INQUIRY INTO THE FAMILY LAW AMENDMENT (DE FACTO FINANCIAL MATTERS AND OTHER MEASURES) BILL 2008

SUBMISSION OF THE GAY & LESBIAN RIGHTS LOBBY (NSW)

JULY 2008

About the Gay & Lesbian Rights Lobby

Established in 1988, the Gay & Lesbian Rights Lobby (GLRL) is the peak representative organisation for lesbian and gay rights in New South Wales. Our mission is to achieve legal equality and social justice for lesbians and gay men.

The GLRL has a strong history in legislative relationship reform. In NSW, we led the fight for the recognition of same sex de facto relationships, which led to the passage of the *Property (Relationships) Amendment Act 1999* and subsequent amendments. The GLRL was also successful in lobbying for the equalisation of the age of consent in NSW for gay men in 2003 and the first recognition of same-sex partners in federal superannuation law in 2004. In 2006, we conducted the largest consultation on same-sex relationship recognition in Australia, with over 1,300 gay, lesbian, bisexual and transgender people in metropolitan, regional and rural NSW.

The rights and recognition of children raised by lesbians and gay men have also been a strong focus in our work for over ten years. In 2002, we launched *Meet the Parents*, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the law reform recommendations outlined in our 2003 report, *And Then … The Bride Changed Nappies*. Several of our recommendations were enacted into law under the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW). We continue to work towards the outstanding recommendations.

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SUMMARY OF RECOMMENDATIONS

Recommendation 1:

The definition of 'de facto relationships' in the De Facto Bill (Schedule 1, Part 1, Clause 1) should be amended to clarify that two people may still be in a de facto relationship if they temporarily separate. (see **part 1.2**)

Recommendation 2:

Remove section 90RB(3) from the meaning of 'child of a de facto relationship'.

Change section 60H of the FLA to recognise a consenting female de facto partner of a woman who has a child through assisted reproductive technology as a parent for the purposes of the FLA. (see **part 2**)

Recommendation 3:

We recommend government support for a public education campaign educating same-sex couples about their new rights and responsibilities. (see **part 3**)

Recommendation 4:

We recommend government support for a concerted court personnel education program. This program needs to cover: judges and counsellors in the Family Court of Australia and magistrates in the Federal Magistrates.

Consideration could also be given to instituting a gay and lesbian liaison officer in courts, as some other NSW government agencies have already done within departments. (see **part 3**)

EXECUTIVE SUMMARY

- Overall, the GLRL supports the intention and objective of the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth).
- The GLRL supports the definition of de facto relationship under the Bill. The current definition includes same-sex couples, mirrors existing state and territory laws, provides guidance and flexibility and emphasises the practical realities of relationship life in Australia (**section 1.1**).
- The GLRL supports amendments to the de facto relationship definition to clearly stipulate that temporary separation does not otherwise terminate a de facto relationship (**section 1.2**).
- The GLRL supports the amendment of parentage presumptions under section 60H of the Family Law Act in lieu of the proposed section 90SM(3). We recommend that consenting lesbian co-mothers should be recognised as parents for the purposes of property and child-related proceedings as well as child support. Current discrimination causes significant hardship to children, mothers and families (see **section 2.3**) and cannot be supported on legal or social grounds (see **section 2.2** and **2.4**).
- There is a significant gap of knowledge in the gay, lesbian, bisexual and transgender community about existing legal rights. The GLRL supports a two-pronged education campaign directed at same-sex couples and federal personnel which administer the family law system (**section 3**).

INTRODUCTION AND SCOPE OF OUR SUBMISSION

The Gay & Lesbian Rights Lobby (NSW) (GLRL) welcomes the opportunity to provide comment on the Family Law Amendment (De Facto Financial and Other Measures) Bill 2008 ("De Facto Bill"). We strongly support the objectives of the De Facto Bill in its current form. However, in this submission, we also provide some suggestions for implementing certain objectives of the De Facto Bill in clearer and more consistent ways throughout the *Family Law Act 1975* (Cth) ("FLA").

In essence, the De Facto Bill will insert a new section into the FLA, **Part VIIIAB**, allowing de facto partners to resolve property and maintenance issues upon the breakdown of their relationship in a similar fashion to married spouses. The new Part VIIIAB and related amendments will largely mirror the current matrimonial property and maintenance division regime contained in Part VIII (property and spousal maintenance), Part VIIIAA (orders relating to third parties), Part VIIIA (financial agreements) and Part VIIIB (superannuation interests). Part VIIIAB includes a new FLA provision (proposed **s 90SM**[1]) giving power to the Family Court to make a property settlement after the breakdown of a de facto relationship, similar in terms and effect to the existing section 75 for married spouses. Importantly, the de facto property division regime only applies after a de facto relationship has been in existence for at least 2 years, unless other limited circumstances apply (for example, if there is a child of the de facto relationship or the relationship is registered under a state or territory registry scheme) (see proposed **s 90SB**)[2]. This temporal threshold prevents vexatious claims being made against a person's property. Furthermore, as the federal family law jurisdiction is a discretionary jurisdiction, the approach taken by individual judges in each case will depend on the various circumstances of the relationship. In some cases, it may be appropriate to treat de facto partners according to a partnership approach[3] to property division, whilst in others it may be appropriate to divide property on the basis of an individual approach[4] (where parties "get out" what they "put in"). Therefore, notwithstanding the quite cumbersome numbering of the new Part VIIIAB, the GLRL supports all these aspects of the De Facto Bill.

