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Committee Secretary

Senate Standing Committee on Legal and Constitutional Affairs

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Parliament House Canberra ACT 2600

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

Dear Secretary,

**RE: Same-Sex relationships (Equal Treatment in Commonwealth Laws - Superannuation) 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 and with a broadly inclusive approach to parent-child relationships is in my view correct. The comments I offer here are intended as constructive comment, directed to the definitions in the drafting and in particular concerns about consistency of approach with state law and interaction with state regimes for the recognition of non-biological parents in families formed through assisted reproductive technology (ART).

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. 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 same model, and this form of recognition is also set be introduced in Victoria this year. All of these laws also sever parental status of an egg or sperm donor who is not a party to the relationship. Thus a parent is:

- A woman who gives birth, regardless of whether she conceives through sex or through ART, and regardless of whether she is a genetic parent to the child;
- A man who is a genetic parent if the child is conceived through sex with the birth mother;

- A man who is the partner of a birth mother who conceives through ART if he consented to the conception, regardless of whether he is a genetic parent;
- A woman who is the partner of a birth mother who conceives through ART if she consented to the conception, regardless of whether she is a genetic parent in four (soon to be five) state and territories.

Both as a matter of principle and practicality, centring the birth mother as the axis of recognition of the parent-child relationship make sense. These parentage presumptions work well for most families and reflect the intended and social or caregiving parent-child relationships. However, they do not fit the exceptional circumstance in which the birth mother is not the intended parent and will not be a residential caregiver of the child through a surrogacy arrangement.

The ACT has responded to the needs of families formed through surrogacy by introducing a system that allows for the transfer of parental status after birth through court order using the twin principles of informed consent and child's best interests in the *Parentage Act 2004* (ACT). Victoria and Western Australia appear set to follow this approach in 2008. It is recommended that the specific needs of families formed through surrogacy be addressed through a formal transfer of parental status process of this kind which is then mirrored in federal law, rather than in an ad hoc manner that may lead to increased inconsistency in federal-state parental status and additional confusion for parents. In my view the approach taken in this Bill is unclear and further confounds rather than resolves existing inconsistencies for non-traditional families.

Firstly, the definition does not specify, as all state parentage presumptions (eg *Status of Children Act 1996* (NSW)) do, the requirement of ***consent*** to the conception of the child, ***nor the point at which consent must be given*** in order to trigger recognition. By way of example, if a woman become pregnant through ART while not in a de facto relationship, and then during the course of the pregnancy entered into a de facto relationship with another person, it is not clear whether a child would or would not be the "product of the relationship" under the Bill. Equally, if an embryo were created during the relationship but then was used without consent it is not clear whether the child would or would not be "product of the relationship". Under the *Family Law Act 1975* (Cth) and state parentage presumptions as they currently stand a de facto partner or husband would *not* be a parent in such circumstances as there was not consent to the conception attempt by the partner (see eg *In the marriage of P and P* [1997] FLC 92−790; *Ganter v Whalland* [2001] NSWSC 1101).

Secondly for families formed through surrogacy, the definition may be both under and over inclusive in focusing upon the child being born to a woman in the relationship or being the biological child of at least one partner. An example of the term being over inclusive would be that it could generate four parents as *both* the birth mother and her partner *and* the commissioning parents (as long as one of them contributed gametes) would be parents under this definition even though the birth parents were not the intended parents, did not live with the child and did not have responsibility for the child. The definition may also be under inclusive in that it would exclude commissioning parents who were the intended parents when they were living with and caring for a child for whom they were unable to contribute gametes (for example if both members of the couple were infertile).

There is also the inconsistency generated by the fact that the adults may be recognised as parents under this Bill who are not legal parents in either state or federal law. This is

particularly striking if they do not have parental responsibility under the *Family Law Act 1975* (Cth).

I am deeply concerned that the new category of child as a "product of the relationship" will cause confusion and uncertainty to such an extent that it may not ultimately help the families it is intended to benefit. The definition contains a fundamental contradiction: it reflects state and territory parentage presumptions for ART families (without however articulating them with the same precision) at the same time as it contradicts them by granting ad hoc coverage of commissioning parents in surrogacy arrangements, without actually according them parental status. Prioritising the genetic link over the legal relationship in certain circumstances runs counter to the prevailing trend and may have unintended consequences for the majority of families formed with the use of donor gametes who are not surrogacy families. In short the same definition pulls in opposite directions to achieve different aims.

