



Gay and Lesbian Rights Lobby

**AUSTRALIAN LAW REFORM COMMISSION:
Review of the Family Law System**

13 November 2018



Gay and Lesbian Rights Lobby

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ABOUT THE GAY & LESBIAN RIGHTS LOBBY

The NSW Gay and Lesbian Rights Lobby ("GLRL" or "the Lobby") welcomes the opportunity to comment as part of the Australian Law Reform Commission's ("ALRC") Review of the Family Law System. The GLRL has a proud history of advocating on behalf of gay men, lesbians and their families. Indeed, this year the GLRL celebrates its 30th year of being an advocate for our community. In those 30 years, the GLRL has established strong ties to the community, consulting with our members and hearing their stories, many of them describing incidents of legal inequality, particularly in area affecting their families. In the past 30 years, the GLRL has been comprised of volunteers who have lived these experiences too. We draw on our history in making this submission.

For 30 years the GLRL has been the leading organisation for lesbian and gay rights in NSW. Established in 1988, our mission is to achieve substantive legislative and social equality for lesbians, gay men and their families. We work closely with bisexual, transgender and intersex organisations, and all Members of Parliament to advance the rights of our communities in NSW.

The GLRL has a strong history in legislative reform. In NSW, we led the process for the recognition of same-sex de facto relationships, which resulted in the passage of the *Property (Relationships) Legislation Amendment Act 1999* (NSW) and subsequent amendments. The GLRL contributed significantly to reforms introducing an equal age of consent in NSW for gay men in 2003 and the equal recognition of same-sex partners in federal law in 2008.

The rights and recognition of children raised by lesbians and gay men have also been a strong focus in our work for over ten years. In 2002, we launched Meet the Parents, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the reform recommendations outlined in our 2003 report and *Then ...The Brides Changed Nappies*. The major recommendations from our report were endorsed by the NSW Law Reform Commission's report, *Relationships* (No. 113), and were enacted into law under the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW).

In 2010, we successfully lobbied for amendments to remove discrimination against same-sex couples in the *Adoption Act 2000* (NSW), and in 2013 we were instrumental in lobbying to secure the passage of anti-discrimination protections for LGBTI Australians, through amendments to the *Sex Discrimination Act* (1984). We also campaigned successfully for the removal of the "homosexual advance" defence from the *Crimes Act 1900* (NSW) and the extinguishment of historical homosexual sex convictions, both in 2014.

Respectively, we formed part of the National Round Table of organisations that campaigned successfully for changes to the *Marriage Act 1961* and for the introduction of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017*.

In 2018 we successfully lobbied for amendments to proposed consequential amendments to the *Status of Children Act 1996* (NSW) and provisions relating to registering a change of sex within the *Births, Deaths and Marriages Registration Act 1995* in response to the 2017 changes to the *Marriage Act 1961*. Alongside this we were also able to assure and replace the current protected attribute of homosexual with 'sexual orientation' to now be inclusive of bisexual people, mending the protected attribute of transgender to the more inclusive term 'gender identity' and introducing the new



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protected attribute of 'intersex status' to bring vilification laws up to par with Commonwealth anti-discrimination protections and sexual orientation, gender identity and intersex (SOGII) definitions.

Today, we turn our attention to the remaining difficulties our community faces in relation to the complex of state and federal family laws.

This submission can be made public and we would be pleased to make ourselves available to you at any stage to discuss the matters therein. Such a discussion and dialogue is, in our view, critical.

INTRODUCTION

While acknowledging the wide scope of the Terms of Reference, the Lobby has determined to restrict its submission to 3 keys areas affecting our community. The areas are:

1. Domestic violence and family violence laws;
2. Adoption and foster parenting laws; and
3. Surrogacy laws.

The Lobby has considered the Discussion Paper released by the ALRC and welcomes many of the proposals. The following submission provides our reasons for emphasising certain proposals over others. A list of our recommendations are contained at the end of the submission.

Further, the Lobby embraces the submission of Surrogacy Australia for which we are grateful to have seen in its draft form.

Terms of Reference

On 27 September 2017, the then Attorney-General referred the following matters to the ALRC:

- the appropriate, early and cost-effective resolution of all family law disputes;
- the protection of the best interests of children and their safety;
- family law services, including (but not limited to) dispute resolution services;
- family violence and child abuse, including protection for vulnerable witnesses;
- the best ways to inform decision-makers about the best interests of children, and the views held by children in family disputes;
- collaboration, coordination, and integration between the family law system and other Commonwealth, state and territory systems, including family support services and the family violence and child protection systems;
- whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children, and the opportunities for less adversarial resolution of parenting and property disputes;
- rules of procedure, and rules of evidence, that would best support high quality decision-making in family disputes
- mechanisms for reviewing and appealing decisions
- families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness;
- the underlying substantive rules and general legal principles in relation to parenting and property;
- the skills, including but not limited to legal, required of professionals in the family law system;



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- restriction on publication of court proceedings;
- improving the clarity and accessibility of the law; and
- any other matters related to these Terms of Reference.