We provide specific comments in relation to these aspects of the De Facto Bill:

1. The recognition of de facto couples (including same-sex couples),
2. The recognition of children,
3. The need for public education.

The GLRL is also available to make further public submissions at the request of the Senate Committee.

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[1] See De Facto Bill, Schedule 1, Part 1, Clause 50.

[2] Ibid.

[3] For example, as *In the Marriage of Ferraro* (1992) 16 FamLR 1, at 40.

[4] For example, as *In the Marriage of JEL and DDF* (2000) 28 Fam LR 1.

PART ONE: THE RECOGNITION OF DE FACTO COUPLES (INCLUDING SAME-SEX COUPLES)

1.1 THE DEFINITION OF A DE FACTO RELATIONSHIP

The De Facto Bill will introduce a definition of 'de facto relationship' into the FLA under a new proposed **section 4AA**.[5] The GLRL fully supports the definition of de facto relationship in the De Facto Bill for the following reasons.

1.1.1 GUARANTEEING EQUALITY FOR SAME-SEX COUPLES

The proposed **s 4AA(1)** and **s 4AA(5)(a)** of the de facto definition reads:

> (1) A person is in a de facto relationship with another person if:
>
> (a) the persons are not legally married to each other; and
>
> (b) the persons are not related by family (see subsection (6)); and
>
> (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.
>
> Paragraph (c) has effect subject to subsection (5).
>
> ....
>
> (5) For the purposes of this Act:
>
> (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; ...

This de facto definition will treat heterosexual and same-sex couples equally. The GLRL supports this aspect of the definition and believe that in modern Australia, it is no longer controversial because:

- Firstly, all the state referral of powers legislation include heterosexual and same-sex 'marriage-like relationships', and therefore there is a strong constitutional foundation for legislating in this fashion.[6]

- Secondly, excluding same-sex couples from a de facto property division regime would fly in the face of more than a decade of relationship reform at a state and territory level. Between 1994 and 2006, through the introduction of inclusive schemes or later reforms to existing schemes, all states and territories now ensure that de facto property division regimes also extend to people in same-sex relationships.[7] All these schemes utilise

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[5] De Facto Bill, Schedule 1, Part 1, Clause 21.

[6] *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic); *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld); *Commonwealth Powers (De Facto Relationships) Act 2006* (Tas); *Commonwealth Powers (De Facto Relationships) Act 2005* (WA) (only refers powers in relation to superannuation matters).

[7] See reforms under the *Domestic Relationships Act 1994* (ACT); *Property (Relationships) Legislation Amendment Act 1999* (NSW); *Statute Law Amendment (Relationships) Act 2001* (Vic); *Discrimination Law Amendment Act 2002* (Qld); *Acts Amendment (Lesbian and Gay Reform) Act 2002* (WA); *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT); *Relationships Act 2003* (Tas); *Statutes*

gender neutral terminology to ensure that same-sex couples and heterosexual couples are treated equally.[8]

The GLRL believes that the strong constitutional mandate to legislate and the long-standing recognition of same-sex couples is enough to justify the continued inclusion of same-sex couples in a federal de facto property regime. Anything less would be a backward step for the human rights and equal dignity of people in same-sex relationships in Australia.

However, in response to some of the likely opposition to the De Facto Bill, we would further highlight the following reasons why same-sex couples must be included in a federal de facto property division scheme:

- **Only a federal scheme can provide a one-stop-shop for property and child-related disputes.** 20% of lesbians and up to 10% of gay men currently care for children.[9] Therefore, same-sex families are a reality of family life in Australia. Like heterosexual de facto families, people in same-sex relationships who care for children are forced to resort to two separate court systems for property matters and matters relating to children upon the breakdown of a relationship. The De Facto Bill provides a 'one-stop shop' for dealing with all relationship disputes.[10]

- **Only a federal property scheme can make orders in relation to couples' shared superannuation assets.** Matters in relation to superannuation regulation have largely been a Commonwealth area of responsibility, with federal legislation 'covering the field' of legislation in this area. Therefore, unlike state and territory de facto schemes, only the federal property division regime can include the couple's shared superannuation assets in the pool for division.[11] If the De Facto Bill is passed, superannuation assets will be taken into account as 'property' in de facto settlements (rather than merely a 'financial resource') and may be subject to flagging and splitting orders, as is currently the situation for married couples.[12] Superannuation is often the largest asset owned by couple apart from their home (if they even own their home). Therefore the De Facto Bill is likely to have a particularly significant impact on a same-sex partner who has

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Amendments (Domestic Partners) Act 2006 (SA); *Relationship Act 2008* (Vic); *Civil Partnership Act 2008* (ACT).