This lack of clarity may have very serious consequences in terms of access to justice. If parents are recognised in an ad hoc way in some areas of law but not others the resulting confusion – both in the minds of the community and in the clarity of professional knowledge of those who advise them such as lawyers, accountants etc – will mean a dramatic under-utilisation of rights. Quite simply, rights that people don't know they have may be just as useless as having no rights at all.

Further, unclear categories of relationship create unnecessary burdens for families who must then test their rights through courts and tribunals. A clear example of this is the long-standing confusion over the category of "interdependent" in use in superannuation law (prior to attempts to clarify it through the Regulations) – trustees of funds continually refused or queried claims by same-sex partners and their children because they were unsure of the scope of the definition or what it required. This placed an extremely heavy burden on same-sex families to bring factual evidence to demonstrate their claims, and to challenge adverse decisions. The category of child as a "product of the relationship" promises similar uncertainty.

A clearer solution would be the use of different recognition methods that accurately targeted the population in need of legal recognition, creating a definition of parent that:

**1. Specifically and consistently address the needs of families formed through ART with donor gametes;**

**2. Separately addresses the needs of families formed through surrogacy, and;**

**3. Allows for these formal categories of parent to be augmented by a form of flexible purposive recognition as needed according to context.**

This could be done as follows:

**1. Specifically and consistently address the needs of families formed through ART with donor gametes**

Create in federal law a clear and consistent definition of child that builds upon and reflects the ART parentage presumptions in use in the states and territories: ie the birth mother

and a consenting de facto or marital partner. This could be done, for example, through a definition of child in the *Acts Interpretation Act 1901* (Cth), or through amending s60H of the *Family Law Act 1975* (Cth) and then incorporating or reflecting that definition in other federal Acts.

Using a gender neutral approach to these 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. 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 my article '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).

This approach has the added advantage that it builds upon existing legal frameworks and so gives access to previous case law for issues of interpretation, such as those on the point of time for consent to conception.

**2. Separately addresses the needs of families formed through surrogacy, and;**

Commissioning parents in surrogacy arrangements have the day to day care of a child for whom they have no legal relationship and with whom they may or may not have a genetic relationship. A formal transfer process grants permanent parental status in much the same way as adoption. The ACT has introduced such a process and WA and Victoria appear soon to follow.

A formal process for the transfer of parental status is important to protect both the interests of the birth mother and the child and to ensure that exploitative practices do not result.

Federal law can reflect this transfer process, again through a definition in the *Acts Interpretation Act 1901* (Cth), or through amending s60H of the *Family Law Act 1975* (Cth). However the main drive for recognition must be at state level and unlike the situation above federal law cannot properly progress without state co-operation. This is because in two mother families formed through ART 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 recognises only one of two social parents. But in the case of surrogacy there is a legal mother under state law whose status must be severed and this cannot be accomplished at federal level.

While transfer of parental status processes are being introduced at state level federal law can accommodate the needs of such families through for example, granting rights to adults who have consent orders of parental responsibility through the *Family Law Act 1975* (Cth). Such orders are commonly sought by commissioning parents: see eg *King v Tamsin* [2008] FamCA 309. While burdensome in the sense that it requires commissioning parents to apply for orders from the Family Court, it does offer clarity over the rights and duties of both the commissioning and birth parents, ensures informed consent and ensures that a child's best interests test is applied.

**3. Allows for these formal categories of parent to be augmented by a form of flexible purposive recognition as needed according to context.**

It has always been the case that certain areas of law have broader familial categories that extend beyond legal or biological parent-child relationships. Such categories include “child of the household”, “dependant” or “loco parentis”. These definitions occur in specific contexts in which the legislative purpose is served by a broad rather than narrow approach.

Such a flexible approach is very useful to augment, rather than replace, the clear categories of parent-child relationship outlined above.

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

Regards

Jenni Millbank