

## **Submission of the Inner City Legal Centre to the Australian Law Reform Commission Review on Family Law System**

### **Introduction**

The Inner City Legal Centre ('ICLC') welcomes the opportunity to make submissions in response to the Australian Law Reform Commission's review of the Family Law System.

The ICLC is both a generalist and specialist legal centre. The ICLC provides free generalist legal assistance to vulnerable clients living in the Eastern and Northern suburbs of Sydney, New South Wales ('NSW'). The ICLC provides a free state-wide specialist legal service for those whose legal issue relates to their lesbian, gay, transgender, intersex or queer ('LGBTIQ') experience.

Integral to the ICLC state-wide specialist legal service are the:

- LGBTIQ Family Law Advice Nights at the ICLC, where clients can access family law advice either face to face or by telephone attendance. Advice is provided by our experienced volunteer solicitors who provide their valuable time to assist clients;
- Safe Relationships Project ('SRP'). The SRP provides advice, court support, advocacy, information and referral services to victims of same-sex domestic violence. Through the SRP the ICLC have a safe room for victims of same-sex domestic violence at the Downing Centre, Sydney, the first such safe room in Australia;
- Special Medical Procedures legal service whereby the ICLC assists parents of trans children in applications to the court for stage 2 hormones treatment, until the decision in *Re: Kelvin* [2017] FamCAFC 258 made such applications unnecessary. The ICLC continues to provide casework to parents of trans children wishing to apply to the Family Court of Australia for stage 3 – bilateral mastectomy and chest reconstruction; and
- Legal advice and casework service to sex workers, the Sex Worker Legal Service (SLS).

### **Approach to this submission**

Our authority to submit arises from our engagement with both LGBTIQ and non-LGBTIQ family law matters through our advice clinics, family law casework as well as our ongoing partnership with the Sydney City and Caringbah Family Relationships Centre, for which the ICLC Family Relationships solicitor provides strategic casework by way of legally assisted mediation.

Please note the ICLC have limited our submissions to a select number of questions only and have sought to prioritise LGBTIQ experience. In part preparation of the ICLC response we sought the input of our volunteer solicitors using an online survey. The ICLC have captured the volunteer's input and identified accordingly throughout our submission.

The ICLC has drawn on the findings and recommendations of the 2014 University of New South Wales (UNSW) Report, *Calling It What It Really Is*.<sup>1</sup> The report has been included in this submission as **Attachment A**. This qualitative report investigated and analysed LGBTIQ people's experiences of domestic violence in LGBTIQ relationships.<sup>2</sup> In brief, it examined the forms of domestic violence experienced in LGBTIQ relationships, experiences of victims reporting to police, and what kind of support was sought for and received by people affected by domestic violence in LGBTIQ relationships. The report made a number of key recommendations, but what is most relevant to the review of the family law system are the policy recommendations, which urge the importance of developing specific policies relating to the experiences of LGBTIQ people, who may have different experiences of domestic violence than non-LGBTIQ people.<sup>3</sup>

### **Our Recommendations**

In consideration of what has been discussed and highlighted throughout the issues paper, we have made submissions that the ICLC believes are fundamental to ensure better access to the family law system for diverse and vulnerable families.

Except where stated otherwise the ICLC endorse the Women's Legal Services Australia ('WLSA') *Submission to the Australian Law Reform Commission's Issues Paper on Review of the Family Law System* prepared by the on 7 May 2018 ('WLSA submission').

## **RELEVANT QUESTIONS FROM ALRC ISSUES PAPER**

### **Question 1**

**What should be the role and objectives of the modern family law system?**

Our volunteer lawyers have consistently identified:

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<sup>1</sup> LGBTIQ Domestic Violence Interagency and the Centre for Social Research in Health, University of New South Wales, *Calling it what is really is: A report into Lesbian, Gay, Bisexual, Transgender, Gender Diverse, Intersex and Queer Experiences of Domestic and Family Violence* [2014].

<sup>2</sup> Ibid, 2.

<sup>3</sup> Ibid, 42.

- The main objectives of the family law system should be to resolve disputes in a just, efficient and safe manner;
- The paramount concern of the modern family law system should continue to be the best interests of the child. Integral to achieving this is the need to give greater weight to children's wishes and provide options for participation in the family law system; and
- To allow for the changing landscape of the family within Australia and thus recognise and allow for the breadth of experience for children and their significant family members including but not limited to step parents, grandparents and sperm donors.<sup>4</sup>

The ICLC recognises the need for the family law system to be inclusive of LGBTIQ peoples and experiences and to recognise the diversity of families within Australia.

