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**Submission to the ALRC Review of the Family Law System**

**Introduction**

I am an Associate Professor at La Trobe Law School, with 15 years of practical and academic experience in family law in Australia and Canada. My research explores the legal recognition of lesbian and single mother by choice families, with a particular focus on legal parentage. I have conducted empirical research with lesbian and single mother families created through assisted reproduction, exploring how they create their families and define the relationships within them. More recently, I have worked on issues related to the relationship between medical treatment for transgender and intersex children and the Family Court’s welfare power.

In this submission, I consider three issues raised by Questions 8 and 16:

1. Improved accessibility to the family law system for LGBTIQ people;
2. Reform of s 60H of Part VII (parentage in the context of assisted reproduction); and
3. Reform of the Family Court’s approach to surgeries on intersex infants and children.

**Question 8: Lesbian, gay, bisexual, transgender, intersex and queer clients – How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?**

Lesbian, gay, bisexual, transgender, intersex and queer people are part of the fabric of Australian society. They have created and been members of families long before marriage equality was introduced. They engage in the family law system as parents, partners, single people, and donors. They parent in couples, alone, and in co-parenting arrangements that may include three or more people. Moving forward, it is imperative that reforms designed to recognize LGBTIQ people and their families do not do so solely through the lens of a dyadic couple (with children). LGBTIQ families are not “the same” as heterosexual families and should not be forced to configure their families to fit normative definitions. While all families and children are entitled to equality, equity demands that the differences found within LGBTIQ families are respected and recognized by the law.

For LGBTIQ to embrace the family law system and feel comfortable within it two changes need to be achieved:

**1.** LGBTIQ people need to know that their differences will be acknowledged and accepted. This requires that from the moment they enter the system, professionals understand that their families may have configurations outside of the nuclear model and that language will need to adapt to respond to this reality. For example, a child may have three or four parents who have co-parented from birth. Or a child may have a known donor who is involved in his or her life, but is not a parent. Two different mothers may have carried siblings, or in the case of “partner IVF” (where one mother’s fertilised egg is gestated by the other mother) one mother may be the birth mother, while the other is the genetic mother.

Case law and research indicate that in the types of circumstances described above, judges and family law professionals often use language that is completely inappropriate to describe the various parties. Donors, even unknown ones, are frequently referred to as the child’s father. Judges routinely distinguish between biological and non-biological mothers and frequently presume that the child is necessarily more attached to their biological mother. In the case of partner IVF, in at least one case the birth mother was referred to as a surrogate and the genetic mother as a donor, despite them being a couple. Judges have also denied or diminished sibling relationships within lesbian families, even in the face of the children’s own evidence, because the children do not have the same biological mother. Until the family law system is able to embrace LGBTIQ families in all their complexity, it will be perceived as unwelcoming of them.

**2.** The second issue that the review must address if LGBTIQ families are to feel welcome in the family law system is section 60H and its interpretation. Section 60H needs to be rewritten to clarify its scope and intent. It needs to provide a definitive and restrictive statement about the legal parentage of children conceived via artificial conception procedures, whether at home or at a fertility clinic and whether the donor is known or unknown. The current trend towards interpreting to 60H as an expansive, rather than restrictive, provision creates enormous uncertainty for LGBTIQ families and conflicts with state law. Recommendations in relation to reforming s 60H are addressed below.

**Question 16: Arrangements for children and family diversity – 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?**

Part VII of the FLA has not kept pace with the changing nature of Australian families. In particular, it fails to meet the needs of LGBTIQ and single mother by choice families who conceive using artificial conception procedures, whether at fertility clinics or at home via self-insemination.

Judicial interpretation of Part VII has also failed to protect intersex infants and children from unnecessary surgeries.

Both of these issues will be addressed below.

