4 October 2024

The Secretary
The Senate Legal and Constitutional Affairs Legislation Committee
Parliament House Canberra

By email: LegCon.Sen@aph.gov.au

Dear Secretary

SUBMISSION TO THE INQUIRY INTO THE FAMILY LAW AMENDMENT BILL 2024

Thank you for the opportunity to provide a submission to the Inquiry into the Family Law Amendment Bill 2024 ("the Bill").

About Rainbow Families Australia

Rainbow Families is the leading voice for LGBTQ+ families in Australia. We are committed to our mission as a charity to support, connect, celebrate, empower, and advocate for LGBTQ+ parents and their families at every stage of their lives.

In 2024, we proudly became a national organisation to support more rainbow families across the country.

We speak on behalf of and empower LGBTQ+ parents and their kids. We create inclusive and safe services, spaces, programs, and resources for rainbow families to thrive. As an equality-focused organisation, we engage with policy and research to fight systemic discrimination with love and affirming action.

What is a rainbow family?

A rainbow family is LGBTQ+-parented family. At Rainbow Families, we define a rainbow family as: any lesbian, gay, bisexual, transgender, queer person who has a child or children; or is planning on having a child or children by way of donor conception (known or unknown), surrogacy (altruistic or compensated), foster care, foster to adoption, adoption (domestic or international), step-parenting, co-parenting or other means.

Rainbow families, like many modern families, come in all shapes and sizes and are formed in many different ways. But the thing we all have in common is that our families are created through love. Over thirty years of peer reviewed research into same-sex parented families shows that children from these families do as well as their peers from non-LGBTQ+ parented families.

info@rainbowfamilies.com.au
www.rainbowfamilies.com.au
PO BOX 306
Erskineville 2043
0481 565 958

Rainbow Families supports passage of the Bill

Rainbow Families considers that the Bill would move the family law system closer to recognising the complex realities of families and protecting vulnerable parties from the impact of family violence. In particular, the proposed amendments would bring about a more equitable, safe and accessible framework for people seeking property settlements.

We also commend the effort to give greater clarity and coherence to provisions relating to property, thereby making them more accessible to those who need to understand them. While we support the Bill overall, our comments below address the detail of specific proposals.

Family violence in property proceedings

Family violence presents a significant barrier to parties seeking property settlements. Fear of repercussions can result in victim-survivors forgoing their entitlements or agreeing to unfair outcomes. Too often, property is overlooked or left to be dealt with after parenting arrangements are resolved.

Although children's safety must undoubtedly be prioritised, the financial security of their primary parent is central to their well-being. Not being able to access a safe means of resolving property matters can entrench long-term financial disadvantage for single-parented families.

Including *economic and financial abuse* as a behaviour that may constitute family violence sends a clear message that it is not acceptable and has consequences. A list of examples demonstrating the breadth of behaviours that constitute economic and financial abuse will assist parties and practitioners to more readily identify it.

The Bill explicitly acknowledges the role that family violence plays in property matters by factoring it in as a consideration as has been done in parenting matters. The proposed amendments to sections 75 and 79 (and mirror provisions in relation to de facto property) recognise family violence as a factor that can impact on parties' current and future financial circumstances and their ability to make contributions as factors to be considered in property decisions.

Previously, parties seeking to have the impact of family violence taken into account relied on the *Kennon* case. However, this has proved problematic due to the high threshold required and therefore the limited range of circumstances in which it applied.

More generally, relying on case law as a primary source of legal guidance places unrealistic expectations on people without legal training to find it or even know that it exists. Codifying the case law in legislation is an important step in making the law more accessible to parties and promoting consistency of understanding among the legal profession.

In matters involving family violence, contributions tend to be viewed through a gendered lens with perpetrators dismissing the victim's non-financial contribution and overstating their own financial

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0481 565 958

contribution. We suggest that providing examples of direct and indirect financial and non-financial contributions would assist parties to better understand the nature of contributions.

In being more explicit about the impact of family violence, the new property provisions will equip victim-survivors with the language to articulate the complexity and nuance of their experiences. It will be harder for other parties and practitioners to overlook the impact of violence and it will serve an important educative function in the community.

We acknowledge that there could be obstacles to establishing *the effect of family violence to which one party has subjected or exposed the other* where the violence itself is contested. Similarly, negotiating or mediating in circumstances where there is no admission of responsibility for the violence will likely present challenges.

Further, quantifying the impact of family violence on contributions and current and future financial circumstances may not be straightforward.