### **Question 3**

**In what ways could access to information about family law and family law related services, including family violence services, be improved?**

In light of the number of telephone calls the ICLC receives asking for information and assistance regarding family law and family violence services, our volunteer lawyers and volunteer practical legal training students have identified people experiencing confusion in accessing family law services. Our volunteers have submitted this issue is primarily the result of inadequate 'easy-access' mechanisms for those people who need to engage with the family law system. As such possible solutions include:

- A central location where people are able to access information to streamline initial engagement with the family law system allowing people to seek information face to face, by telephone, post and via the internet;
- This centralised system could take the form of an effective, well-resourced service located throughout Australia in metropolitan and regional areas;
- Service points located within Federal Circuit Court and Family Court of Australia (Courts) and in regional and remote areas in local Courts with family law jurisdiction and or co-located in Centrelink offices;
- Options to access information in an equitable way by providing computers for the sole purpose of accessing this centralised family law system service, at Commonwealth government services such as Centrelink; and
- Options to have information express posted for socio-economically disadvantaged people who are without Internet access.<sup>5</sup>

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<sup>4</sup> Interview with ICLC Volunteer Solicitors (Survey Monkey, 27 March 2018).

Further the ICLC submit

- An LGBTIQ family safety practitioner parallel to the New South Wales Police Gay and Lesbian Liaison Office ('GLLO') be available to people at the Courts or Family Relationship Centres to assist with and facilitate an inclusive experience of the family law system; and
- Designated court support if requested by a LGBTIQ person to assist with navigating and engaging with the family law system.

### **Question 8**

#### **How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?**

The structure and formation of LGBTIQ families can be complex and so their needs and engagement with the family law system may differ to the family structure conceived at the time the *Family Law Act 1975* (Cth) (FLA) was enacted. While we understand that societal awareness is changing on this point, family law professionals still do not properly understand LGBTIQ peoples and experience within the family law context. Our recommendations, as a community legal service specialising in the needs of LGBTIQ people, are that the current family law system would benefit from:

- Improved access to information as outlined above in the answer to Question 3;
- A systematic review of all forms/paperwork to ensure that no-one is excluded. Examples include:
  - Asking open-ended questions about gender rather than providing male/female tick boxes;
  - Or using 'parent one', 'parent two' rather than 'mother' and 'father';
- A comprehensive needs analysis be performed across the family law system to identify gaps in sensitivity and understanding of best practice in working with LGBTIQ clients; and
- Implementing training developed from the needs analysis to address deficiencies in working with LGBTIQ peoples and thus improving accessibility.

Our practice experience indicates that there are particular access issues for lesbian and gay parents and transgender people who come into contact with the family law system. Some of these issues are outlined below.

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<sup>5</sup> Ibid.

### Accessibility for non-biological lesbian co-parents

As referenced in the issues paper, non-biological lesbian parents have particular issues when accessing the family law system. The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (the 2008 amendments) sought to remedy this situation by reforming section 60H of the *Family Law Act 1975* to recognise the non-birth mother as a parent of children born to her female de facto partner, if she consented to the conception of their children via an artificial conception procedure.

While an analysis of relevant case law has found the 2008 amendments have, to a large extent, achieved the direct objectives of recognising the non-birth mother as a parent, further examination reveals that lesbian parents are still not treated in the same way as heterosexual parents in family law. An analysis of relevant case law shows that a court is more likely to grant a non-parent (a sperm donor) access to a child against the wishes of an intact lesbian family than to grant a non-parent (grandparent) access to a child against the wishes of an intact heterosexual family.

This example goes to show that courts may not be interpreting and applying the objects and principals of the *Family Law Act* consistently.

Underlying this example is the need to address the potential for subjectivity around the notion of 'best interests of the child'. For example, a belief that it is in the best interest of a child to have a male and a female parent runs counter to the notion of a lesbian couple parenting. It also runs counter to the notion of two men parenting together. If the family law system is going to be truly accessible to all families, legal practitioners and judiciary must be aware of how this bias is a barrier to LGBTIQ people.

### LGBTIQ people experiencing domestic violence

As referenced in the issues paper, LGBTIQ people experiencing domestic violence have difficulty accessing support services due to limited professional knowledge. LGBTIQ people tell us that they feel most confident accessing services if they know that support service personnel understand their particular situation and experience.

