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Thursday 24 July 2008

Committee Secretary

Senate Standing Committee on Legal and Constitutional Affairs

PO BOX 6100

Parliament House Canberra ACT 2600

By email: legacon.sen@aph.gov.au

Dear Secretary,

RE: Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008

I write to offer expert comment on the above Bill. I am Australia's leading researcher on same-sex relationship recognition models, having published in this field for the past 15 years. In 2006 I authored the research report upon which much of the Human Rights and Equal Opportunity Commission Report, *Same-Sex Same Entitlements* was based. In particular I worked with HREOC to develop flexible and equitable models for the recognition of children born into same sex families. I am also an expert in family law issues concerning other non-traditional family forms, such as those formed through donor gametes and surrogacy.

The general approach of the reforms directed towards gender neutral de facto relationships is in my view correct. Including all committed couple relationships within the one property division regime, regardless of gender and regardless of whether the relationship has been formalised, is a sensible and equitable approach. State and territory courts have long experience in assessing when de facto relationships have begun and ended and this experience can readily be brought to bear to cases before the Family Court by virtue of the similarity of the checklist factors in s 4AA(2) with those in use in the states (discussed in Millbank, "The Changing Meaning of 'De Facto' Relationships" (2006) 12 *Current Family Law* 82-93). The discretionary approach to property adjustment means that unmeritorious claims can be dealt with, and the ability to enter into binding financial agreements means that couples who do not wish to be covered by the regime may exit it at any stage in their relationship.

The major failing of the Bill is in its approach to s60H. S90RB provides that:

> (3) For the purposes of this section, subsection 60H(1) applies to parties to a de facto relationship who are of the same sex in a corresponding way to the way in which it applies to parties to a de facto relationship who are of different sexes.

It is completely illogical and iniquitous to amend this section in this manner. The effect of this amendment is to recognise the parent-child relationship of children born through assisted reproductive technologies (ART) in two female parents families only for the purpose of property divisions proceedings and not for the purpose of any child-related provisions under the Act. It makes no sense to acknowledge the existence of a parent-child relationship for the purpose of property division but not for the purpose of child support or child maintenance, parental responsibility, or for decisions about time with children.

As I am sure you are aware, all states and territories accord parental status to the birth mother of a child born through ART regardless of genetic connection to and also accord parental status to her consenting male de facto partner or husband. Section 60H(1) and (4) reflect these presumptions. In recent years the approach of the states and territories has increasingly changed to also include female partners. In Western Australia, the Northern Territory, the ACT and NSW a female de facto partner of the birth mother is also accorded parental status through the model, and this form of recognition is also set be introduced in Victoria this year. These newer presumptions are not reflected in the current s60H, which continues to use male-gender specific terminology.

In addition while all of the state and territory laws sever parental status of an egg or sperm donor who is not a party to the relationship, such provisions are not reflected in the Family Law Act. This has led to considerable confusion as to whether the court is bound only by the terms of s60H when considering a child born through ART or whether it can look beyond the section to grant parental status to genetic parents who do not fit within its terms in certain circumstances (such as surrogacy arrangements: see eg *Re Mark* [2003] FLC 93−173; *King v Tamsin* [2008] FamCA 309). This situation has led to considerable uncertainty for lesbian families with known sperm donors as well as for surrogate families, and ought to be clarified.

The current s60H has been demonstrated to be confusing, inconsistent with state law, uncertain in operation and discriminatory. It is in clear need of amendment.

Introducing a gender neutral approach to the s60H presumptions will be consistent with the majority of states and territories in Australia by the end of 2008. In addition it will enhance rather than reduce the rights of children in Queensland, South Australia and Tasmania while they wait for their laws to catch up to what is increasingly both the national and international approach to lesbian families formed through ART. Inconsistency with the remaining three states is not a significant problem because the legal status of a genetic father has already been severed under state law, thus if federal law moves faster than the remaining states it simply adds a legal parent to a system that presently recognises only one of two social parents.

Recognition from birth of both female parents of children born through ART is now in place in Canada, New Zealand, South Africa, the United Kingdom, as well as California, New Jersey and Washington DC in the US (these trends are discussed in Millbank, “The Role of Functional Family in Same-Sex Family Recognition Trends” (2008) 20(2) *Child and Family Law Quarterly* 155-182 available on SSRN.com).