However, it is incumbent upon family law practitioners to engage with the intent of the provisions and communicate it clearly to their clients. It is also vital that efforts are made within the family law sector to promote understanding early in the life of the new provisions so that misconceptions do not become entrenched.

A clearer explanation of how property orders are made

The established procedure followed when determining property disputes, commonly referred to as the "four-step process" is not currently articulated in the *Family Law Act*. Codifying the process within the legislation is important for reasons of accessibility as discussed above in relation to case law. It is very difficult for someone without legal training to navigate the relevant provisions in their current form. While legal practitioners understand that the matters set out in 75(2) in relation to spousal maintenance are also applied to consideration of parties' future needs, this is far from obvious to a layperson.

The Bill takes a sensible approach by expanding 79 (and its mirror de facto provision) to establish a coherent explanation of the process the court follows in making property orders. A new subsection 79(3) sets out the steps, by firstly identifying the assets and liabilities of the property pool referring to subsection 79(4) which deals with contributions and the newly included 79(5) which reproduces the 75(2) factors in full. The inclusion of headings 'considerations relating to contributions' and 'considerations relating to current and future needs' in relation to subsections 4 and 5 adds clarity.

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New provisions for resolving ownership of pets

A new mechanism enabling the court to make orders in relation to companion animals is a welcome addition to the *Family Law Act*. This has been a difficult area for separated couples to navigate as it does not fit within the remedies available within the Act. For many people, pets are considered part of the family and decisions about who will care for them following separation are understandably fraught with emotion. This is especially the case within the LGBTQ+ community for where pets take on a central role for many couples who do not have children.

The proposed provision is a sensible approach to preventing protracted conflict between parties while prioritising animal welfare. The detailed considerations for the court will provide certainty to parties bringing proceedings and guidance to those negotiating settlements outside of court.

Regulation and accreditation of children's contact services

The introduction of a comprehensive framework to regulate contact services is a much-needed addition to the family law landscape. Many separated families rely on contact centres as the only safe means of maintaining or re-establishing relationships, and ensuring safe transitions between parents. However the current lack of oversight or mandated minimum standards potentially places children and vulnerable parties at risk. When making orders relating to supervised contact, the court needs to be assured that the nominated service is going to act in the best interests of the children.

Disclosure of financial information in property matters

While the duty of full and frank disclosure is well known among family law practitioners, its location in the *Family Law Rules* rather than the *Family Law Act* means it is often overlooked by parties. Locating the obligations for parties to provide relevant financial information in new provision within the Act will make these provisions more accessible and highlight their importance.

We suggest that there is scope for greater clarity about when the duty of disclosure applies outside of court proceedings. While proposed new 71(B) sets out the obligation for parties preparing for proceedings, it needs to extend to filing consent orders where no proceedings are contemplated. We note that subsection (10) specifies the obligations of family dispute resolution practitioners to provide information to parties about complying with the duty of disclosure.

Lack of financial disclosure is a significant barrier to resolving property disputes in mediation without mechanisms available to the court to compel it. A clearer statement that the duty applies to parties attending mediation would help support the disclosure process.

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Protected confidences

We support the introduction of provisions that would prevent protected confidences being adduced in evidence or produced by subpoena. Without safeguards in place, perpetrators of family violence are able to use the court process as a means of furthering abuse and targeting victim-survivors at their most vulnerable.

The experience of having deeply personal information provided in confidence later aired in court proceedings causes distress and re-traumatisation. This is particularly the case for LGBTQ+ individuals who have poorer mental health outcomes than the general population. 74.5% of Lesbian, Gay and Bisexual people have experienced a mental disorder at some time in their life compared with 41.7% of heterosexual people (ABS 2024). For trans members of our community, the availability of sensitive material relating to gender identity exacerbates the stigma and discrimination that they experience in family law proceedings.

The proposed comprehensive definition of *health service* captures a broad range of personal and sensitive material. It is appropriate that there is a high threshold in terms of probative value and importance for such material to be made available. However, the onus should not be on the protected confider to argue why their confidences should not be allowed into evidence.

While the proposed provisions would enable the court to restrict the use of protected confidences by its initiative, its role is not to advocate for parties. The confider should not have to shoulder additional demands while already in a vulnerable position. Instead, the onus should be on the party wishing to access the protected confidence to satisfy the court that the probative value and importance of the material outweighs potential distress and harm to the confider.

Once again, we thank the Committee for the opportunity to provide a submission to the inquiry. Rainbow Families is available to provide further input or clarification if required.

Regards

Ashley Scott
Executive Officer
Rainbow Families

info@rainbowfamilies.com.au
www.rainbowfamilies.com.au
PO BOX 306
Erskineville 2043
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