The ICLC refers to the 2014 report *Calling It What It Really Is*, which supports the generally accepted claim that LGBTIQ people experience domestic and family violence at the same rate as women (and although there are difficulties collecting data about transgender experiences of domestic violence, it appears that transgender people's experience of violence is even higher).

The report made a number of key recommendations relating to the accessibility of the family law system. These include:

- Support Services Recommendation 2.7: ‘Increased services based in or near rural and regional areas for LGBTIQ people and families affected by domestic and family violence’;<sup>6</sup>
- Support Services Recommendation 2.8: ‘Resourcing for transgender and intersex community-based organisations to work in partnership with mainstream services to improve responses to the specific needs of transgender and intersex people affected by domestic and family violence’;<sup>7</sup>
- Support Services Recommendation 2.9: ‘Develop further mainstream and specialist LGBTIQ service providers to better understand the needs of diverse LGBTIQ families’.<sup>8</sup>

Please note the ICLC have also addressed specific access issues for LGBTIQ people in the answers below.

### **Transgender people, including transgender parents**

Transgender people experience higher levels of discrimination than the rest of the LGBTIQ community - 90 per cent experience “at least one form of stigma or discrimination, including verbal abuse, social exclusion, receiving lesser treatment due to their name or sex on documents, physical threats and violence”.<sup>9</sup> This discrimination is felt in every aspect of the lives of transgender people, including when they are accessing the family law system. It leads to:

- High levels of depression;
- The need to modify activities due to fear of stigma; and
- Other negative life experiences.

For this reason it is particularly important to consider the unique needs of transgender people and parents in any needs analysis and subsequent training of legal professionals and when establishing and reviewing systems and paperwork.

### **Question 9**

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<sup>6</sup> LGBTIQ Domestic Violence Interagency and the Centre for Social Research in Health, University of New South Wales, ‘Calling it what is really is: A report into Lesbian, Gay, Bisexual, Transgender, Gender Diverse, Intersex and Queer Experiences of Domestic and Family Violence [2014], 39.

<sup>7</sup> Ibid, 40.

<sup>8</sup> Ibid, 40.

<sup>9</sup> M Couch, M Pitts, H Mulcare, S Croy, A Mitchell, and S Patel, *Tranznation: A report on the health and wellbeing of transgender people in Australia and New Zealand* (Australian Research Centre in Sex, Health and Society, La Trobe University, 2007).

## **How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?**

People and more so vulnerable people living in rural, regional and remote areas of Australia experience an added layer of complexity and thus difficulty in accessing the family law system. Where family law matters are concerned, it is imperative that clients living in rural, regional and remote areas are afforded the same access to the family law system as those living in the metropolitan cities and surrounds.

In our view, the greatest barrier to people in rural, regional and remote areas from accessing legal support is that there is limited access to Courts in regional areas. Our volunteer lawyers have submitted:

- More family courts are placed in rural areas;
- Increased resourcing and frequency for court circuits;
- Increased resourcing to professional development and training for local court magistrates in rural areas to improve capacity and opportunity to hear family law matters;
- Dedicated family law lists in the local court to distribute caseloads away from the Court; and
- Educating family law solicitors in collaborative legal practice and arbitration in the local courts to further relieve the caseload of the Courts.<sup>10</sup>

### **Question 11**

#### **What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?**

Our volunteer lawyers have consistently identified the need for:

- An increase in resources to the family law courts including:
  - An increase in the number of duty lawyers in the Federal Circuit Court Family Law Division;
  - An increase in the number of Judges appointed to the Courts as the number of self represented litigants has increased an increased time is required to hear the cases;<sup>11</sup>
- In light of the number of self represented litigants a:

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<sup>10</sup> Interview with ICLC Volunteer Solicitors (Survey Monkey, 27 March 2018).

<sup>11</sup> Ibid.