[8] *Domestic Relationships Act 1994* (ACT), s 3; *Property Relationships Act 1984* (NSW), s 4(1)(a); *Property Law Act 1974* (Vic), s 275(1) (see also *Relationships Act 2008* (Vic), s 35(1)); *Acts Interpretation Act 1954* (Qld), s 32DA(10); *Domestic Partners Property Act 1996* (SA), s 3(1); *Interpretation Act* (WA), s 13A(1); *Relationships Act 2003* (Tas), s 4(1)(a).

[9] ABS (2005) *Year Book Australia,* 'Same-Sex Couple Families', p 142; Jenni Millbank (2002) *Meet the Parents: A Review of the Research on Lesbian and Gay Families*, Sydney: Gay & Lesbian Rights Lobby, p 21.

[10] HREOC (2007) *Same-Sex: Same Entitlements – National Inquiry into Discrimination Against People in Same-Sex Relationship: Financial and Work-Related Entitlements and Benefits*, Sydney: HREOC, p 272.

[11] HREOC, n8 above, p 273.

[12] De Facto Bill, Schedule 1, Part 1, Clauses 50 – 55. This amends Part VIIIB of the FLA, relating to superannuation interests.

sacrificed their earning capacity throughout the relationship in order to fulfil homemaker responsibilities, and therefore has been left with an inequitable share of the couples' superannuation assets.

- **The federal Family Law scheme has a specialist emphasis on informal dispute resolution and is best equipped to deal with the emotional, legal and financial issues that arise at the end of a relationship.**[13] Minimising conflict between ex-partners (particularly if they have children) can only ensure the speedier and less costly resolution of already emotionally-charged disputes.

- **The federal scheme offers others benefits not universally available under state or territory schemes,** such as a broader consideration of future needs in addition to past contributions of partners in property division[14] and provisions for spousal maintenance[15].[16]

For these reasons, the GLRL supports this aspect of the de facto definition.

1.1.2 INDICIA OF A RELATIONSHIP: PROVIDING GUIDANCE YET FLEXIBILITY

The proposed **s 4AA(2)**, **s 4AA(3)** and **s 4AA(4)** of the de facto definition provide guidance to a court when determining if (and when) a de facto relationship came into existence. The proposed provisions read:

> (2) Those circumstances may include any or all of the following:
> (a) the duration of the relationship;
> (b) the nature and extent of their common residence;
> (c) whether a sexual relationship exists;
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
> (e) the ownership, use and acquisition of their property;
> (f) the degree of mutual commitment to a shared life;
> (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
> (h) the care and support of children;
> (i) the reputation and public aspects of the relationship.
>
> (3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.

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[13] HREOC, n8 above, p 273.

[14] For example, the *Property (Relationships) Act 1984* (NSW), s 20(1) only directs the court to consider past contributions of the de facto partners, and not future needs.

[15] Some states have no maintenance provisions for de facto couples: see *Property Law Act 1958* (Vic) (however, section 51 of *Relationships Act 2008* (Vic) introduces maintenance provisions); *Domestic Partners Property Act 1996* (SA); *Property Law Act 1974* (Qld). Some states and territories have limited maintenance provisions: *Property (Relationships) Act 1984* (NSW), ss 26, 27; *De Facto Relationships Act 1991* (NT), ss 24, 26; *Domestic Relationships Act 1994* (ACT), ss 18, 19; *Relationships Act 2003* (Tas), s 47.

[16] Lindy Willmott, Ben Mathews & Greg Shoebridge (2003) 'De Facto Relationships Property Adjustment – A National Direction', 17(1) *Australian Journal of Family Law* 37; HREOC, n8 above, p 273.

> (4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

The proposed **s 4AA(2)** of the definition imports a list of factors for a court to consider in determining if (and when) a de facto relationship came into existence. These factors are largely identical to similar lists in state and territory schemes.[17] The proposed **s 4AA(3)** gives the court discretion to consider only relevant factors in section 4AA(2) and attach appropriate weight to each. Importantly, no one factor is necessary for finding a de facto relationship has come into existence (proposed **s 4AA(4)**).[18]

The GLRL strongly supports this aspect of the de facto definition as it provides guidance and more certainty around what constitutes a de facto relationship, but leaves the court with some flexibility to consider the diversity of relationships which come before it. For example, it is clear that there is diversity amongst opposite-sex de facto couples in relation to how individual couples define their roles in a relationship (i.e. how finances are shared, how household tasks are shared etc.).[19] This is likely to be the case for same-sex couples also, whose relationships may not fit the gender-defined norms that have traditionally applied to heterosexual couples. For example, in gay and lesbian de facto cases, there has been a greater tendency for couples to have property in the names of only one partner, to remain cohabiting for a long period after the relationship has ended, to have children born into relationships through assisted reproductive technology, and to mutually define the boundaries of their intimate relationship.[20] Therefore, the proposed **s 4AA(4)** in particular, is important for ensuring that the law adapts to accommodate individual expressions of relationship life in Australia, whilst providing some clear guidance as to what constitutes a de facto relationship. Therefore, the GLRL supports this aspect of the de facto definition.

