Gay & Lesbian Rights Lobby

Thursday 2 October 2008

Re: Supplementary Submission for the Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008

Dear Senator Crossin,

Further to our original written submission, the NSW Gay & Lesbian Rights Lobby (GLRL) would like to address in more detail one of the questions posed by Senator Barnett in relation to the definition of child/parent. Senator Barnett asked:

> **Senator Barnett:** It has been put to our committee that in terms of these [parent/child] definitional issues, the inconsistencies and how to deal with them, the section 60H proposal[1] or something similar to that[,] is one way to deal with it. Professor Parkinson has also promoted the option of having some sort of partner dependency definition or proposal. I was just wondering if you had considered that and if you had a view on that?[2]

This supplementary submission will further address this question.

Please note, in this submission we use the term 'parent' and 'co-parent' in the context of children born through assisted reproductive technology.[3]

- **Parent** refers to the birth mother of a child.
- **Co-parent** refers to the birth mother's partner who has jointly planned, conceived and raised the child with the birth mother. This may be a male or female partner who intended to be a parent with the birth mother at the time of the child's conception.

Section 60H currently recognises a **male** de facto partner to the birth mother as a legal parent. The proposed amendments to Section 60H under the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth) would recognise the birth mother's **male or female** de facto partner as a legal parent.

---

[1] As proposed under the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 currently before parliament.

[2] Senate Legal and Constitutional Affairs Standing Committee (2008) 'Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008', *Senate Hansard* (Committee hearing transcript), Tuesday 23 September at 32.

[3] Including IVF, donor insemination or self insemination.

Gay & Lesbian Rights Lobby (NSW)
Postal Address: PO Box 304 Glebe NSW 2037
Tel: (02) 9571 5501 **Fax:** (02) 9571 5509 **Email:** glrl@glrl.org.au **Web:** www.glrl.org.au

1. Professor Patrick Parkinson's evidence: The two options

As we understand it, Senator Barnett's question was alluding to Professor Parkinson's earlier evidence concerning alternative options for including children living in same-sex families throughout federal law. Professor Parkinson phrased the alternatives as consisting of two options:

> **Professor Parkinson:** One is to adopt the approach that I think Jim Wallace [from the Australian Christian Lobby] urged upon you, which is to give equal rights to same sex couples and their children without the need to redefine 'parenthood'. That is option No. 1. Option No. 2 is to change the meaning of 'parent' in the Family Law Act, which is the core meaning, and then to withdraw the term 'product of the relationship' from all these other bills, so that if one is a child or a parent under the Family Law Act, one is a child or parent for all purposes in federal law.[4]

To paraphrase Professor Parkinson, there are two options:

- **"The *Family Law Act* option."** One option is to ensure all **federal** definitions of child/parent reflect the proposed amendments to Section 60H and the new Section 60HB, which will be inserted into the *Family Law Act 1975* ('FLA') if the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 is passed.

- **"The *ad hoc tests* option."** The other option is to ensure all federal definitions of child include various legal formulations, which are intended to include children in same-sex families, but without redefining the statutory meaning of 'parent'. In his written submission, Patrick Parkinson suggests two options in particular:
    - A dependency test;
    - A 'partner of a parent' test.[5]

[4] Senate Legal and Constitutional Affairs Standing Committee, n2 above, at 16.

[5] Patrick Parkinson (submission no. 1) at 10; Senate Legal and Constitutional Affairs Standing Committee (2008) *Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008*. Available at: <www.aph.gov.au/senate/committee/legcon_ctte/same_sex_general_law_reform/submissions/sub01.pdf> [Accessed 1 October 2008].

2. The GLRL strongly supports the *Family Law Act* option

The GLRL strongly supports the *Family Law Act* option outlined above. It reflects and implements the model definition of child we have already outlined in our extensive submissions to the Legal and Constitutional Affairs Committee.

- **The *Family Law Act* option will reflect the reality of family life in Australia today.** The present reality is that children *are* born into same-sex parented families, and children are conceived through surrogacy arrangements to heterosexual and same-sex families. Neither class of children are currently equitably recognised by federal law. It is discriminatory and unjust to deny a child federal entitlements and benefits on the basis of the sexual orientation or marital status of their parents, or their method of conception.

- **The *Family Law Act* option will ensure a consistent definition of 'parent/'child' throughout federal law.** By reflecting the proposed FLA definition of 'parent' throughout federal law, there will be consistency in the recognition of child-parent relationships for all federal purposes. This will ensure that parents are empowered with all the rights and responsibilities of parenthood under the federal law, including child support obligations, family assistance and tax benefits.