- Dedicated lists for self-represented litigants wherein a judge deals solely with matters run by self-represented litigants;
- A mandatory pre-filing requirement where self represented litigants must obtain legal advice attesting to the merit and the subsequent filing procedure once merit is confirmed. In sum the self represented litigant can be issued with a certificate noting the matter has both merit and is in a format ready for filing.<sup>12</sup>

#### **Question 14**

**What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children?**

#### **Presumption of Equal Shared Parental Responsibility**

The ICLC agree in part with WLSA in the WLSA submission,<sup>13</sup> and as noted in the Australian Law Reform Commission *Review of the Family Law System Issues Paper* ('Issues Paper'). Specifically the ICLC agree with WLSA submission regarding the complexity and repetition within the decision-making framework of Part VII of the FLA. The ICLC welcomes a comprehensive review and revision of the Part VII decision making framework for the purpose of child safety, reducing service costs for clients, improving productivity for the courts, clarifying the confusion of Equal Shared Parental Responsibility ('ESPR') with shared time and allowing for the child's views to be given respect and weight.

However the ICLC submits that the presumption of ESPR remains. As noted in the WLSA submission the presumption of ESPR is not meant to apply in cases of violence and abuse because it is recognised it would not be in the best interest of the children for an abuser to be involved in long-term decision making about someone they have abused or exposed to family violence. The ICLC agree with WLSA submission and the report by the House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to support and Protect Those Affected by Family Violence* (2017) ('House of Representatives Report 2017') that Part VII does not adequately prioritise the safety of children in parenting matters,<sup>14</sup> and the presumption of equal shared parental responsibility '*has been improperly applied to many cases involving family violence and that giving rise to*

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<sup>12</sup> Ibid.

<sup>13</sup> Women's Legal Services Australia, Submission to the Australian Law Reform Commission's Issues Paper on Review of the Family Law System, *Review of the Family Law System Issues Paper 2017*, 7 May 2018, 14.

<sup>14</sup> Report of the House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to support and Protect Those Affected by Family Violence* (2017), 222 [6.124].



*court orders and consent orders which put people effected by family violence including children, at unacceptable risk*'.<sup>15</sup>

Further the ICLC note recommendation 19 of the House of Representatives Report 2017,<sup>16</sup> and the concerns informing that recommendation.<sup>17</sup> However, the ICLC supports the improvement of skills and expertise of the family law system including the Court with respect to family violence as stated in Recommendations 27 and 28 of the House of Representatives Report 2017.<sup>18</sup> The ICLC submits an improvement in skill and expertise across the family law system as the avenue to ensure the presumption is properly applied or rebutted.

The ICLC notes retaining the presumption is important because it sets a bar for parenting rights and responsibilities that parents engaged with the family law system are made aware of. Importantly, with judicial review, the consequent significance and weight of 'losing' that parenting right and responsibility in light of child safety concerns is conveyed to that parent who has been identified as a perpetrator of unacceptable risk. With the proper judicial application of the presumption and corollary rebuttal where child safety is at issue, the ICLC contends that it should be the method to address the concerns raised in the House of Representative Report 2017 and WLSA submission.

Further the ICLC proposes in matters involving family violence, and the family violence is supported by evidence from a professional specialising in working with victims of family violence, the threshold requirement in *Rice v Asplund* (1978) 6 Fam LR 570 be considered to be satisfied. We propose in meeting that threshold allows the victim parent the opportunity to access the family law system to change the orders with relative ease and thus avoid the barriers identified within the ALRC Issues paper. Those barriers include high cost, complex and delayed procedure and poor prioritising of family violence matters experienced to date.<sup>19</sup>

## **Welfare Jurisdiction**

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<sup>15</sup> Ibid, 222 [6.125].

<sup>16</sup> Ibid, xxxiii [6.130].

<sup>17</sup> Ibid, 221-222 [6.123 - 6.129].

<sup>18</sup> Ibid, xxxvii, [8.82-8.83].

<sup>19</sup> Sarah Middleton, 'Time for a Change? Shared Parenting, Variation of Orders and the Rule in *Rice and Asplund*' (2006) 34(3) *Federal Law Review* 399 where Chief Justice Evatt, with whom Pawley SJ and Fogarty J agreed, stated the Rule in these terms:

*[The court] should not lightly entertain an application to reverse an earlier custody order. To do so would be to invite endless litigation for change is an ever present factor in human affairs. Therefore, the court would need to be satisfied by the applicant that ... there is some changed circumstance which will justify such a serious step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material.*

As the Issues paper notes, concerns have been raised about the FLA welfare jurisdiction,<sup>20</sup> which gives the family courts a broad power to make orders relating to the welfare of children.<sup>21</sup>