1.1.3 EMPHASISING FUNCTION OVER FORM

The proposed **s 4AA(5)(b)** of the de facto definition reads:

> (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship

This part of the de facto definition clarifies that two persons may still be in a de facto relationship, even if one of the parties is married or in another de facto relationship.

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[17] *Property (Relationships) Act 1984* (NSW), s 4(2); *Property Law Act 1958* (Vic), s 257(2) (see also *Relationships Act 2008* (Vic), s 35(2)); *Acts Interpretation Act 1954* (Qld), s 32DA(2), *Interpretations Act 1984* (WA), s3A(2) (articulated in slightly different wording, but the same in substance); *De Facto Relationships Act 1991* (NT), s 3A(2); *Legislation Act 2001* (ACT), s 169(2) (would be persuasive for interpreting the definition of 'domestic partnership' under the *Domestic Relationships Act 2004* (ACT), s 3); *Relationships Act 2003* (Tas), s 4(3); *Family Relationships Act 1975* (SA), s 11B(3).

[18] Most states and territories have a similar provision: see for example *Property (Relationships) Act 1984* (NSW), s 4(3).

[19] Helen Glezer (1997) 'Cohabitation and Marriage Relationships in the 1990s', (47) *Family Matters* 5, p 7-8.

[20] Jenni Millbank (2005) 'Cutting a Difference Cake: Trends and Developments in Same-Sex Couple Property Disputes', 43(10) *Law Society Journal* 57, p 59.

The Australian Bureau of Statistics shows that approximately 28% of people in de facto relationships counted in the 2001 Census were either **separated or divorced** (the ABS did not provide a breakdown of how many were separated versus how many were divorced).[21] This means that a significant number of people in de facto relationships are still married, at least 'on paper', presumably to former partners. In some cases, it is conceivable that persons may enter into a de facto relationship which results in substantial contributions to property and homemaker contributions, before a previous relationship has been officially ended (i.e. before a divorce has been finalised). Therefore, it is important that the de facto definition recognises the diversity of people and relationships which may come before the court.

The de facto property division scheme has always been about providing a sensible resolution to property disputes in whatever relationship circumstances Australians find themselves. Functional realities over legal formalities have always been the backbone of de facto property regimes. Therefore, the GLRL supports this aspect of the definition.

1.2 TEMPORARY SEPARATION

One of the issues which have arisen in case law concerns the situation where a couple has temporarily separated and then resumed living in a de facto relationship.[22] Originally, courts treated temporary separations (of only a few weeks in some cases[23]) as a 'break' in otherwise long relationships and found the existence of two *separate* de facto relationships.[24] Therefore, there was a concern that strict applications of the de facto definition could lead to largely artificial understandings of human relationships in decisions, as relationships naturally go through periods of difficulty.[25]

Legislative provisions and judicial decisions have attempted to provide some clarity around the issue of temporary separation. Western Australia has indicated that in the event of a separation, the court must have regard to the length of a break in the relationship and the extent to which the relationship broke down.[26] South Australia, which unusually sets a 3-year cohabitation requirement for de facto recognition across all laws, allows the 3-year cohabitation requirement to be aggregated over a 4 year period.[27] Recent cases in other jurisdictions have moved towards a more flexible approach to people who temporarily separate.[28] For example, in a 2005 NSW

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[21] ABS (2005) *Year Book Australia*, Canberra: ABS.

[22] Jenni Millbank (2006) 'The Changing Meaning of "De Facto" Relationships', Legal Studies Research Paper No 06/43, Sydney Law School, p 8.

[23] See for example, *Gazzard v Winders* (1998) 23 *Fam LR* 716 at 728 (15-year relationship treated as two separate relationships because of 6-week separation); *Lipman v Lipman* (1989) 13 *Fam LR* 1 (13-year relationship treated as two separate relationships because of 6-month separation). See Millbank (2006), n20 above.

[24] Millbank (2006), n20 above.

[25] Ibid.

[26] *Family Court Act 1997* (WA), s 205Z(2).

[27] *Family Relationships Act 1975* (SA), s 11A(a)(ii).

[28] Millbank (2006), n20 above.

Court of Appeal decision[29], Handley JA introduced a new 'aggregate approach', treating as one relationship, a 22-year relationship that involved 4 years of separation.[30]

For clarity and a codification of existing case law, the GLRL recommends that a new paragraph be inserted into the de facto definition which says that temporary separation does not necessarily terminate a de facto relationship. For example, a section 4AA(7) could read:

> **Two people may still be in a de facto relationship if they are living apart from each other on a temporary basis.[31]**

This will ensure the de facto definition will accommodate the vagaries of human relationships.

Recommendation 1:

The definition of 'de facto relationships' in the De Facto Bill (Schedule 1, Part 1, Clause 1) should be amended to clarify that two people may still be in a de facto relationship if they temporarily separate.

[29] *Milevsky v Carson* (2005) DFC 95-314.

[30] Millbank (2006), n20 above, p 9.

[31] HREOC, n8 above, p 80.