- **The *Family Law Act* option will ensure a greater harmonisation between federal, state, territory (and even international) 'parent'/'child' definitions.** Currently, parentage presumptions in New South Wales, the Australian Capital Territory, the Northern Territory and Western Australia, recognise lesbian co-mothers as parents – including on birth certificates – but there is uncertainty about whether these mothers are recognised under federal law. Victoria is also intending to introduce inclusive parentage presumptions in 2008. Therefore, the proposed reforms to the FLA will ensure a greater harmonisation between the majority of states and territories which currently recognise lesbian co-mothers as legal parents.

  Importantly, in states which do not automatically recognise lesbian co-mothers at present (i.e. Queensland, South Australia and Tasmania[6]), children are set to gain a second legal parent under federal law. This means that children in lesbian families in these non-recognition states will be entitled to the full gamete of federal benefits and entitlements, notwithstanding the discrimination against

[6] Note however that Tasmania allows co-mothers to adopt a child of their partner.

their families in their states of residence. This includes rights for children: to benefit from tax exemptions upon the inheritance of their parent's superannuation; obligations on a non-resident parent for child support; the right for a child to maintain a relationship with both their parents upon familial separation; equal rights for a child of an Australian citizen to acquire citizenship; the recognition of their parents and siblings as one family unit for the purposes of the Medicare safety net – and many, many more entitlements and benefits.

It is important to note that Canada, the United Kingdom (from 2008), New Zealand, South Africa and some American states (California, New Jersey & Washington DC) also have parentage presumptions which recognise lesbian co-mothers as legal parents. Therefore, Australian federal law would also harmonise with these international jurisdictions.

3. The GLRL strongly opposes the *ad hoc tests* option

The GLRL strongly opposes the *ad hoc tests* option outlined above.

- **The *ad hoc tests* option would create further legal inconsistency in federal law and pose a nightmare for administration.** Every federal piece of legislation could have a different definition of 'child' which would require a person to individually prove their status for the purposes of *every* area of federal responsibility. By contrast, the *Family Law Act* option above would benefit from the fact that the majority of children in Australia could utilise their birth certificates to prove their child-parent relationship.

- **The *ad hoc tests* option would create uncertainty about legal rights and responsibilities.** An ad hoc approach to defining parent-child relationships in federal law would exacerbate the current uncertainty and confusion facing same-sex couples and their children in negotiating the law. The lack of consistency in the law and terminology (such as 'interdependency') which does not reflect the reality of people's lives and relationships, simply makes asserting legal rights overwhelmingly and unnecessarily complex for people in our community. Legal rights which are not comprehendible to lesbian, gay, bisexual and transgender Australians are no more useful than having no rights at all.

- **The *ad hoc tests* option would prevent the recognition of relationships traced through the child-parent relationship.** Legal relationships, such as the relationships of 'sibling', 'grandparent', 'grandchild', 'aunt/uncle' etc., all rely on the initial recognition of a child-parent relationship. For example, adopted

children have a legal nexus with other children of their adoptive parents (i.e. their adoptive siblings) as a result of the initial recognition of their adopted child-parent relationship. Similarly, children born through assisted reproductive technology have a legal nexus with the legal relatives of their parent *and* co-parent, regardless of a biological relationship with those relatives. Therefore, children in same-sex families who are denied the recognition of their co-parent – are also denied the recognition of the multitude of relatives which are traced through that co-parent. This includes siblings, grandparents, grandchildren, aunts, uncles etc. who are legal recognised as related to that co-parent.

- **A *dependency test* would cover too many children *and* not enough children.** It is almost impossible to achieve the coverage required by a parent-child definition through a dependency test without being overly broad. For example:

    - **The dependency test may be too broad...** The test could include many people in child/adult relationships, such as grandparents, other relatives or foster carers in the care of a child. This could extend coverage to new classes of relationships which were never intended to be covered. It would be extremely difficult to calculate the costs of providing financial benefits to this broader class of child/adult relationships. In some areas, such as social security and child support, there may also be serious negative financial implications for people in these child/adult relationships. Indeed, even Professor Parkinson contends:

        > That test of substantial dependency would not be able to be inserted across federal law to solve all the problems. You have to look at each bill, each act of parliament, and then come up with an appropriate test to achieve the purposes for which that act was passed.[7]

    - **.... or not broad enough.** The notion of dependency may not include children of same-sex families who have moved out of home or are working and no longer financially dependent.