The sterilisation of a young person including a child with an intellectual disability must usually be authorised by the Family Court pursuant to the welfare jurisdiction.<sup>22</sup> In relation to intersex children, concerns have been raised about the ability of intersex children to participate in the decision-making about their gender identity and the extent to which judicial oversight is required on these decisions.<sup>23</sup> These concerns are raised within the context of the arguments put forward by the Australian Human Rights Commission,<sup>24</sup> and Women with Disabilities that forced sterilisation is a serious violation of human rights and have called for a prohibition of involuntary or coerced sterilisation of girls unless there is a serious threat to life.<sup>25</sup>

In the recent decision of *Re: Carla* [2016] FamCA 7, the Family Court decided a family can consent to the sterilisation of their child, aged 5, without Court authorisation. This approach has been criticised by human rights advocates.<sup>26</sup> In 2016 the UN Committee against Torture, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities recently stated:

*States must, as a matter of urgency, prohibit medically unnecessary surgery and procedures on intersex children. They must uphold the autonomy of intersex adults and children and their rights to health, to physical and mental integrity, to live free from violence and harmful practices and to be free from torture and ill-treatment. ... Intersex children and adults should be the only ones who decide whether they wish to modify the appearance of their own*

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<sup>20</sup> *Family Law Act 1975* (Cth) s 67ZC.

<sup>21</sup> Australian Law Reform Commission, *Review of the Family Law System* Issues Paper No 48 (2018) 44.

<sup>22</sup> *Ibid* and *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

<sup>23</sup> *Ibid*, 45.

<sup>24</sup> Morgan Carpenter, '*The Family Court Case Re: Carla (Medical procedure) [2016] FamCa 7*' (8 December 2016); Australian Law Reform Commission, and; Australian Human Rights Commission, Submission No 5 to the Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* 2013, November 2012, 4.

<sup>25</sup> *Ibid*; Women With Disabilities Australia, Submission No 49 to the Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* 2013, March 2013, 12.

<sup>26</sup> *Ibid*; Human Rights Law Centre, *Queensland Family Court Approves Sterilising Surgery on 5 Year Old Intersex Child: Re: Carla (Medical Procedure) [2016]* <http://www.hrlc.org.au/human-rights-cases-summaries/2017/4/21/queensland-family-court-approves-sterilising-surgery-on-5-year-old-intersex-child>.

*bodies – in the case of children, when they are old or mature enough to make an informed decision for themselves...* <sup>27</sup>

The ICLC note one of the criticisms of *Re: Carla* is that the Court did not provide proper oversight. <sup>28</sup> The criticism was that evidence used by clinicians in the case cited old data on cancer risks contrary to the 2013 Australian Senate Standing Committee on Community Affairs Committee, *Report into Involuntary or coerced sterilisation of intersex people in Australia* (Senate Report).<sup>29</sup> The Committee commented:

*“4.39 The committee is aware of a risk, not directly discussed by witnesses to the inquiry, that clinical intervention pathways stated to be based on probabilities of cancer risk may be encapsulating treatment decisions based on other factors, such as the desire to conduct normalising surgery... Treating cancer may be regarded as unambiguously therapeutic treatment, while normalising surgery may not. Thus basing a decision on cancer risk might avoid the need for court oversight in a way that a decision based on other factors might not. The committee is disturbed by the possible implications of this.”*<sup>30</sup>

It is within this context that the ICLC submits, for applications for special medical procedures for intersex children, in the absence of children and adults with the capacity to consent, authorisation needs to be sought from the Court. Further the ICLC suggests Division 4.2.3 *Family Law Rules 2004* (Cth) be adjusted to allow the option for a professional person and or body with expertise in the field at issue to either join proceedings or be invited by the Court to join proceedings and (similar to the way s 91B of the FLA works to invite intervention by a child welfare officer). The ICLC also submits that the Court adopt an inquisitorial approach for the purpose of adducing and reviewing current medical evidence when determining a special medical procedures application, and specifically for applications involving intersex children.

It is the ICLC’s experience to date that the Courts welfare jurisdiction has worked to facilitate applications for special medical procedures. To ensure judicial review is inclusive of relevant and contemporary specialist medical practice, current medical evidence,

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<sup>27</sup> Ibid; Intersex Human Rights Australia <<https://ihra.org.au/31036/re-carla-family-court/>>; United Nations Human Rights Office of the High Commissioner, ‘*Intersex Awareness Day – Wednesday 26 October. End violence and harmful medical practices on intersex children and adults, UN and regional experts urge.*’ ( 24 October 2016) United Nations Human Rights Office of the High Commissioner <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E?>.

