Human Rights Law Centre

Putting children first: Recognising diverse families

Submission to the Australian Law Reform Commission's Review of the Family Law System

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Contact

Anna Brown & Lee Carnie

Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4450
F: + 61 3 8636 4455
E: anna.brown@hrlc.org.au & lee.carnie@hrlc.org.au
W: www.hrlc.org.au

Human Rights Law Centre

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1. Introduction

We welcome the Review of the Family Law System commissioned by the Australian Government and conducted by the Australian Law Reform Commission.[1] The Review is a timely opportunity to review the ongoing relevance and flexibility of our family law system to meet the needs of families who come into contact with it every day. Given the short timeframe for this review, our submission is limited to the human rights of LGBTI people in responding to questions 8, 14, 16, 23 – 25, 35 and 36 in relation to family diversity and the welfare jurisdiction of the Family Court.

Children deserve to be raised and nurtured in a loving, secure and stable family environment. Despite the growing diversity of family structures across Australia, not all children have the security of knowing that their family and relationships will be recognised and given equal status under our laws. Lesbian, gay, bisexual, transgender and intersex (**LGBTI**) people across Australia raise children in loving, committed and stable homes in communities across the country. Unfortunately, in some cases not all of the people involved in the care and raising of a child are recognised as legal parents or carers, depending on how their families were formed. The family law system should allow rainbow families and LGBTI people who live in our communities to have the legal certainty and emotional security available to other families.

There are also cases where what is best for the child may conflict with a parent's wishes. When there is controversy or disagreement about medical treatment for a transgender child, the Family Court will continue to play a role in determining whether a child is *Gillick* competent to consent to treatment and whether the treatment is in the child's best interests. In contrast, the welfare jurisdiction of the Family Court has rarely been involved in medical interventions performed by doctors on intersex children. The limited case law available shows a clear need for stronger oversight of medical decision-making to ensure the human rights of intersex children are fully respected.

We commend the Australian Law Reform Commission for conducting a thorough review of the family law system and welcome any further contact to discuss our recommendations in greater detail.

[1] Australian Law Reform Commission, *Review of the Family Law System: Issues Paper* (March 2018).

2. List of recommendations

Recommendation 1:

We recommend that the Australian Government introduce a federal civil union scheme. In the alternative, we recommend that a process for couples to register and / or dissolve their overseas civil unions be made available under the family law system.

Recommendation 2:

We recommend that the Australian Government work with state and territory governments to allow for same-sex parents to be legally recognised using the terms that most accurately describes their relationship to their child.

Recommendation 3:

We recommend that the ALRC consider how children born through international commercial surrogacy arrangements being raised in Australia can be provided with greater legal certainty about the status of their parents.

Recommendation 4:

We recommend that the Australian Government develop and implement appropriate guidelines and policies to ensure that trans and gender diverse people involved in family court proceedings referred to using their preferred name and terminology that matches their gender identity (see also recommendation 8).

Recommendation 5:

We recommend that the Family Law Act be amended to contemplate a child having more than two legal parents.

Recommendation 6:

We recommend that the Family Court introduce a specialist fast-track list for special medical procedure applications on behalf of transgender children to be determined as quickly as possible before judges who have specialist expertise on gender identity.

Recommendation 7:

We recommend that the Australian Government implement the recommendation of the 2013 Senate Community Affairs Reference Committee's *Involuntary or Coerced Sterilisation of Intersex People in Australia* report.

Recommendation 8:

We recommend that the Australian Government should implement the recommendations of the Royal Commission into Family Violence at a federal level.

Recommendation 9:

We recommend that the Australian Government require professionals working in the family law system to undergo LGBTI cultural awareness training.

3. Improving accessibility for rainbow families

3.1 Relationship recognition

From 2009, after the passage of reforms that amended a number of federal laws, all same sex and different sex de facto couples can be assessed to be in a 'genuine de facto relationship' to access legal and financial entitlements that accompany recognition. It is not necessary for couples to register their relationship in order to access these entitlements, which were previously denied to non-married couples. The scope of these reforms included employment, workers' compensation, tax concessions, social security entitlements, veterans' entitlements, health care costs, family law, superannuation, aged care, and migration laws.