PART TWO: THE RECOGNITION OF CHILDREN

2.1 THE DEFINITION OF A 'PARENT' AND 'CHILD'

The De Facto Bill inserts defines the parent-child relationship for the purposes of de facto property division and maintenance.[32] The definition, contained in the proposed **section 90RB**, defines the meaning of a 'child of a de facto relationship' **only** for the purposes of Part VIIIAB (financial matters relating to de facto relationships). The proposed section 90RB says:

> (1) For the purposes of this Part, any of the following is a child of a de facto relationship:
> (a) a child of whom each of the parties to the de facto relationship are the parents;
> (b) a child adopted by the parties to the de facto relationship or by either of them with the consent of the other;
> (c) a child who under subsection 60H(1) is a child of the parties to the de facto relationship.
>
> This subsection has effect subject to subsection (2).
>
> Note: Subsection 60H(1) is given an extended application by subsection 60H(4) and subsection (3) of this section.
>
> (2) A child of a de facto relationship who is adopted by a person who, before the adoption, is not a prescribed adopting parent ceases to be a child of that de facto relationship for the purposes of this Part.
>
> (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.

The GLRL strongly supports the intention of this proposed provision. Namely, it attempts to amend **section 60H(1)** of the FLA which provides a parentage presumption that the husband or *male* de facto partner of a woman who has a child through donor insemination will be the legal parent of that child for the purposes of the FLA, so long as *he* consented to the fertilisation procedure at the time of conception. The proposed **s 90RB(3)** effectively says that section 60H(1) should be read in a non-discriminatory fashion for same-sex couples (but only in the context of Part VIIIAB).

Despite our support for the intention of the provision, the GLRL is concerned by the uncertainty arising from the drafting of this section. We believe the likely intention of **s 90RB(3)** is simply to ensure that a *female* de facto partner to a woman who has a child through assisted reproductive technology would be treated in the same way as if the woman had a husband or *male* de facto partner. We note that similar amendments extending parentage presumptions to lesbian co-mothers have already been enacted in NSW, Western Australia, the Northern Territory and the ACT, with Victoria proposing similar amendments this year. If section 90RB(3) is simply attempting to make parentage presumptions gender-neutral for lesbian co-mothers for the purposes of Part VIIIAB, then the provision should plainly say so – as it is a misnomer to say it applies to 'same-sex' couples when it only applies to *female* same-sex couples. It is not ideal for such an important acknowledgement of parental status to be inserted through such a vague "backdoor" provision.

[32] De Facto Bill, Schedule 1, Part 1, Clause 50.

2.2 OUR POSITION ON THE DEFINITION OF 'PARENT' AND 'CHILD'

The GLRL believes the correct approach for including children born to lesbian couples through donor insemination would be to extend the parentage presumption in section 60H(1) by clearly and plainly by *amending* section 60H.

It is simply illogical that a lesbian co-mother will be afforded parental status under the FLA only for the purposes of determining what happens to her and her partner's property, but not for the purposes of determining where her and her partner's child will live and what time she will spend with her child upon the breakdown of her and her partner's relationship.[33] Section 90RB(3) effectively says lesbian co-mothers will only be mothers for the purposes of property-related proceedings but not for the purposes of being mothers!

The non-recognition of lesbian co-mothers under the FLA has wide implications for lesbian families and their children. This is because section 60H defines who is a parent for family law purposes *and* for child support purposes under the Child Support Scheme.[34] The key impacts of this discrimination are:

- **A birth mother cannot pursue child support from the co-mother through the Child Support Scheme, because the co-mother is not recognised as a legal 'parent'**. Therefore, the birth mother must resort to a costly and traumatic proceeding through state and territory courts in order to be awarded child support.[35] The GLRL believes that money is better spent on her child, rather than lawyer's fees.

- **The co-mother will not be recognised as a 'parent' in child-related proceedings in the Family Court.** As a result, when making decisions about what is in the best interests of a child, the relationship between the co-mother and her child will only be taken into account by the Family Court as an 'additional' consideration, not a 'primary' consideration.[36] This creates uncertainty for a child in the event of parental separation and exacerbates the emotional difficulties for a family at the breakdown of a relationship. This also creates uncertainty for a child if the birth mother dies.

The GLRL believe that only one change is necessary to rectify this discrimination. Section 60H of the *Family Law Act 1975* (Cth) should be made gender neutral to ensure that a *female* de facto partner (the co-mother) will be recognised as a 'parent' for the purposes of family law and child support.

We believe the key reasons for this change are:

- **It is in the best interests of children to have the economic and emotional security which comes with the legal recognition of their families.** Lesbian parents have to go

[33] For example, Part VII of the FLA allows courts to make parenting orders in favour of persons in relation to a wide range of matters, including with whom the child lives and spends time with: FLA, s 64B(2).

[34] The *Child Support (Assessment) Act 1989* (Cth) relies upon section 60H of the *Family Law Act*.

[35] *W v G* (1996) 20 Fam LR 49.

[36] *Family Law Act 1975* (Cth), s 60CC.

to enormous financial and personal costs to secure child support for their children and resolve conflicts on the breakdown of a relationship. This change will ensure the majority of same-sex families are treated equitably.