<sup>28</sup> Ibid; [2016] FamCA 7.

<sup>29</sup> Ibid; Australian Senate Standing Committee on Community Affairs Committee, *Report into Involuntary or coerced sterilisation of intersex people in Australia*. Community Affairs References Committee; 2013.

<sup>30</sup> Ibid, 91-92.

including contemporary medical research and guidelines would ensure the process was one whereby the applications are subject to thorough judicial scrutiny.

In regards to applications to the court for stage 2 hormone treatment transgender children, the Full Court decision in *Re: Kelvin* [2017] overturned the requirement for a court application where the young person is considered to be ‘*Gillick*’ competent, and their parents and treating medical practitioners agree with the proposed treatment.<sup>31</sup> The ICLC submits clarity is required for children in the care of the Minister of the relevant state welfare department seeking stage 2 treatment.

Furthermore, the ICLC submits further clarification is required, following the recent single Judge decision in *Re: Matthew* [2018] FamCA. In this case parents of a trans child applied to the Court for authorisation of stage 3 surgery; double mastectomy and chest reconstruction. The Court decided that the young person was *Gillick* competent, their parents and treating medical practitioners agreed with the proposed treatment and as such Court authorisation was not required.<sup>32</sup> Despite this positive change in case law the ICLC submits further clarity is required for the treating medical practitioners to be able to securely perform surgery without requesting the parents apply to the Court every time. In addition, the ICLC submits further clarity is required for children in the care of the Minister of the relevant state welfare department seeking stage 3 treatment.

## **Question 16**

**What changes could be made to Part VII of the Family Law Act to enable it to apply consistently to all children irrespective of their family structure?**

### **Issues of parentage;**

The ICLC refers to the Family Law Council *Report on Parentage and the Family Law Act* published in December 2013 (‘FLC Report’) and to the WLSA submission on that issue. The WLSA noted that they generally supported the recommendations made in the FLC Report with the exception of Recommendations 2 and 3.<sup>33</sup> The ICLC notes that we differ from WLSA on this issue. The ICLC provides a free legal service to LGBTIQ peoples. The issues regarding parentage vary significantly across the LGBTIQ communities and so to capture the breadth of such diverse family experiences the ICLC propose an inclusive definition of parentage.<sup>34</sup>

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<sup>31</sup> *Re: Kelvin* [2017] FamCAFC 258, and *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

<sup>32</sup> *Ibid*, 112.

<sup>33</sup> Above n 13.

<sup>34</sup> Family Law Council Report on Parentage and The Family Law Act, vii (A).

Specifically the ICLC endorses the FLC Report for a federal Status of Children Act, which would provide a clear statement of parentage laws for the purposes of all the laws of the Commonwealth. The ICLC support the Family Law Council's rationale underpinning this proposal; that the focus of Part VII of the FLA is to resolve post separation disputes and parenting arrangement for the child/children; and to guide the Court by principles of best interest for that purpose. As such the legal status of the adult as parent is an important but not determinative question in the aforementioned disputes.<sup>35</sup>

In further answering question 16 the ICLC volunteer lawyers have made the following submissions:

- that children's views should be given greater weight in the Court. In order to achieve this, it has been submitted that an Independent Children's' Lawyers ('ICL') should take on a greater role within the court process;
- an ICL should be compulsory in all matters, not just care and protection matters; and
- Family Consultants should be court appointed at the commencement of family law proceedings and should be present at court to view all parties submissions in order to make a more informed recommendation. This would contribute to creating a more collaborative court environment, which we believe is more beneficial than the current adversarial approach to family law.<sup>36</sup>

### **Question 23**

**How can parties who have experienced family violence or abuse be better supported at court?**

Safety at court is the paramount concern for parties who have been subject to family violence. The family law system is currently under resourced and over capacity. As noted in the ALRC Issue paper these factors pose a further risk issue for families experiencing family violence and currently engaged within the delayed system. Our volunteer lawyers submit, in addition to improved resourcing to increase capacity to ensure efficient and sensitive outcomes for matters involving family violence within the family law system:

- the inclusion of safe rooms with staff trained in working with victims of family violence and inclusive practice in all Courts working within the family law jurisdiction; and

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<sup>35</sup> Ibid, viii.

<sup>36</sup> Interview with ICLC Volunteer Solicitors above n, 1.