The 'decoupling' of marriage from financial and legal entitlements in 2009 meant that de facto same-sex couples in Australia already have access to the financial and legal benefits available to different sex de facto couples, and almost all the benefits to which married couples are entitled. As a result, the legal significance of marriage equality for obtaining legal protections and entitlements was less relevant in Australia than in other countries.

In 2017, the *Marriage Amendment (Definitions and Religious Freedoms) Act 2017* (Cth) allowed the same legal certainty and protections for loving couples whose marriages were not legally recognised in Australia, or who were denied access to marriage because they did not fit the definition of 'a man and a woman'.

Almost all states and territories in Australia have established relationship recognition schemes for same-sex couples to officially register their relationship for legal purposes, with the exception of Western Australia and the Northern Territory. The federal government recognises these state and territory civil unions for the purposes of federal entitlements. However, recognition of civil unions by other states and territories and other countries is limited and differs between states and territories.

The main benefits of relationship recognition are to avoid the evidentiary hurdles of providing the existence of a de facto relationship by providing certainty of legal recognition, at least in the couple's home state. For example, in cases where a member of the couple has died and their body has not been returned to their partner, or concerns over a partner being refused access to visit their loved one in hospital in a medical emergency.

As relationship recognition is also available for non-romantic relationships in at least one state jurisdiction (for example, relationships between a person with a disability and their carer), civil unions or civil partnerships provide a clear distinction and acknowledgement that the relationship involves an ongoing commitment based on love and a shared intention to share a life together as a couple. Queensland and the ACT offer couples the option of civil partnerships and civil unions, respectively, whereas the remaining states have described their schemes simply as providing for relationship registration. As relationship recognition laws differ between states and territory, they provide a patchwork of legal protection which is difficult for most members of the general public to understand.

All couples who marry overseas and then separate can now apply for divorce in Australia. However, there is a small but significant number of couples who entered into international civil unions and who cannot dissolve these unions in Australia because there is no legal avenue available. This issue has a disproportionate impact on same-sex couples because they were more likely to take up civil union options when marriage in various countries was only available to different-sex couples.

Introducing a federal civil union scheme would provide for uniform relationship recognition for all loving couples and ensure that couples who entered into civil unions overseas can be recognised across Australia. Civil unions are an important form of legal recognition for couples who do not wish to marry to have the certainty of having their relationship legally recognised.

Recommendation 1:

We recommend that the Australian Government introduce a federal civil union scheme. In the alternative, we recommend that a process for couples to register and / or dissolve their overseas civil unions be made available under the family law system.

3.2 Recognition of parents in rainbow families

There has been increasing recognition of the role of rainbow families in Australian society. Our laws and our courts increasingly recognising the diversity of families.

Rainbow families include children being raised by a single parent, couple, or three, four or more parents, or carers. There are often complex caring arrangements for children being raised by step parents, separated families, children in foster care or permanent care, children who are adopted, or children living across two or more primary homes. Some rainbow families include children conceived through assisted reproductive technology, and other families may include donors and / or surrogates who helped create them, either through altruistic surrogacy in Victoria or through interstate or international surrogacy arrangements.

(a) Recognition of same-sex parents

The federal family law system interacts with state and territory laws which regulate access to assisted reproductive treatment and surrogacy. The Northern Territory does not permit same-sex couples to start a family using assisted reproductive treatment or altruistic surrogacy, and Western Australia does not permit all same-sex couples to access altruistic surrogacy.

States and territories in Australia recognise a woman who carries a child and her female partner as the parents of a child born into a same-sex headed family, but the language used to describe these relationships is not always available without discrimination: :

- In New South Wales, Tasmania and Western Australia, two same-sex parents may choose whether to be recognised as mother and mother, or parent and parent.
- In the Northern Territory, one parent can be recognised as mother, birth mother or parent and the other parent can be described on the birth certificate as other parent, 2nd parent, 2nd mother or parent.
- In Victoria, same-sex parents can be described on the birth certificate as mother and parent, or parent and parent.
- In the Australian Capital Territory, same-sex parents can only be recognised as mother and mother.
- In Queensland, a same-sex couple can only be recognised as mother and parent.
- In South Australia, a same-sex couple can only be recognised as birth mother and co-parent.