- **Section 60H is inconsistent with the majority of states and territories.** Western Australia (2003), the Northern Territory (2003), the Australian Capital Territory (2004), New South Wales (2008) and Victoria (proposed 2008) already have (or may soon have) similar provisions to section 60H which recognise co-mothers as legal parents. Therefore, co-mothers in these states will be legal parents for the purposes of state and territory law, such as laws relating to inheritance and consent to medical treatment, but **not** legal parents for the purposes of child support and family law.

- **Lesbian mothers in NSW, ACT, WA and NT are able to file for a declaration of parentage in their state or territory Supreme Court which will be binding on the Family Court through section 69S of the FLA.** Whilst lesbian mothers in some states and territories can file for recognition through their local Supreme Court, the clear downside is that lesbian co-mothers have to go through a costly and cumbersome legal process to be recognised as parents, whilst other parents do not. Similarly, the FLA applies differently to lesbians co-mothers in Australia depending on where they live. This means that co-mothers in Victoria, Queensland, South Australia and, in some cases, in Tasmania are particularly disadvantaged.

- **Section 60H will be inconsistent with other proposed federal changes.** The Rudd Government has announced it will implement further recognition of same-sex couples and their children across other federal laws. We expect that lesbian families will be recognised as a family for the purposes of social security but not for the purposes of child support and family law. However, these areas are often mutually dependent on each other. For example, eligibility for the Family Tax Benefit B places obligations on a parent to secure child support before being eligible for receipt of payment. It is not clear how the recognition of lesbian families in some areas but not others will impact on their ability to claim benefits. Furthermore, it is patently unfair to recognise families in areas which will detriment them, without providing children and their parents the economic and emotional security of legal recognition at the most traumatic times, such as when parents separate or one parent dies. This is contrary to the Human Rights and Equal Opportunity Commission recommendation for omnibus reform.[37] This is also in contrast to the sentiments expressed by the participants in the *Same-Sex: Same Entitlements* Inquiry who said they would happily forfeit the advantages of discrimination once **all** the disadvantages were removed.[38]

- **20% of lesbian women currently have children.** An estimated 50-70% of these children are born through donor insemination and this proportion is likely to increase in

[37] Human Rights and Equal Opportunity Commission (HREOC) (2007) *Same-Sex: Same Entitlements – National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, Sydney: HREOC, p 383.
[38] Ibid, p 216.

the future.[39] The 2006 Census recorded at least 4,386 children living in same-sex families in Australia. Therefore, these provisions will likely impact on a large number of Australian families.

- **Lesbian mothers support these changes.** Lesbian parents in our 2001 consultation were almost universally in favour of equal legal recognition being afforded to co-mothers and birth mothers.[40] A consultation by the Victorian Gay & Lesbian Rights Lobby found similarly high (80%) support.[41]

2.3 WHAT LESBIAN MOTHERS SAY ABOUT DISCRIMINATION AGAINST THEIR FAMILIES

In February 2008, the Gay & Lesbian Rights Lobby launched its 58 '08 campaign urging members of the gay, lesbian, bisexual and transgender community to write to the Commonwealth Attorney-General, The Hon Robert McClelland, in support of the Human Rights and Equal Opportunity Commission's recommendations for reforming 58 laws which discriminate against same-sex couples. Amongst over 1,000 letters, the GLRL was struck by the number of lesbian mothers who documented significant hardship as a result of discrimination in family law processes. We have included these stories with the permission of the mothers.

On the 25 March 2008, Fran[42], a mother of 3 living in NSW, wrote:

> I have had to access the Family Court to gain continued contact with my non-biological child from a same sex relationship. The process was difficult for all parties. The current law allowed my ex-partner to 'legally' discriminate against me as my relationship as the child's mother was not recognised, and my child's right to her continued relationship with myself and her brother and sister (also not recognised by current law) was also not recognised. My ex-partner was able to exclude me from the child care centre and refuse contact completely. I have gained shared parenting rights through the Family Court as the applicant.
>
> The difficulty of this process was compounded by the current laws and navigating the discrimination within the law. I am still discriminated against in accessing the right to care for my child and claim family assistance because I am excluded from the birth certificate and there is difficulty in gaining a copy of the birth certificate without the parent's consent/signature.
>
> The current laws which discriminate against me and my family have generated a great deal of emotional and financial difficulty for me and my children. I hope that the current laws will change to reflect the diversity of relationships that the current systems do not deal with effectively.

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[39] Jenni Millbank (2002) *Meet the Parents*, n9, p 22–4.

[40] Jenni Millbank (2003) *And Then … The Brides Changed Nappies: Lesbian Mothers, Gay Fathers and the Legal Recognition of our Relationships with the Children we Raise*, Sydney: Gay & Lesbian Rights Lobby, p 6.

[41] Ruth McNair & Nikos Thomacos (2005) *Not Yet Equal: Report of the VGLRL Same Sex Relationships Survey*, Melbourne: Victorian Gay and Lesbian Rights Lobby, p 45-6.

[42] Surname has been removed to protect the privacy of the author.

Whilst Fran's family is now recognised under recent reforms to parentage presumptions in NSW, Fran would still not automatically be a parent for the purposes of family law proceedings. Her only course would be to first file for a parentage declaration in the Supreme Court of NSW, which would then be binding in the federal family jurisdiction by virtue of section 69S of the FLA. This is a costly and cumbersome process which could otherwise be avoided by a simple amendment to section 60H of the FLA.