The Lobby has read and considered the Terms of reference and now makes the following submission.

PART A: DOMESTIC VIOLENCE AND FAMILY VIOLENCE LAWS

From a legal standpoint, the definition of family violence is ‘gender neutral’ and broad. According to section 5(1)(a) of the Family Violence Protection Act 2008, family violence is defined as a “behaviour by a person towards a family member of that person if that behaviour is—physically or sexually abusive; or emotionally or psychologically abusive; or threatening; or coercive; or in any other way controlling or dominating, [which] causes that family member to feel fear for the safety or wellbeing of that family member or other person”. As such this Act does not discriminate against LGBTIQ people directly or indirectly¹.

However, other important and related law does. The *Equal Opportunity Act 2010*, for example, includes the exemption for organisations to discriminate on the basis of a person’s “religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary ... to comply with the doctrines, beliefs or principles of their religion”.

This creates barriers for LGBTIQ victims accessing family violence support services as a large majority of family support and domestic violence services are non-government faith-based organisations². These services focus on a “heterosexual model”, focusing on male perpetrators and female victims. However, a third of LGBTIQ people experience family or domestic violence³. Indeed, many members in the LGBTIQ community felt a lack of support when facing violence and a lack of adequate support services to deal with this complex issue⁴.

We strongly recommend that the Australian Government remove exemptions from anti-discrimination legislation that affects family law and disadvantages LGBTIQ individuals accessing support and trauma services in the family violence space. This issue can be broadened out to the out of home care sector and foster care system, where faith-based organisations do not facilitate adoption to same-sex parents.

¹ Horsley, P (2015) Family Violence and the LGBTI Community, Submission to the Victorian Royal Commission into Family Violence, Gay and Lesbian Health Victoria, Australian Research Centre in Sex, Health & Society, La Trobe University, Melbourne

² Calton, J., Cattaneo, L. B., Gebhard, K. T. (2015). Barriers to help seeking for lesbian, gay, bisexual, transgender, and queer survivors of intimate partner violence. *Trauma, Violence and Abuse*.

³ <https://www.abc.net.au/news/2015-08-11/1-in-3-lgbti-australians-in-an-abusive-relationship/6688244>

⁴ ACON 2011, One size does not fit all – Gap analysis of NSW domestic violence support services in relation to gay, lesbian, bisexual, transgender and intersex communities’ needs, Sydney.



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PART B: ADOPTION AND FOSTER PARENTING LAWS

The number of children in out of home care is continually rising. The government is trying to find ways to address this issue; meanwhile there are 60,000 children in out of home care and 15,000 on a wait list to be assessed by a caseworker⁵

Currently, under law, non-government organisations providing foster-care, out-of-home care and adoption services are allowed to discriminate against prospective parents. This is clearly discriminatory and serves only to suppress the number of prospective parents. Taking NSW as an example, the Department of Family and Community Services, Barnardos, Anglicare and CatholicCare facilitate the majority of adoption and foster care arrangements in New South Wales. Anglicare and CatholicCare openly discriminate against prospective parents on the basis of sexuality or gender as stipulated in their brochures and service referrals⁶

We strongly recommend that the Commonwealth Government remove exemptions from anti-discrimination legislation that affects family law and disadvantages LGBTIQ parents and the children in our out of home care and foster care system.

PART C: SURROGACY LAWS

The need for standardisation and uniformity is also evidence in the area of surrogacy. The Lobby endorses the Discussion Paper's proposal to move surrogacy provisions out of the *Family Law Act 1975* (Cth) ("FLA") and, in doing so, rationalise and harmonise the applicable law in this area. In particular, the Lobby recommends a uniform national approach either through a single Federal statute that would cover the field and supersede the state schemes (which would require a referral of power from the states insofar as non-married couples are concerned), or a uniform law implemented in all states and territories.

The Lobby supports uniformity, certainty and simplicity in this area. The Lobby is concerned with a disparate and complex web of regulation across states in a context in which LGBTIQ families are increasingly accessing, or are interested in accessing, reproductive technologies and surrogacy arrangements.

Where possible, the Lobby submits that domestic altruistic surrogacy should be encouraged and facilitated. However, current state laws facilitate this to differing standards and many do not guarantee the intended parents any certainty in having their parentage recognised from birth or within a short time frame thereafter.

⁵ <https://www.abc.net.au/news/2018-10-24/nsw-government-adoption-law-overhaul-proposed/10422140>

⁶ Rainbow Families, Submission to NSW Local Adoption Inquiry, 95, p. 6.