In *Arc Dekker*,[2] two mothers brought a case to be recognised as mother and mother on their child's birth certificate. VCAT held that they could not be referred to as mother and mother, but could both be referred to as parents.

There is no requirement that the language on the birth certificate issued under state and territory laws be the same as the language used in the Family Law Act. The latter is concerned with status, not nomenclature.

Recommendation 2:

We recommend that the Australian Government work with state and territory governments to allow for same-sex parents to be legally recognised using the terms that most accurately describes their relationship to their child.

(b) Legal uncertainty for children born through international surrogacy

A number of state and territory jurisdictions have laws with extraterritorial application criminalising couples entering into commercial surrogacy arrangements overseas, and the remaining jurisdictions do not legally authorise such arrangements. As a result, not all parents of children born following an international commercial surrogacy arrangement are legally recognised as such. Parents are also

[2] *Arc-Dekker v Registrar of Births, Deaths and Marriages* [2016] VCAT 1529.

deterred from approaching the Court to achieve legal clarity due to fear of reprisals. While the issue of international commercial surrogacy is not explicitly referred to in the terms of reference for this review, we would encourage the ALRC to consider how the children born into these families can be provided with greater legal certainty about the status of their parents.

Recommendation 3:

We recommend that the ALRC consider how children born through international commercial surrogacy arrangements being raised in Australia can be provided with greater legal certainty about the status of their parents.

(c) Recognition of trans and gender diverse parents

There are also barriers to ensuring that trans and gender diverse parents being recognised in accordance with their affirmed gender during the family law court process. For example, a gender diverse person who gives birth to a child faces limited choice across Australia in how they are described on their birth certificate.

Case study: Transgender mother faces repeated barriers to being treated with respect

The Human Rights Law Centre was approached by Sarah*, who was involved in a parenting dispute in the Family Court. Sarah and Ruth had been married for more than 10 years, and had four children together. When Sarah came out as a transgender woman, this resulted in the end of their marriage.

Sarah and Ruth were unable to agree on parenting arrangements and the matter progressed to the Family Court. Throughout the court process, Sarah was repeatedly referred to as the 'father' of the children. Sarah felt that court staff and report writers, in particular, were unwilling to refer to Sarah using her correct pronouns. As Sarah often dealt with different court staff, she would be forced to repeatedly disclose her transgender status to court staff in public areas.

Sarah believed that the documents filed by Ruth's lawyers repeatedly referred to her former name, gender and pronouns as a sign of deliberate disrespect, which caused her to mistrust Ruth's willingness to mediate in good faith. The mediator's dismissal of Sarah's concerns also led Sarah to believe that her mediator was not acting in an impartial and unbiased way.

Because of the difficulties Sarah faced being recognised, Sarah lost faith in the integrity of the family law process. Her mental health deteriorated and her increasing belief that the court would not allow her to spend time caring for her children led her life to spiral out of control.

Sarah decided not to make a complaint or take any action in relation to her negative experiences, as she wanted to avoid any potential adverse impact on her case.

* Not their real names. We have de-identified this case study to protect our client's privacy.

By relying on legal identity documents, family courts can unintentionally undermine a transgender or gender diverse person's gender identity throughout court proceedings. This can cause serious distress, lead to the party being unable to engage constructively with the court, reduces the person's trust and respect for the family law court process, and can lead to the person playing a less active role in proceedings.

Recommendation 4:

We recommend that the Australian Government develop and implement appropriate guidelines and policies to ensure that trans and gender diverse people involved in family court proceedings referred to using their preferred name and terminology that matches their gender identity (see also recommendation 9).

(d) Recognition of more than two parents

Australia's family law does not recognise families with more than two parents on a birth certificate, although parenting orders under the *Family Law Act 1975* (Cth) can be made in favour of more than two people. Queensland and the ACT expressly prohibit more than two parents being recorded on a child's birth certificate. For example, if a gay man and two lesbians are raising a child together, the partner of the birth mother is generally presumed to be a parent under Australian law and the gay man is the 'donor'.