    It is also important to note that a dependency test is not used to *define* the parent-child relationship. Rather, it is used to **restrict** those already recognised as a 'child' according to their financial needs. For example, the term 'child' may initially be defined to include **all** biological children, adopted children, ex-nuptial children and step-children. A dependency test is then usually added to qualify

[7] Senate Legal and Constitutional Affairs Standing Committee, n2 above, at 17.

this broad coverage to children who are 'wholly or partly dependent' on a parent. In other words, the definition of 'child' is the camera lens which captures the broader familial picture – whilst the dependency test is the focus mechanism through which we ascertain children who remain financially dependent on their parents (e.g. children living at home, children who are in fulltime study, children who are still young etc.). There is simply no logic in having the focus mechanism without the camera.

And even then, as Professor Parkinson rightly points out – the dependency test would not work for all situations. This simply invites inconsistent federal definitions of 'child' with state and territory law, and even *within* different areas of federal law.

- **A *'partner of a parent'* test would conflate the important distinction between <u>parents/co-parents</u> (original, intended parents to a child) and <u>step-parents</u> (a new partner to an existing parent/co-parent).** The distinction between parents/co-parents and step-parents is an important one. This is because parents/co-parents should be uniformly recognised across all parent-child definitions as parents, regardless of their biological relationship to the child. By contrast, step-parents are generally recognised in a smaller range of laws for specific purposes. Therefore:

    - **A 'partner of a parent' test would confuse the situation** where both parents/co-parents (who may have separated) *and* step-parents (new partners to an original parent and co-parent) are recognised by the law. The co-parent's place as one of the original parents to the child should not be displaced or diminished, notwithstanding the important and invaluable contributions made by step-parents.

    - **A 'partner of a parent' test would not recognise the new partner of a co-parent as a step-parent.** Step-parent recognition relies on the initial recognition of a child-parent relationship with the partner (i.e. the parent/co-parent) of the new step-parent. If same-sex parents separated and both parents commenced new relationships, a child in a same-sex family would only have only **one** of their step-parents recognised (i.e. the new partner of their parent but not the new partner of their co-parent. By contrast, a child in a heterosexual family could potentially have two step-parents recognised.

4. Where to from here? – Our sample drafting

As we have outlined, the GLRL strongly supports the *Family Law Act* option outlined above and rejects the *ad hoc tests option* as unworkable, unduly complex and inherently discriminatory.

The benefit of the *Family Law Act* option is the simplicity in which amendments to the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 (Cth) ("Same-Sex Relationships Bill") can be made which will deliver genuine equality to children in same-sex families.

Therefore, we suggest some sample drafting below which will implement the *Family Law Act* option outlined above. Our sample drafting:

- Will replace the problematic 'product of a relationship' definition by implementing the *Family Law Act* option,
- Will ensure consistency across federal law,
- Will ensure the greater harmonisation of state, territory and federal law, and
- Will ensure the majority of children can prove their parent-child status simply through a state-issued birth certificate.

Here are some examples of our sample drafting:

- In the Same-Sex Relationships Bill's amendments to section 29(4) of the *Age Discrimination Act 2004* (Schedule 2, Part 2, Clause 4):

> **4 Subsection 29(4)**
>
> Insert:
>
> > ***child****:* without limiting who is a child of a person for the purposes of paragraph (a) of the definition of ***near relative*** in this subsection, someone is the ***child*** of a person if he or she is a parent of that child within the meaning of Section 60H or Section 60HB of the *Family Law Act 1975*.

- In the Same-Sex Relationships Bill's amendments to section 29(4) of the *Age Discrimination Act 2004* (Schedule 2, Part 2, Clause 7):

> **7 Subsection 29(4)**
>
> Insert:
>
> ***parent**:* without limiting who is a parent of a person for the purposes of paragraph (a) of the definition of ***near relative*** in this subsection, someone is the ***parent*** of a person if he or she is a parent of that person under Section 60H or Section 60HB of the *Family Law Act 1975*.

- In the Same-Sex Relationships Bill's amendments to section 5(1) (definition of *child*) of the *Bankruptcy Act 1966* (Schedule 2, Part 2, Clause 11):

> **11 Subsection 5(1) (definition of *child*)**
>
> Repeal the definition, substitute:
>
> ***child**:* without limiting who is a child of a person for the purposes of this Act, each of the following is the ***child*** of a person:
>
> (a) an adopted child, stepchild or exnuptial child of the person;
> (b) the child of a person who is a parent of that child under Section 60H or Section 60HB of the *Family Law Act 1975*.

We trust this information will be of some assistance.

Regards,

Ghassan Kassisieh
Policy and Development Coordinator