**1. Part VII and LGBTIQ and single mother by choice families**

The discussion below will focus on reform of s 60H, which addresses legal parentage where an artificial conception procedure was used. In its current form, s 60H does not adequately respond to the diversity of LGBTIQ families and fails to even acknowledge families created by single women, who are now the biggest users of donated sperm via fertility clinics in Australia. More broadly, many of the provisions in Part VII presume that only heterosexual, two parent families engage with the family law system.

**a. Interpretation of s 60H**

Section 60H needs to be rewritten to clarify its scope and intent. Most importantly, it needs to provide a definitive and restrictive statement about the legal parentage of children conceived via artificial conception procedures, whether at home or at a fertility clinic and whether the donor is known or unknown. At present, some judges are interpreting s 60H as a restrictive statement of legal parentage,[[1]](#footnote-1) while the majority are interpreting it as expansive.[[2]](#footnote-2) Those who favour the latter are looking to other sections in Part VII to determine parentage, many of which are based in biology. This is extremely problematic for families who conceive via assisted reproduction, where one parent will often not have a biological tie to the child. As the Family Law Council noted in its report on parentage and the FLA in 2013, the expansive approach also produces an inconsistency between the FLA and state laws, creating enormous uncertainty for people who conceive using assisted reproduction.[[3]](#footnote-3)

**b. Recognition in s 60H of single mothers by choice**

At present, un-partnered women who conceive using artificial conception procedures (often referred to as “single mothers by choice” or SMCs) are not recognized at all in section 60H. Donors to lesbian and heterosexual couples are expressly excluded from legal parentage by s 60H, but no identical provision applies when the woman is un-partnered. The result is that sperm donors to SMCs, whether known or unknown (ie, a donor from a fertility clinic), may be legal parents. Single women are now the biggest users of donated sperm in Australia, surpassing lesbian and heterosexual couples in 2015.[[4]](#footnote-4) Failing to acknowledge their existence in s 60H and the FLA more broadly is a serious omission that results in an inconsistent application of the law depending on the child’s family structure.

A small number of SMCs have come before the Family Court to resolve disputes with known sperm donors.[[5]](#footnote-5) In these cases, judges have determined that s 60H does not apply to SMCs because they do not fit into any of the scenarios addressed by the section. Applying the expansive approach to 60H, judges have turned to definition of “parent” in Part VII more generally, holding that the donor is a parent because Part VII treats biology as the determining factor in parentage and, because of the use of terms such as “both” and “two”, all children must have two parents.[[6]](#footnote-6) In *Re Mark*, Brown J acknowledged that it was possible that the expansive approach to s 60H might result in an unknown donor being declared a legal parent,[[7]](#footnote-7) particularly where the mother is un-partnered. The Family Law Council in its report of parentage and the FLA in 2013 also raised this concern.[[8]](#footnote-8) The prospect of unknown donors being legal parents has serious ramifications for SMCs and their children (and donors), particularly in Victoria, where parents can apply for “early access” to their sperm donor’s identity, with his consent, through the Victorian Assisted Reproductive Treatment Authority’s Central Register. Victorian SMCs are now frequently meeting their child’s “unknown” donor while their child is still a minor, often unaware they putting themselves at legal risk.[[9]](#footnote-9)

**c. Judicial and professional attitudes towards non-biological lesbian mothers**

In a co-authored review I conducted of intra-lesbian disputes heard by the Family Court since 2008, it was found that even where non-biological lesbian mothers are declared to be legal parents under 60H, they are not always treated as equal parents.[[10]](#footnote-10) Some significant findings from the study were:

1. In cases where the presumption of equal shared parental responsibility applied, an order for ESPR was made in approximately half of the cases, a figure roughly in line with ESPR outcomes for the general family courts population.[[11]](#footnote-11) However, in cases where ESPR was not ordered, sole responsibility was always awarded to the biological mother, underlining the prioritisation of the biological tie and reinforcing the co-mother’s exclusion. Furthermore, in four of the seven cases where ESPR was ordered, both women had given birth to at least one child, suggesting that ESPR was ordered in those cases at least in part because both women shared a biological tie to at least one of the children.
2. Despite often stating that biology was irrelevant to their decision-making, many of the decisions about **parenting time** suggest an underlying preference for birth mothers. In 13 of the 16 cases in which both women were held to be legal parents and parenting orders were made, the birth mother was awarded more, and usually substantially more, time with the children. Equal time was awarded in only one case, while four decisions resulted in orders that could be described as “shared care”. In all but one of the shared care cases, both women had carried at least one child, mirroring the finding thatESPR is most likely to be ordered where both women are birth mothers. By contrast, in cases where ESPR was *not* ordered, non-biological mothers who were not also birth mothers (though they were legal parents) fared poorly, with the majority receiving no parenting time at all.
3. Even when a non-biological mother is declared a legal parent, she is not always added to the child’s birth certificate. Given that birth certificates are a statement of parentage for many day-to-day purposes, these decisions amount to serious discrimination against non-biological lesbian mothers. For example, in *Halifax v Fabian*, Cronin J rejected the non-biological mother’s application to be added to her child’s birth certificate on the grounds that he “[failed] to see what benefit” the change would provide the child, despite acknowledging that Ms Fabian, the birth mother, was actively trying to “distance” the child from Ms Halifax and had already made unilateral decisions about his health care. In *Lusito & Lusito* [2011] FMCAfam 55, Purdon-Sully FM denied the non-biological mother’s birth certificate application on the grounds that the child, who the mother had parented for 10 years, may want to later pursue a relationship with his anonymous sperm donor. In an extraordinary paragraph, Purdon-Sully FM states that denying the non-biological mother’s application was “inclusive” of the child’s donor:

“[The argument that the non-biological mother’s name should not be added to the child’s birth certificate] was not based on reasons of exclusion but inclusion – to enable [the child] to be consulted at an appropriate time about an issue that may have future consequences for him. It is open to [the child] and his biological father to pursue a relationship after he turns 18 years.”[[12]](#footnote-12)

Purdon-Sully FM’s reference to the child’s “biological father” – who is actually an anonymous donor who has no legal relationship to the child and is under no obligation to reveal his identity, let alone develop a relationship with the child – as someone who might appropriately appear on the child’s birth certificate is bizarre. Purdon-Sully FM’s diminishing of the co-mother’s *actual* relationship with her son, while valorising the *hypothetical* relationship the boy might have with his anonymous donor sometime in the future, suggests that some members of the judiciary continue to find it difficult to fully embrace the commitment to non-biological parentage that s 60H(1) represents.

1. Sibling relationships between children of LGBTIQ couples were often diminished by judges where the children had different birth mothers or different donors. Judges frequently described kinship in terms of genetic quantum, such as “half-sibling”, “non-biological sibling” and “biological half-brother”, or by only ever using the terms “sisters” or “siblings” in quotation marks. In *Halifax v Fabian*, where the two children who had been raised together but had different birth mothers, Cronin J undermined the sibling relationship altogether, stating that though “the children…love each other” and “consider themselves to be sisters” they “are not”.[[13]](#footnote-13) When discussing the tensions between each of the children’s important relationships, the consequences of Cronin J’s denial of the sibling relationship are revealed:

In a case in which two parents have competing views about who should care for their children or child, the best interests principle also gives rise to a conflict between the biological attachment between a mother and child and the non-biological relationship between two young children *who see themselves as sisters*. In this case, the evidence suggests and I so find, the relationship between the biological mother and her child is much stronger and more important than the relationship between the “sisters”.[[14]](#footnote-14)

Decisions like *Halifax* fail to recognise the significance of the children’s understanding of their family relationships, denying them in favour of a purely biological re-construction of the family.