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The FLA defers to state laws on the parentage of children born of a surrogate.⁷ The majority of state law on this topic, and the FLA, presume the surrogate and their partner to be the parents of the child, regardless of the biological parenthood of the child.⁸

The state schemes now provide mechanisms by which parentage orders in favour of the intended parents can be obtained, which in turn triggers s 60HB of the FLA for the purposes of that Act. However, while the NSW scheme (and other schemes such as the Victorian scheme) provide such a mechanism, applications for parentage orders in favour of the intended parents cannot generally be made until 30 days after the birth of the child (and no more than 6 months after the birth). The parentage order is an order of the Supreme Court of NSW.⁹ There are a suite of conditions that must be proven before the making of a parentage order, including the mandatory condition that the surrogacy agreement be a pre-conception surrogacy agreement,¹⁰ and conditions requiring independent legal advice and counselling for the intended parents and the surrogate.¹¹

There are a number of opportunities for significant difficulties to arise for LGBTIQ couples accessing parentage orders through the state schemes. These include ambiguity in whether the surrogate's independent legal costs are able to be reimbursed without infringing the prohibition on commercial surrogacy arrangements, and the extended and ambiguous inquiry to be undertaken where there is a post-conception arrangement.

Looming larger than those difficulties, however, is delay between the birth of a child and the commencement of the child living with their intended parents, and the recognition that the intended parents are the legal parents of that child. The 30 day delay before parents can make an application for a parentage order is just the tip of the iceberg. Applications are required to be made to the state Supreme Courts, courts which deal often with the most serious matters and are accordingly slow and expensive courts to access. Further, while the proceedings are non-adversarial and uncontroversial, the Court retains a duty to require evidence to be provided which proves careful compliance with the detailed scheme set down by the acts, and then the court must carefully examine the whole of the evidence. Taking into account typical backlogs, costs and the natural delay occasioned by collating this evidence in an admissible form, it is a reasonable estimate (supported by the experiences of LGBTIQ couples) that the process can take in excess of a year to complete.

This delay occasions instability, uncertainty (particularly in regard to overseas travel, formal documents etc) and angst. The problem is particularly pronounced for gay male couples in which neither party is the birth mother or her partner.

Worse still, the problem is not justified. There is no data to suggest that surrogates are likely to insist

⁷ *Family Law Act 1975* (Cth), s 60H and 60HB.

⁸ See e.g. *Status of Children Act 1996* (NSW), ss 9, 14 and *FLA* s60H.

⁹ *Surrogacy Act 2010* (NSW), s 16.

¹⁰ *Surrogacy Act 2010* (NSW) s 24.

¹¹ *Surrogacy Act 2010* (NSW) ss 36 and 37.



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on parentage following the expensive, long and rigorous process to which they're subjected under the state schemes. Data collected by Surrogacy Australia firmly hold that surrogates repeatedly report not wanting to be named on birth certificates or as legal parents. Insofar as the delay is justified by a sense that surrogates are vulnerable in the process, the preconditions to parentage orders alleviate these concerns.

The current delay is, however, having a negative effect on health outcomes in Australia and abroad. The Lobby notes research conducted by Surrogacy Australia in 2013 (Published in the MJA 1 September 2014) that found the main reason for not proceeding with altruistic surrogacy was the perceived length of the process. A key reason for the lengthy process is the long lead time to establishment of parental responsibility post-birth. Such delays encourage Australians to engage in offshore surrogacy, often times through commercial arrangements. Offshore surrogacy has a higher chance of being commercial and occasioning health difficulties for surrogates and children.

The problem of delay and uncertainty are more pronounced where international surrogacy is engaged. The preconditions to the parentage orders in state schemes practically require a surrogate to be resident in the relevant state (e.g. by way of the counselling, legal advice requirement, and independent counsellor's report requirements). In many cases, this will render international surrogacy beyond the ambit of the state schemes. The Family Court of Australia has expressly recognised that in the case of children born of surrogacy or reproductive technologies, the Court has no power to make a the necessary order.¹² This would mean that a child born of international surrogacy in a context that fails to meet the state schemes is left in an incredibly uncertain and volatile position, potentially with a family unable to legally make important decisions for the child (e.g. schooling). This problem is particularly troubling should a complication such as separation arise.

The Lobby submits that this is a wholly unsatisfactory position for Australian family law.

Accordingly, for domestic altruistic surrogacy the Lobby recommends that a uniform scheme be developed by which parentage orders are pre-authorised so long as the arrangement meets the current rigorous pre-conditions. Ideally these preconditions would be uniform across the states. This recommendation is based on the model implemented in British Columbia, Canada and as taken up by recommendations of the Surrogacy UK Working Group on Surrogacy Law Reform. In terms of international surrogacy arrangements, the Lobby recommends that the FLA be amended to empower the Family Court to make orders that would close the loophole leaving children born of offshore surrogacy arrangements vulnerable.