- comprehensively developed security plans, dedicated lockable rooms and security staff suitably trained in LGBTIQ best practice to accompany parties in and out of court.<sup>37</sup>

For LGBTIQ families, the experiences of family and domestic violence are equally as prevalent as for women in the general population. In a 2011 study conducted by the New South Wales LGBTIQ Domestic Violence Interagency and analysed by the University of New South Wales it was found that 54.7% of all participants reported they had previously been in one or more emotionally abusive relationship, while 34.8% reported that they had been abused sexually or physically by a previous partner.<sup>38</sup> These statistics show that LGBTIQ persons are equally at risk of family violence as non-LGBTIQ women, and that LGBTIQ people may also experience unique forms of family and domestic violence targeted at their sexuality, gender identity or expression, or intersex status.

The study also noted that underreporting by LGBTIQ victims of family violence remains an issue. Victims report they are still uncomfortable reporting family violence to police. Of a total of 620 individuals surveyed by the New South Wales LGBTIQ Domestic Violence Interagency, 43.5% of people did not report the incident to police.<sup>39</sup>

Several relevant recommendations of the *Calling it What It Really Is* report include:

- Support Services Recommendation 2.1: ‘Better promotion of specialist LGBTIQ support services so that individuals affected by domestic and family violence can access the range of services they need. The promotion of services for gay men, transgender and intersex people affected by domestic and family violence is particularly needed’;<sup>40</sup>
- Support Services Recommendation 2.2: ‘Ongoing training and support for mainstream domestic and family violence services, the justice sector and the human service sector to enable LGBTIQ people affected by violence in their relationships to access culturally safe support in their chosen support service’;<sup>41</sup>
- Support Services Recommendation 2.5: ‘Safe crisis support options for gay, bisexual, transgender, intersex and queer men, including accommodation options’;<sup>42</sup>

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<sup>37</sup> Ibid.

<sup>38</sup> LGBTIQ Domestic Violence Interagency and the Centre for Social Research in Health, University of New South Wales, ‘Calling it what is really is: A report into Lesbian, Gay, Bisexual, Transgender, Gender Diverse, Intersex and Queer Experiences of Domestic and Family Violence [2014], 4.

<sup>39</sup> Ibid, 27.

<sup>40</sup> Ibid, 40.

<sup>41</sup> Ibid, 40.

<sup>42</sup> Ibid, 40.

- NSW Police Force Recommendation 1.11: ‘Consistent and meaningful inclusion of LGBTIQ awareness and sensitivity training for all DVLOs, GLLOs, general duties officers and senior officers who authorise police initiated ADVOs’;<sup>43</sup> and
- Policy Recommendation 1.19: ‘Exploration of best practice approaches for supporting LGBTIQ people who may face barriers to reporting DFV to Police and accessing mainstream and specialist services’.<sup>44</sup>

In order to achieve greater reporting numbers amongst the LGBTIQ communities and thus targeted legal responses, an inclusive system that allows victims to feel safe when reporting family violence to police, and one that is readily available to victims, will serve to further assist those victims with attendant family law matters.

It is our submission that the family law system needs to be more sensitive to the prevalence of LGBTIQ family violence and the unique experiences concomitant with these issues. This can be partially achieved by:

- conducting a needs analysis to determine gaps in best practice knowledge when working with LGBTIQ people;
- develop training from needs analysis, in best practice when working with LGBTIQ people for professionals working within the family law system; and
- to improve inclusivity by increasing awareness and understanding of the family violence experiences of the LGBTIQ communities and people.<sup>45</sup>

Finally, an increase in resourcing to:

- allow for needs analysis and training; and
- for LGBTIQ inclusive safe rooms in Courts, like ICLC’s SRP service, that aims to assist and protect LGBTIQ victims of family violence, across the family law system;

will ensure better justice outcomes for LGBTIQ victims of family and domestic violence.

## **Question 25**

**How should the family law system address misuse of process as a form of abuse in family law matters?**

The ICLC provides legal advice and assistance to sex workers through our Sex Worker Legal Service (SLS). The Sex Workers Outreach Project (SWOP) is a network partner to the SLS.

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<sup>43</sup> Ibid, 42.

<sup>44</sup> Ibid, 42.

<sup>45</sup> Inner City Legal Centre, Submission to the Law Council of Australia’s Consultation paper: LGBTI People, *The Justice Project Consultation Paper: LGBTI People 2017*, 28 September 2017.