Similarly, on 1 March 2008, Michelle[43] of NSW wrote of the toll legal discrimination took on her relationship with her partner. Despite it all, Michelle and her ex-partner have amicably resolved the matters relating to the care of their child, notwithstanding the considerable obstacles faced by legal discrimination:

> My partner and I wanted a child. After many prior miscarriages I knew my chances were low so we sort out an IVF specialist. After many months of struggle I became pregnant. At 13 weeks my baby died. Extensive blood testing uncovered a problem with my blood. With two embryos left in cryogenic storage I was faced with a dilemma. Try to carry a child again, knowing the baby's chances were low, or seek permission from the Board of Directors at the IVF clinic for my partner to carry my genetic child. It was a long fight against a Board that did not allow 'surrogacy.' But in the end, with the help of our Specialist the board agreed that we were a couple, and as such this was not an instance of surrogacy.
>
> What a liberating day that was. For the first time I felt as though I was the equal of my heterosexual counterparts. The transfer went ahead. My partner was pregnant. After 10 years of trying to have a child I was going to realise my dream in a way I had never imagined. I was flying. Can you even imagine how hard I crashed back down to Earth when it was brought to my attention by a lawyer that I would have no legal rights to my biological child? [...]
>
> Today my beautiful daughter is three and a half. She was born into a loving committed relationship and despite its eventual demise, she still has two parents who respect each other and put her first. So far as the law is concerned, she has only one parent. I am considered nothing more than an egg donor who managed to get some inferred legal rights through a Parenting Order.
>
> With a Parenting Order in place she lives between our two homes. The strain and the turmoil tore the relationship of her two mothers apart. She is beautiful, intelligent, confident, gentle, and well rounded despite it all. At her tender age she understands the difference between a birth mother and a biological mother. She calls us Mummy and Mama. In her mind there is no battle. She knows who her parents are. [...]
>
> I don't want this for myself. I want it for my child. I want it for every child of a homosexual couple. These children, who love and adore their parents, have a right to have that relationship honoured by law and our society. They deserve that as much as any Australian child does. [...] To have their place as parents respected – [...] to not live in fear that one day their partner might die, and that they may lose their child to another family member as a result, to not fear a legal system, to whom they are virtually invisible. [...]

[43] Real name changed to protect identity of author.

However, even intact families suffer unnecessarily as a result of legal discrimination. In a letter to the GLRL on Mothers' Day (11 May 2008), Kendi Burness-Cowan expressed frustration with how legal discrimination fostered social discrimination towards her children and family:

> Today is Mother's Day. This morning I asked our oldest child what a mummy was. She told me it was someone who helped children with all the things they couldn't do for themselves; gave them hugs; and looked after them. She talked a lot about love and care and safety. She didn't say a thing about biology or genetics. At three and a half, she understands the meaning of real family.
>
> […] She has no idea that while it's plainly obvious to her that she has two parents, the law as it stands considers her to have just one mother. Our daughter and our one-year-old son are too young to realise that having two mummies means they are viewed differently by the law. We really hope that by the time they are old enough to understand, there won't be any differences.
>
> We've been fortunate in that we've encountered very little negativity about our decision to create a family. But our children should not have to rely on luck to see that they're treated just like every other child. They deserve to have their family properly recognised, just as we as parents deserve the same legal protections as every other parent.
>
> Right now, I enjoy parental status under the law. My partner does not. […] This situation saddens me in a way that defies written description. We are like every other family in almost every respect. We've been through sleepless nights when our children were tiny. We've marvelled as they have taken their first steps and said their first words. We've struggled to keep our relationship on course as we've negotiated the rough waters of parenthood. We are just like everyone else. We are not less than. We are equal to.
>
> Legislative change to recognise this reality is incredibly important to us. It's important because of the practicalities – it will mean we don't have to fear being legally discriminated against – but it's also deeply important for what is symbolises.
>
> Our son and daughter are real. They are part of a real family. They have two parents, not one. And they deserve the same legal recognition as every other family.

The GLRL received many stories from supportive family members. On 26 February 2008, Mardi Petersen of Tasmania, wrote in support of her sister and her sister's partner, who were mothers of one daughter (with another baby on the way):

> My sister is in a same sex relationship. Her and her partner are incredibly fabulous people. They have a two year old daughter and another baby on the way. Changing these 58 laws [highlighted by HREOC] would mean the world to them.
>
> My sister is the biological mother of both of these children. [...] It is horribly unfair to think that my sister-in-law does not have the same rights as other parents just because she is the same sex as my sister.
>
> And to add to all of that the amount of trouble that my sister and her partner had to go through to actually get pregnant is abominable. These people are decent hard-working, loving people who have the right to have children and your laws are making it so much harder for them to have the family that they want and the equality that they want. [...] PLEASE CHANGE THESE LAWS... MY FAMILY DESERVES EQUALITY.