While we recognise that birth registration is governed by state and territory law, the assumption that a child will only have two legal parents is pervasive throughout the Family Law Act and amendment is required. We note that the 2013 Family Law Council Report recommended that the Family Law Act be amended to recognise more than two parents.[3]

Recommendation 5:

We recommend that the Family Law Act be amended to contemplate a child having more than two legal parents.

3.3 Contested applications for medical treatment for transgender children

For many years, parents of transgender children were required to apply to the Family Court for orders for their children to access medical treatment to affirm their gender.

In the recent case of *Re Kelvin*,[4] the Full Court of the Family Court considered whether stage 2 hormone treatment provided to a transgender teenager was "therapeutic" and overruled its previous approach that had classified the treatment has non-therapeutic, based on medical evidence.

[3] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013).

[4] [2017] FamCAFC 258.

The Court demonstrated in this case that it has begun to incorporate a proportionality type test – weighing up the therapeutic benefits of the treatment against the risks – in its assessment of whether a treatment for a child should be subjected to the court authorisation process. While the HRLC respectfully disagrees with the Full Court's interpretation and application of *Re Marion* in this respect (preferring, instead, the approach of the minority which reflected the submissions made on behalf of our client A Gender Agenda) we accept that this approach represents the most recent articulation of the law by the Full Court of the Family Court.

Since *Re Kelvin,* the case of *Re Matthew*[5] has found that stage 3 treatment for transgender teenagers (surgery) is therapeutic in nature and did not require court approval, as it would significantly reduce the psychological pain and distress that the young person was experiencing as a result of the incongruence between the physical appearance of his breasts and his presentation as male.

Following the recent *Re Kelvin* and *Re Matthew* decisions of the Family Court, special medical procedure applications for medical treatment for transgender children do not require court authorisation except in cases involving controversy (e.g. where a child is the ward of a state or a parent considers that the child is not *Gillick* competent to consent to treatment). This is a positive development for trans young people and their families and will drastically reduce the number of applications which will be considered by the Family Court.

In 2017, Justice Connect's Stage 2 Access project conducted a survey of transgender children who were previously or currently the subject of special medical procedure applications.[6] The young people who responded to the survey provided the following responses:

- 100% of young people felt the process was slow.
- 86% of young people felt the process was difficult for their family.
- 67% of young people would rather the judge make a decision based only on the medical reports instead of someone having to go to court.
- 57% of young people were scared that they would not be allowed to start Stage 2 Treatment.

One young person also voiced their opinion on the legal requirement that both parents be notified of the application: "I feel like its crap that my biological father who I have no contact with has to be informed of this".

We consider that, for the remaining special medical procedure applications for transgender children, the Family Court should streamline their processes and schedule the cases before judges with specialist expertise to adjudicate on these matters.

[5] [2018] FamCA 161.

[6] Justice Connect, *Stage 2 Access Survey Results* (2017).

Recommendation 6:

We recommend that the Family Court introduce a specialist fast-track list for special medical procedure applications on behalf of transgender children to be determined as quickly as possible before judges who have specialist expertise on gender identity.

3.4 Inadequate oversight of medical interventions on intersex children

The reluctance by the Family Court to embrace the treatment of transgender teenagers as therapeutic stands in contrast to the seeming willingness of the Family Court to authorise treatment of intersex children, at much younger ages without the capacity to understand the nature and significance of the treatment in question.

Division 4.2.3 of the Family Law Rules set out the process for applying to the Family Court for a medical procedure. The High Court's decision in *Re Marion* sets out common law limits of parental capacity to authorise medical treatment on behalf of their children. Parents can provide valid consent to medical treatment on behalf of their children where treatment is therapeutic, but not for non-therapeutic treatment. The Court held that court authorisation is required for a medical procedure that requires invasive, irreversible and major surgery and is not for the purpose of curing a malfunction or disease. The Court also recognised in that particular case that sterilising procedures without the person's own consent was a violation that could impact the person's sense of identity, including the risk that the person would perceive themselves as "reduced" or "degraded".

In *Re Marion*, the Court considered that surgery carried out to treat a malfunction or disease should be characterised as therapeutic. The majority recognised that the distinction between therapeutic and non-therapeutic was a difficult one, and there was not an attempt to provide an exhaustive definition. Generally the Courts have deferred to medical opinion on this question.