The proposed 2008 amendments do not accord with the national and international trend to accord parental status to both mothers when children are born through ART, limiting recognition only for the purposes of assessing contribution and needs in property division.

This means that there are a number of provisions of the FLA which remain untouched by these amendments. These include:

- The FLA grants automatic shared equal parental responsibility to both legal parents.

  Parental responsibility is the right to care for and make decisions about a child, including medical decisions. Because of s60H a non-biological parent in a same-sex couple does not automatically have parental responsibility. To obtain parental responsibility under the FLA, she must apply to the court for parenting orders by consent, the legal costs of which are currently approximately $6000. Parents in a same-sex family applying for these orders must satisfy the court that the orders are in the child's best interests. Heterosexual families have such rights automatically, including fathers who have never lived with the child.

- The FLA includes a presumption that parental responsibility will continue to be shared equally by both legal parents after separation (ss 61C, 61D, 61DA).
- If parental responsibility is shared and parents apply for contested parenting orders, the Court must consider the child spending equal time or substantial and significant time with each parent (s 65DAA).
- When determining what is in a child's best interests, the range of factors has been divided for the first time into primary and secondary considerations. The "benefit to the child of having a meaningful relationship with both of the child's parents" is a primary factor (s 60CC(2)(a)).

These presumptions and factors do not apply to a non-biological parent in a same-sex family even if she has an order for parental responsibility because she is still not a "parent" under the FLA.

In addition to the burdens of non-recognition for in-tact lesbian families this places the non-biological mother at a very considerable disadvantage in negotiating or litigating a child-related dispute if the mothers separate (see eg *H and J* [2006] FMCA fam 514; *Verner & Vine* [2007] FamCA 354, discussed in Millbank, "The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family" *forthcoming* (2008) 22(2) *International Journal of Law, Policy and the Family* available on SSRN.com).

Further, s60H governs the application of the *Child Support (Assessment) Act 1989* (Cth) (CSAA) because it is adopted through s 5 of the CSAA. Thus while the husband or male de facto partner of a woman who has a child through assisted conception is a liable parent, a female partner, even if a recognised parent under state law, or the subject of an order granting parental responsibility under the *Family Law Act 1975,* is not a liable parent under the CSAA.

Thus, if a same-sex couple separate and the child remains living with the birth mother she cannot use the relatively simply administrative processes under the Act to pursue support from the other parent. Yet under current law if the child remained living with the non-biological parent, the CSAA may well apply. Child support payments under the CSAA are paid *to* the eligible carer of the child. "Eligible carer" means someone who has sole, substantial or shared care of a child (s7B(1)) An eligible carer need not be a "parent or legal guardian" of the child if there is consent to that person having care of the child or if it is "unreasonable in the circumstances" for the parent or legal guardian to have care (s7b(2), (3). The same inconsistency occurs in the FLA provisions on child maintenance -

maintenance may only be granted against parents (and in limited situations, step-parents), although it can be received by non-parents (see eg ss66B, 66C, 66D, 66F).

There is no reason to continue this situation, which causes great hardship to parents and children in same-sex families, and offers no conceivable benefit to heterosexual families.

In summary, I strongly recommend that this Bill be amended prior to passage in the following ways:

- Amend s60H using gender-neutral language, so that the female de facto partner of a woman who has a child through assisted reproduction is covered by s60H(1) and (4).

- Amend the Family Law Regulations 1984 Schedule 6 and 7 to prescribe all current state legislation on the parental status of children born through assisted conception procedures.

- Amend the definition of "parent" in the FLA section 4 to state that it means:
  1. the biological parents of a child conceived through intercourse,
  2. the parents of a child lawfully adopted by them,
  3. parents recognised under s60H (amended as above) and
  4. parents recognised under state laws prescribed by the FLA (such that state laws granting transfer of parental status in surrogacy arrangements can also be picked up as they occur).

I hope these comments are of some assistance. Please do contact me if you would like to discuss this further.

Regards

Jenni Millbank