**d. Legal recognition of multiple parent families**

Some LGBTIQ families choose to create co-parenting relationships in which they share parenting across two households. The most common scenario is a lesbian couple who co-parent with a gay couple, where one of the men is the child’s biological father. It is recommended that the review consider extending parentage to three or four parents in order to recognise the small but significant number of families who choose such arrangements. The ALRC should consider the multiple parent model available in the province of British Columbia, Canada,[[15]](#footnote-15) though it is recommended that a more expansive model be adopted that does not rely so heavily on biological ties.[[16]](#footnote-16)

The benefits of recognising multiple parent families are:

1. It allows for children’s lived reality to be reflected in their legal parentage.
2. It recognizes the non-conjugal co-parenting relationships created by LGBTIQ families.
3. It can assist in clarifying when known donors are *not* intended to be legal parents.

It is recommended that any multiple parent model include the following features:

1. The option of creating three or four parent families where the additional parents need not share a biological relationship with the child (eg, the donor *and* his/her partner can be legal parents).
2. That the decision to co-parent be evidenced by written agreement prior to conception.
3. That birth certificates allow for the naming of multiple parents.
4. That the FLA include an irrebuttable presumption that if parties have *not* entered into a multiple parent agreement, a donor is not a legal parent.

**2. The Family Court’s welfare power and intersex children**

The recent Family Court decision of *Re Carla[[17]](#footnote-17)* held that it was not necessary for the parents of an intersex child to secure Family Court approval prior to conducting life-altering genital surgery.[[18]](#footnote-18) In *Re Carla,* the parents of a five-year-old intersex child brought an application to the Family Court requesting that the Court authorise them to consent to surgery to remove their child’s gonads, as well as “any further or necessary and consequential procedures to give effect to her treatment” as recommended by her medical team. Carla had already undergone genital surgery without Family Court approval when she was four to “feminise [her] external appearance”.[[19]](#footnote-19) The parents also asked the Court to determine whether it was necessary for them to have applied for Court authorisation before the surgery could be performed. Forrest J held that the surgery, which would render Carla infertile, was in her best interests. It was also Forrest J’s view that it was in Carla’s best interests that this irreversible, life-altering surgery be performed “before she is able to understand the nature of the procedure”.[[20]](#footnote-20) Finally, Forrest J held that the Court’s approval was *not* required to authorise doctors to perform the gonadectomy on the basis that the treatment was medically necessary and thus therapeutic. This conclusion is in stark contrast to all recent statements on the issue, whether from the Australian Senate, the United Nations, or Human Rights Watch

In its 2013 report on involuntary or coerced sterilisation of intersex people, the Australian Senate concluded that “in light of the complex and contentious nature of the medical treatment of intersex people”, oversight of medical-decision making is required for those who are too young to provide informed consent.[[21]](#footnote-21) It was recommended that all proposed medical interventions for intersex children require authorisation from either a state civil or administrative tribunal or the Family Court of Australia.[[22]](#footnote-22) It was further recommended that “normalising treatment” – that is, non-medically necessary surgeries that are designed to “enhance” the visual presentation of a child’s genitalia – be deferred until the child can give “fully informed consent”.[[23]](#footnote-23) The Senate’s recommendations are consonant with a recent joint statement of four United Nations Committees, which recommended that “States must, as a matter of urgency, prohibit medically unnecessary surgery and procedures on intersex children.”[[24]](#footnote-24)

It is recommended that the ALRC consider how the welfare power operates in relation to intersex children. In particular, it is recommended that all proposed medical interventions on intersex children be treated as “special medical procedures” requiring court authorisation. This is because much of the treatment is not therapeutic, there is a high chance of the decision being incorrect (both in terms of the chosen gender of the child and whether the child would choose to have the surgery once they were old enough to consent), the consequences of an incorrect decision are grave, and because there is a significant chance that the interests of the child may be in conflict with those of his or her parents.

By way of clarification, court authorisation ***should not*** be necessary for transgender children seeking access to medical treatment. Hormone treatment for transgender children is therapeutic and part of internationally recognized treatment protocols. It is therefore not a special medical procedure.