The small number of special medical procedure applications that have been determined by the Family Court in relation to intersex children have proceeded without a contradictor and allowed treatment to go ahead on the advice of clinicians.

We have identified a small number of medical procedure applications that have been heard by the Family Court involving intersex children. In all but one case, the child was not *Gillick* competent[7] to provide informed consent on their own behalf, but the court nonetheless authorised the medical procedures to occur.

We provide a brief summary of the cases and outcomes below.

- *Re A* (1993) 16 Fam LR 75: The Court held that medical procedures to assign male sex organs to a child born with congenital adrenal hyperplasia to reverse the feminising genital reconstruction surgery conducted in the postnatal period was in his best interests, particularly

[7] The UK case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 sets out a common law test for when a child may consent to medical treatment, but does not establish a test for circumstances in which a parent or guardian may consent on a child's behalf.

considering the risk to A's mental health, identity and self-esteem if the procedures were not performed.

- *Re Lesley* [2008] FamCA 1226: The Court held that a gonadectomy for 4 year old Lesley who was born with 17-betaHSD deficiency was in her best interests to prevent the risk of virilisation and negative serious psychological and social consequences for Lesley, and the increased risk (28%) of cancer developing.
- *Re Sally* [2010] FamCA 237: The Court held that a gonadectomy for 14 year old Sally who was born with 5-alpha reductase deficiency was in her best interests given the significant psychological risks associated with postponing the surgery, including Sally's schooling, ability to form and maintain relationships, self-esteem and behaviour.
- *Re Sean and Russell* (2010) 44 Fam LR 210: The Court held that a gonadectomy was consistent with ensuring 18 month old Russell and three and a half year old Sean's best long term health outcomes given the high likelihood of developing cancers concomitant with Denys-Drash Syndrome.
- *Re Dylan* [2014] Fam CA 969: The Court held that Stage 2 cross-hormone treatment (intramuscular primoteston) for 15 year old Dylan who was born with 11 Beta-hydroxylase deficiency was in his best interests because of the potential for significant psychological and social damage to Dylan if treatment was not undertaken.
- *Re Sarah* [2014] FamCA 208: The Court held that a gonadectomy for 17 year old Sarah who was born with 45X/46XY Turner Syndrome did not require court approval as it was therapeutic, and the treatment was in her best interests as the surgery was minor, non-invasive and not for the purpose of sterilisation.
- *Re Carla* (2016) 54 Fam LR 576: The Court held that a gonadectomy for 5 year old Carla who was born with 17 beta hydroxysteroid dehydrogenase 3 deficiency did not require court approval as it was therapeutic, and the treatment was in her best interests as it was necessary to treat a genetic bodily malfunction.
- *Re Kaitlin* [2017] FamCA 83: The Court held that stage two cross-hormone treatment for 16 year old Kaitlin who was born with hypopituitarism was in her best interests and she was Gillick competent to consent to taking estrogen.

Justice Forrest's decision in *Re Carla* has attracted widespread criticism and caused alarm within the intersex community. The decision reveals the failure of existing legal frameworks and the Family Court to adequately scrutinise and appropriately regulate the treatment of intersex children.

The Court held that the proposed medical treatment (a gonadectomy to be performed on a 5 year old child) was "therapeutic" as it was "necessary to appropriately and proportionately treat a genetic bodily malfunction that, untreated, poses real and not insubstantial risks to the child's physical and emotional health" and indicating that similar cases do not require court authorisation. The judgment does not reveal consideration of the available medical literature about the likelihood of Carla growing up to identify as male. Instead, the evidence in support of the procedure in issue relies on superficial gender stereotyping including observations that Carla "happily wore a floral skirt and shirt with glittery sandals and Minnie Mouse underwear".

The best interests of the child would dictate that any less intrusive available alternative should be preferred. However, Forrest J dismisses the option of monitoring Carla's gonads on the outside of her body without elaboration of his reasons or engaging with the available evidence except to state that it "would be likely to have quite adverse psychological consequences". A weighing of the balance of harms involved in the two options, including the adverse psychological consequences of rendering Carla infertile, is notably absent.

