicitly recognising that the legislation proceeds 'from an *Anglo-European* notion of parental responsibility'.[88] The practices of other cultures therefore challenge the presumption that the heterosexual nuclear family is necessarily the only 'natural' or legitimate family form.

The very concepts of what is natural and legitimate have been challenged by reproductive technology. The new technology represents a departure from the necessary biological connection that has hitherto underpinned understandings of 'family'.[89] The creation of families through ART, itself an 'unnatural' process, has now gained general community acceptance, at least where it is sought by heterosexual couples. The concept of what is 'natural' or acceptable is not static,

82 Melton, above n 62, 499.

83 Nicholson, above n 34, 15–16.

84 Bernard Salt, *Population Growth* (2000) 69.

85 V Barbeler, *The Young Lesbian Report: A Study of Attitudes and Behaviours of Adolescents Today* (1992), cited in McNair et al, above n 17, 7.

86 'Lesbians on the Loose 1995 Readership Survey' (1996) 7(3) *Lesbians on the Loose* 9, cited in McNair et al, above n 17, 7.

87 Dean Collard et al, 'The Contribution of Aboriginal Family Values to Australian Family Life' in Jane Inglis and Lyla Rogan (eds), *Flexible Families: New Directions in Australian Communities* (1994) 116.

88 [1997] FLC ¶92-741, 83,991 (Nicholson CJ, Ellis and Moore JJ) (emphasis added).

89 Dolgin, above n 74, 29.

but is a product of social construction that must evolve with changing societal attitudes. For example, it was not so long ago that racially mixed families were seen as unnatural. In a 1967 case overturning a state ban on interracial marriage, the US Supreme Court referred to a comment by the trial judge in the earlier related criminal proceedings that the 'fact that He [God] separated the races [on different continents] shows that He did not intend for the races to mix.'[90] As Kay has argued:

> Just as the existence of racially mixed families once challenged the legitimacy of white supremacy in ways that ultimately strengthened the social fabric ... so may the contemporary example of stable same-sex families ultimately lead to a richer and more diverse social and cultural life.[91]

Social structures and models of family which have been posited as 'natural' may, in time, come 'to be seen as an artificial and invidious constraint on human potential and freedom.'[92]

C *Child's Right to a Mother and a Father*

Section 60B(2)(a) of the *Family Law Act 1975* (Cth) provides that children 'have a right to know and be cared for by both their parents'. This provision echoes principle 6 of the Declaration of the Rights of the Child, which states that a child 'shall, wherever possible, grow up in the care and under the responsibility of his parents.'[93] Despite the fact that 'parent' is not defined in either the Act or the UN Declaration, these principles have been widely used to support the view that children have a right to a mother and a father. In the context of ART, such provisions raise difficult questions as to who are the child's parents. Where processes such as IVF and donor insemination are employed, the child may have both biological and social parents. While those who oppose lesbian access to ART would argue that 'parents' means the child's biological parents, where a child is conceived through the use of donor insemination, the law presumes the woman's husband or de facto male partner — the 'social' father — is the legal father.[94] Hence it could be argued that the child has a right to know and be cared for by two parents, whether they be the social or biological parents.

In support of the child's right to know its biological parents, one may point to the well-documented crises of identity suffered by many adopted children who feel compelled to trace their biological heritage.[95] Furthermore, it could be

[90] *Loving v Virginia*, 388 US 1, 3 (1967).

[91] Herma Kay, 'Private Choices and Public Policy: Confronting the Limitations of Marriage' (1991) 5 *Australian Journal of Family Law* 69, 84.

[92] *City of Cleburne v Cleburne Living Center*, 473 US 432, 466 (1985) (Marshall J).

[93] GA Res 1386 (XIV), 14 UN GAOR Supp (No 16) 19, UN Doc A/4354 (1959) ('UN Declaration').

[94] *Status of Children Act 1996* (NSW) s 14(2); *Status of Children Act 1974* (Vic) s 10F; *Status of Children Act 1978* (Qld) s 18; *Family Relationships Act 1975* (SA) s 10E(2); *Artificial Conception Act 1985* (WA) s 7(2); *Status of Children Act 1974* (Tas) s 10C(2); *Artificial Conception Act 1985* (ACT) s 7; *Status of Children Act 1975* (NT) s 5F. See Jenni Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?' (1998) 12 *Australian Journal of Family Law* 99, 124.

[95] Kathleen Funder (ed), *Citizen Child: Australian Law and Children's Rights* (1996) 50.

argued that children of lesbians may be more driven to find their biological fathers than those with a social father.[96] While this is a legitimate concern, it is addressed by the Victorian Act which affords offspring of donor procedures the right to access identifying information about their biological parents.[97] At present, the Victorian Act is unique in this respect, but the NHMRC guidelines state that children born from the use of ART procedures are entitled to knowledge of their biological parents.[98] In Western Australia, the right of the anonymous donor's offspring to access this information is limited to non-identifying information.[99] In South Australia, no paternal information may be disclosed without the donor's consent.[100]

V CONCLUSION

With the proliferation of anti-discrimination laws and international instruments in the latter half of the 20th century has come a heightened awareness of the rights of the individual. While these rights are important, they cannot be allowed to subvert the interests of human beings of the future. In the context of ART, it is therefore appropriate that the paramount consideration be the welfare of any child born as a result of such technologies. It is within this framework that the question of whether lesbians should have access to ART must be assessed. That said, the available research on the outcomes of children with lesbian parents does not support claims that being raised by lesbians is not in accordance with the welfare of the child. The evidence indicates that children of lesbians are equally well adjusted — socially, psychologically and emotionally — as children raised in comparable circumstances by heterosexual parents.

Even amongst those who concede that children raised by lesbians are not likely to be harmed as a result, it is often asserted that the hetero-nuclear family is still the ideal. However, when this assumption is deconstructed, it becomes clear that the real value of the family lies in its function — its role in nurturing and providing for children. This function can be provided just as well by lesbian parents. Hence, by allowing lesbians to become parents, core family values are not lost or undermined. In the absence of any objective evidence that the hetero-nuclear family form is inherently superior, this model of family should not be blindly preserved to the exclusion of equally valid alternative family forms. Although the decision in *McBain* is, on its face, a straightforward case of statutory interpretation, on another level it can be seen as a recognition that other family forms are capable of providing the necessary love and support and thus are deserving of legal endorsement. Allowing lesbians to have access to ART will not devalue the traditional family or the role of fathers in society. It will simply add richness and diversity to the fabric of society and to the evolving institution of the family.

96 Jansen, above n 11, 322.
97 Section 79. See also Szoke, above n 13, 254.
98 NHMRC, *Ethical Guidelines*, above n 20, 6.
99 *Human Reproductive Technology Act 1991* (WA) s 46. See also Szoke, above n 13, 249.
100 *Reproductive Technology Act 1988* (SA) s 18(1).