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1. Re Patrick [2002] FamCA 193. [↑](#footnote-ref-1)
2. Groth & Banks [2013] FamCA 430; Re Mark [2003] FamCA 822. [↑](#footnote-ref-2)
3. Family Law Council, Report on Parentage and the Family Law Act (2013) at 43. [↑](#footnote-ref-3)
4. VARTA Annual report, 2017. [↑](#footnote-ref-4)
5. # Groth & Banks [2013] FamCA 430; Masson & Parsons and Anor [2017] FamCA 789.

   [↑](#footnote-ref-5)
6. Groth & Banks [2013] FamCA 430 at 15. [↑](#footnote-ref-6)
7. Re Mark [2003] FamCA 822 at 81. Brown J stated, the expansive approach to s 60H “might lead to the imposition of responsibilities or entitlements on a class or classes of people who previously considered themselves immune”. [↑](#footnote-ref-7)
8. Family Law Council, Report on Parentage and the Family Law Act (2013). [↑](#footnote-ref-8)
9. For a discussion of the family law implications of early contact with sperm donors, particularly for SMCs, see Fiona Kelly & Deborah Dempsey. 2016. “The family law implications of early contact between sperm donors and their donor offspring” *Family Matters,* vol. 98: 56-63. [↑](#footnote-ref-9)
10. Fiona Kelly, Hannah Robert & Jennifer Power. 2017. "Is there still no room for two mothers? Revisiting lesbian mother litigation in post-reform Australian family law". *Australian Journal of Family Law*, vol 31, no. 1: 1-26. [↑](#footnote-ref-10)
11. Rae Kaspiew, Rachel Carson, Jessie Dunstan, Lixia Qu, Briony Horsfall, John De Maio, Sharnee Moore, Lawrie Moloney, Melissa Coulson & Sarah Tayton, *Evaluation of the 2012 Family Violence Amendments: Court Outcomes Project*, Australian Institute of Family Studies, Melbourne, 2015 at Table 3.25. [↑](#footnote-ref-11)
12. *Lusito & Lusito* [2011] FMCAfam 55 at 131. [↑](#footnote-ref-12)
13. Ibid at 18 & 35. [↑](#footnote-ref-13)
14. Ibid at 28. [↑](#footnote-ref-14)
15. Family Law Act, SBC 2011, c 25, s 30. [↑](#footnote-ref-15)
16. For a discussion and critique of the British Columbia multiple parent model see Fiona Kelly, “Multiple Parent Families under British Columbia’s New Family Law Act” (2014) 47 *UBC Law Review* 565-596. [↑](#footnote-ref-16)
17. *Re Carla* [2016] FamCA 7*.* [↑](#footnote-ref-17)
18. For a critique of the decision in *Re Carla* see Fiona Kelly & Malcolm Smith, “Should court authorisation be required for surgery on intersex children? A critique of the Family Court decision in Re Carla” (2017) 31(2) Australian Journal of Family Law 118. [↑](#footnote-ref-18)
19. Ibid[2]. [↑](#footnote-ref-19)
20. Ibid [30]. [↑](#footnote-ref-20)
21. Senate Community Affairs Reference Committee, Parliament of Australia, *Involuntary or coerced sterilisation of intersex people in Australia,* (2013) xiii (Recommendation 5). [↑](#footnote-ref-21)
22. Ibid xiii (Recommendation 6). [↑](#footnote-ref-22)
23. Ibid (Recommendation 3). [↑](#footnote-ref-23)
24. UN Committee against Torture*,* theUN Committee on the Rights of the Child, the UN Committee on the Rights of People with Disabilities, and the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, ***End violence and harmful medical practices on intersex children and adults, UN and regional experts urge*, (24 October 2016) <**<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>**>.**  [↑](#footnote-ref-24)