2.4 WHAT THE RESEARCH SAYS ABOUT SAME-SEX PARENTING

Some submissions have claimed that lesbian and gay parents do not provide a suitable environment for raising children, which they say justifies continuing legal discrimination against same-sex families. The GLRL has conducted its own comprehensive review of social science and psychological research which has demonstrated that children raised by lesbians and gay men are just as happy and well adjusted as children raised in other familial structures.[44] A wide body of research documents that the sexuality of a child's parents bears no detriment on the welfare and development of the child.[45]

Children raised by gays and lesbians show no discernible differences with regards to:

- Levels of happiness, satisfaction with life and social adjustment,
- Teasing or ostracism, quality of friendships, popularity, sociability or social acceptance,
- Anxiety or depression, psychiatric state or levels of self esteem,
- Moral and cognitive development,
- Gender/sex role identification, or
- Sexual orientation.[46]

In some cases, children parented by same-sex couples have even demonstrated better development outcomes. Some research suggests that children benefit from seeing a more equitable division of paid and unpaid domestic labour characteristic of same-sex partnerships. Children may also develop more empathetic attitudes towards other social difference.[47] Lesbian and gay parents have also been found to use less physical discipline than other parents.[48]

The longevity and academic rigour of our research review is further demonstrated by a report commissioned by the Canadian Department of Justice. The authors of the Canadian study highlighted that 'some of the most methodologically sound studies' have conclusively found that children parented by gay or lesbian parents were not disadvantaged in their social competence or development.[49]

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[44] See Millbank (2002) *Meet the Parents*, n9, p 37 – 50.

[45] Charlotte Patterson (2000) "Family Relationships of Lesbians and Gay Men", *Journal of Marriage and the Family* 62:1052, p 1064.

[46] Mike Allan & Nancy Burrell (1996) "Comparing the Impact of Homosexual and Heterosexual Parents of Children: Meta-Analysis of Existing Research", *Journal of Homosexuality* 32(2): 19; Charlotte Patterson (1992) "Children of Lesbian and Gay Parents", *Child Development* 63:1025; Fiona Tasker & Susan Golombok (1996) "Do Parents Influence the Sexual Orientation of their Children? Findings from a Longitudinal Study of Lesbian Families", *Developmental Psychology* 32:3; Fiona Tasker & Susan Golombok (1997) *Growing Up in a Lesbian Family*, New York: Guildford Press.

[47] Lisa Saffron (1998) "Raising Children in an Age of Diversity – Advantages of Having a Lesbian Mother", p 37; Charlotte Patterson and Raymond Chan (1997) "Gay Fathers", p 254 – 255.

[48] S Johnson & E O'Connor (2001) *Lesbian and Gay Parents: The National Lesbian and Gay Family Study*, San Francisco: American Psychological Association.

[49] Paul Hasting (and K Vyncke, C Sullivan, L McShane, M Benebgui & W Utendale) (2006) *Children's Development of Social Competence Across Family Types*, Canada: Department of Justice, p 34.

The report further highlighted that although there were preliminary findings to suggest young people with lesbian or gay parents experienced 'possibly more' homophobic discrimination, the children did not demonstrate any difference in peer acceptance or social adjustment at school in comparison to heterosexually-parented children.[50] These findings would suggest that children parented by gays and lesbians are good at building resilience to homophobic discrimination, yet they reaffirm the need for concerted policy to redress homophobia in wider society so that no child is victimised because of their familial structure. The case for inclusive law reform is more convincing than ever.

Recommendation 2:

Remove section 90RB(3) from the meaning of 'child of a de facto relationship'.

Change section 60H of the FLA to recognise a consenting female de facto partner of a woman who has a child through assisted reproductive technology as a parent for the purposes of the FLA.

[50] Hasting et al (2006) *Children's Development of Social Competence Across Family Types*, n49, p 36.

PART THREE: THE NEED FOR EDUCATION

The GLRL believes that a public education campaign is required following the extensive recognition of same-sex couples in federal law. Our large consultations with over 1,300 lesbian, gay, bisexual and transgender people in NSW showed that state-based reforms as far back as 1999 were not well understood or even known about – despite a local and targeted education campaign at the time.[51]

Similarly, with a likely growing interaction between same-sex couples and the federal family jurisdiction, the GLRL believes that federal family court personnel and others involved in the family law system should receive more training to understand the diversity in same-sex relationships and families. This is essential to ensure that such decision-makers are aware of, and sensitive to, the particular forms and needs of lesbian and gay families. It is essential that court personnel do not work from stereotypes or improper analogies drawn from heterosexual family forms.

Recommendation 3:

We recommend government support for a public education campaign educating same-sex couples about their new rights and responsibilities.

Recommendation 4:

We recommend government support for a concerted court personnel education program. This program needs to cover: judges and counsellors in the Family Court of Australia and magistrates in the Federal Magistrates.

Consideration could also be given to instituting a gay and lesbian liaison officer in courts, as some other NSW government agencies have already done within departments.

[51] Laurie Berg, Vicki Harding, David Scamell and Ben Bavinton (2007) *All Love is Equal... Isn't It?: The Recognition of Same-Sex Relationships under Federal Law*, Sydney: Gay and Lesbian Rights Lobby, p 10.