The judgment also refers to a past clitoral recession and labiaplasty performed on Carla at age 3 as a matter of factual record. These surgeries are similarly serious and irreversible with 'feminisation' as their described purpose and with no cancer risk to provide a medical justification. Despite this, the lack of court authorisation is not commented on. This case is a particularly disturbing misapplication of the principles in *Re Marion* and, in our view, should prompt an urgent review of the decisions made by the Family Court in these types of matters.

The HRLC considers that government action is needed to ensure that medical treatment of intersex minors is appropriately regulated and subject to sufficient scrutiny and oversight.

In 2013, the Australian Senate Community Affairs References Committee released its report on the involuntary or coerced sterilisation of intersex people in Australia (**Senate Report**),[8] but implementation of the recommendations across Australia remains extremely limited.

Recommendation 7:

We recommend that the Australian Government implement the recommendation of the 2013 Senate Community Affairs Reference Committee's *Involuntary or Coerced Sterilisation of Intersex People in Australia* report.

3.5 Addressing family violence experienced by LGBTI people

The Victorian Royal Commission into Family Violence's report confirms that existing research suggests that intimate partner violence in LGBTI communities may be similar to the general population, and the level of violence against transgender and intersex people from parents and other family members is particularly high.[9] The Commission recognised that there are distinct forms of family violence affecting LGBTI people which need to be recognised by service providers, and which we consider must be incorporated into the family law system, such as:

- telling a partner they will lose custody of children as a result of being outed;
- using homophobia as a tool of control—for example, through telling a partner they will be unable to gain access to police or other support services because the system is homophobic;

[8] Australian Senate Community Affairs Reference Committee, 'Involuntary or Coerced Sterilisation of Intersex People in Australia - Second Report' (2013) *The Australian Senate Printing Unit Parliament House*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Sec_Report/index.

[9] Victorian Government, *Royal Commission into Family Violence: Report and recommendations* (March 2016) 35.

- telling a partner they deserve the violence because they are lesbian, gay, bisexual, transgender or intersex;
- telling a partner they are not a real woman, man or lesbian, gay or bisexual person;
- disclosing or threatening to disclose HIV status hiding,
- withholding or otherwise preventing a partner from taking medication or treatment such as hormones or HIV medication.[10]

The Commission made recommendations:

- to better understand and respond to family violence in LGBTI communities and how to effectively respond to it;
- to require family violence services to achieve Rainbow Tick accreditation to ensure they provide safe and informed services for LGBTI people;
- for funding for legal resources, community education campaigns, training and advice to specialist family violence services and assistance with obtaining safe accommodation for victims of family violence who cannot remain in their home; and
- to examine the need to clarify anti-discrimination protections to remove any capacity for family violence accommodation and service providers to discriminate against LGBTI people.[11]

These recommendations only apply to the Victorian Government, which leaves LGBTI people experiencing family violence in most states and territories without appropriately trained staff to assist them.

Recommendation 8:

We recommend that the Australian Government should implement the recommendations of the Royal Commission into Family Violence at a federal level.

3.6 Improving understandings of diversity in family law

In order for the family law system to better understand and properly accommodate the needs of LGBTI people, it is essential that family lawyers and independent children's lawyers, family dispute resolution and mediation staff, report writers and judicial officers receive appropriate training about providing LGBTI culturally competent services.

[10] Ibid 145.

[11] Ibid 160 – 162.

Recommendation 9:

We recommend that the Australian Government require professionals working in the family law system to undergo LGBTI cultural awareness training.

4. Conclusion

The terms of reference of the review of the family law system highlight the importance of our family law system adequately recognising the greater diversity of family structures in modern Australian society, and the contemporary needs of families who come into contact with it.

Rainbow families and LGBTI children already exist in our communities – in our workplaces, schools and family courts. While there have been significant improvements, there remains much to be done to ensure that our family law system has the requisite flexibility to cater for the growing diversity of family structures and relationships, and experiences of gender diversity. In addition, there are critical steps to be taken to ensure that the welfare jurisdiction of the Family Court provides adequate oversight for intersex children, while ensuring that transgender children do not face unnecessary barriers or delays in accessing essential medical treatment.