The Lobby further reiterates its support for the facilitation of domestic altruistic surrogacy, noting that research suggests overseas surrogacy is associated with multiple pregnancies, premature births and adverse health outcomes.

¹² *Shaw & Lamb and Ors* [2018] FamCAFC 42 (13 March 2018); *Bernieres and Anor & Dhopal* [2017] FamCAFC 180 (1 September 2017).



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Notwithstanding that position, the Lobby recommends that criminal sanctions for commercial surrogacy and advertising of surrogacy be abolished in favour of a regulatory scheme.

At present, some Australian jurisdictions impose criminal sanctions (including up to two years' imprisonment¹³) for those who enter into commercial surrogacy arrangements, whether domestic or international, with the definitions being wide enough to punish the intended parents and the surrogate. Further, criminal sanctions are available to punish either intended parents or surrogates if they pay to advertise for a surrogate or to be a surrogate. The Lobby recommends that the ALRC give careful consideration to "covering the field" in this area and abolish criminal sanctions in favour of a regulatory regime. The use of the criminal law in this area has the potential to disproportionately affect the LGBTIQ community.

The Lobby submits that the criminalisation of paid advertising is illogical. While the Lobby accepts that such advertisements cannot extend to commercial surrogacy, the Lobby submits that there is no reason to criminalise the advertisement of altruistic surrogacy. State laws at present are capable of capturing online community groups regarding surrogacy for which members pay a fee. Providing information and linking willing surrogates and couples for altruistic surrogacy should not be a criminal act.

The recommendation is made more compelling in the absence of a national register for willing surrogates and families seeking a surrogate.

The criminal law is a blunt tool and inapt for a context in which vulnerable children will be born. Indeed, there is no proof that criminalisation has worked to deter overseas commercial surrogacy arrangements. The Lobby could find no examples of prosecutions for commercial surrogacy arrangements. In a model with appropriate incentives for altruistic surrogacy, supervision of surrogacy arrangements and counselling, there is no need to continue a policy of criminalisation. Some ambiguity exists surrounding the reimbursement of expenses of surrogates. The Lobby submits this ambiguity in the light of criminal sanctions makes domestic surrogacy unattractive. In line with preferring domestic surrogacy to offshore surrogacy, the criminal sanctions should be removed and the extent of permissible reimbursement should be clarified.

The aims of criminalisation simply aren't being achieved; however the consequences are undermining Australian families. At best, to avoid detection or punishment, parents who engage in commercial surrogacy do not seek formalised parenting or adoption, or permission is not given by surrogates, undermining family stability and causing undue uncertainty, stress and trauma. At worst, criminalisation places children and families at risk of significant financial penalties or imprisonment, both of which undermine stability and safety. These consequences stand in stark contrast to the likely consequences of a scheme that provides incentives for altruistic domestic surrogacy or sanctions for commercial surrogacy which are not criminal in nature. Criminalisation is not in the best interest of

¹³ *Surrogacy Act 2010 (NSW)* s 8.



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children and families and must be abolished.

As such we strongly recommend that the Australian Government work to collaborate internally with partner governments and standardise surrogacy laws across the country in the best interests of parents and children. Indeed as a government that is signatory to the Hague Convention on the Protection of Children and the United Nations Convention on the Rights of the Child, the emphasis should be on keeping children safe with a family or parent/s.

RECOMMENDATIONS

1. That the ALRC recommend the removal of exemptions from anti-discrimination legislation that affects family law and disadvantages LGBTIQ individuals accessing support and trauma services in the family violence space;
2. That the ALRC recommend the removal of exemptions from anti-discrimination legislation that affects family law and disadvantages LGBTIQ parents and the children in our out of home care and foster care system;
3. That the ALRC recommend a re-enactment or significant modification of the *Family Law Act 1975 (Cth)*;
4. That as a part of the re-enactment or modification of the *Family Law Act 1975 (Cth)*, laws pertaining to surrogacy are removed and placed into a single piece of stand-alone legislation that dictates a uniform national approach to surrogacy;
5. That the proposed uniform national approach to surrogacy facilitate altruistic domestic surrogacy as much as possible by removing delay-causing processes, particularly by allowing parentage orders only to be made after the birth of a child;
6. That the proposed uniform national approach to surrogacy ensure that children born of international arrangements be able to be the subject of parentage orders in the Family Court of Australia;
7. That a national database of willing surrogates and couples looking for surrogates be established;
8. That criminal sanctions for paid surrogacy advertising be abolished; and
9. That criminal sanctions be abolished from any regulatory framework relating to individuals entering into commercial surrogacy arrangements.

Any questions are welcome and can be directed to Lauren Foy and James Bolster, Co-convenors of NSWGLRL, on 0421 447 026 or 0439 425 296 and convenor@glrl.org.au

Kind regards,



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