The answers to questions 25 are a direct response to the issues from SWOP and are supported by the ICLC.

**SWOP submits:**

In circumstances where misuse of process within the family law system constitutes an extension of family violence in family law matters, SWOP suggested guidelines be developed that are specific to sex workers. Specifically the guidelines would seek to address the misuse of the parent's sex worker history/occupation status from being disclosed as a means of alleging that a person is an unfit parent or should not have the child live with or spend time with the parent. The ICLC notes that these guidelines would be informed by the best interest of the child and the not exposing the child to an unacceptable risk of harm.<sup>46</sup> SWOP submits this recommendation is fundamental to the ongoing task of removing the stigma from sex work. SWOP notes that the recommendation for guidelines is complicated by the varied legal status of sex work across Australia.<sup>47</sup>

SWOP highlights the added complexity of shaming and stigma for sex worker parents who identify as Aboriginal and Torres Strait Islander (ATSI) or culturally and linguistically diverse (CALD) and / or live in regional areas if or when they are 'outed' to the family, community and / or local area.<sup>48</sup>

Further and more specifically, the ICLC note SWOP's submission and it's the intersection with:

- Question 5 - Aboriginal and Torres Strait Islander Communities;
- Question 6 - Culturally and linguistically diverse clients; and
- Question 9 – People living in rural, regional and remote areas;

of the ALRC Issues Paper.

For ATSI communities, this is an issue that can be partially addressed through:

- training in best practice when working with sex worker parents within the family law system; and
- embedding within the recommendations at question 5, paragraph 61; further enhancing accessibility of the family law system for ATSI communities, the inclusion of the provision for a culturally and sex worker safe service;

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<sup>46</sup> *M v M* (1988) 82 ALR 577.

<sup>47</sup> Email from Jackie McMillian, *Policy, Media & Communications Officer, Sex Workers Outreach Project Inc.* to Shann Preece, 24 April 2018.

<sup>48</sup> *Ibid.*



in an attempt to minimise the added barrier created by the shaming and stigma for sex worker parents.<sup>49</sup>

For CALD communities, this is an issue that can be partially addressed through:

- training in best practice when working with sex worker parents within the family law system; and
- adding to the recommendations at question 6, paragraph 71, to include the provision of a culturally sensitive and sex worker safe service;

in an attempt to minimise the added barrier created by the shaming and stigma for sex worker parents.<sup>50</sup>

As noted at question 9, paragraph 100 of the ALRC Issues paper there is the issue of visibility for regional sex workers. Again recommendations are as above for ATSI communities as the intersection is likely, and could include:

- training in best practice when working with sex worker parents within the family law system; and
- embedding within the recommendations at question 5, paragraph 6; further enhancing accessibility of the family law system for ATSI communities, the inclusion of the provision for a culturally and sex worker safe service;

#### **Question 41**

**What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?**

Our volunteer lawyers submitted:

- for solicitors seeking to practice in family law, they should complete:
  - a Masters Diploma of Applied Law (Family Law);
  - a minimum family law specific CLE training per year;
  - collaborative law training; and / or
  - FDRP training;

For the reason that family law solicitors need to be well rounded in negotiation skills and collaborative law and not focused solely on engaging in adversarial litigation.<sup>51</sup>

In sum the ICLC submits family law solicitors need to be:

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Interview with ICLC Volunteer Solicitors, above n, 1.

- highly trained in the substantive law, negotiation and collaborative law skills in addition to professional skills and knowledge of family violence; and
- be trained to apply a trauma informed practice;

One ICLC volunteer lawyer submitted: ‘I would even go as far as having family law solicitors do FDRP rotations once every 2 years to help develop their negotiation skills’.<sup>52</sup>

The ICLC submits all professionals working within the family law system complete mandatory training in *Best Practice when working with LGBTIQ families* and the requirement for this training is ongoing and updated every 2 years to maintain currency.

#### **Question 45**

**Should s 121 of the *Family Law Act* be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?**

The answers to questions 25 are a direct response to the issues from SWOP and are supported by the ICLC.

In sum SWOP suggested any changes to s 121 of the FLA should continue to ensure the privacy of parent’s employment as a sex worker and thus continue to be subject to privacy safeguards.<sup>53</sup>

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<sup>52</sup> Above n, 35.

<sup>53</sup> Ibid.

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## ATTACHMENT A

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