

16 November 2018

Australian Law Reform Commission
PO Box 12953
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By Email: familylaw@alrc.gov.au

Re: Submission on the Review of the Family Law System

The LGBTI Legal Service ('the Service') thanks the Australian Law Reform Commission (ALRC) for considering our submission in its family law review.

The Service is a non-profit, community-based legal service that began operation on 7 July 2010. The former Justice of the High Court of Australia the Hon Michael Kirby AC CMG, officially launched the service on 1 December 2010.

The Service was established in response to the recognised need of the LGBTI community to gain access to justice through the provision of legal and other welfare services, and to have its interests represented in public dialogue. The Service includes a Law Reform division that advocates for law reform and human rights across Australia. We work closely with other LGBTI community organisations, and express our particular support for submissions made to the ALRC by Rainbow Families Australia, the National LGBTI Health Alliance, the Law Council of Australia and the Queensland Law Society.

Why are we making a submission?

The ALRC's review represents the first comprehensive review of the family law system since the Family Law Act commenced in 1976. There has been profound social and cultural change in Australia since that time. Perhaps one of the most marked shifts, particularly in recent years, is the increasingly diverse composition of the Australian 'family unit'. LGBTI Australians can now marry, and parenthood is more than ever both an aspiration and reality for members of our community. The 2011 Australian Census indicated an 85.3% increase in the number of children living in same-sex couple families compared to 2001. A 2012 study found 22.1% of LGBTI respondents had children or step-children, and close to 40% desired more children.¹

The family law system needs reform to better meet the needs of contemporary Australian families, including LGBTI families, and this is explicitly recognised in the review's terms of reference. The LGBTI community face unique social and legal challenges when navigating the family law system, which is grounded in a rigid heteronormative paradigm. Among these challenges are a lack of culturally capable services, inadequate dispute resolution processes, and outmoded parenting, property, 'welfare' and domestic and family violence laws.

¹ Australian Bureau of Statistics (ABS), 2013; Luke Gahan, 'Separated Same-Sex Parents' Experiences and Views of Services and Service Providers' (2017) 17(2) *Journal of Family Strengths*; W Leonard et al, 'Private lives 2: The second national survey of the health and wellbeing of GLBT Australians' *Australian Research Centre in Sex, Health and Society* 1.

Our submission

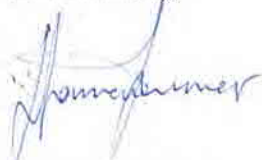
In this paper we discuss the proposals put forward in the ALRC Discussion Paper released on 2 October 2018, focussing on the areas which in our observation are most relevant to the LGBTI community. At a high level, we submit that:

- Proposed information services and material include LGBTI-tailored content regarding parentage, adoption, custody and domestic and family violence;
- Proposed working groups comprise representatives from the LGBTI community, such as our Service, in addition to health and family service providers;
- Safe and culturally appropriate Family Hubs and dispute resolution services be developed in consultation with LGBTI legal, social and health service providers;
- All professionals engaged in the system receive the training and ongoing support necessary to provide culturally-competent services to the LGBTI community – this is particularly important in relation to Court triage and adjudication processes;
- Reform relating to children accommodate the diverse family structures in which young Australians live, the diverse roles adults have in many children’s lives, the similarly diverse range of sibling relationships children have, and of course, the fact that many young people are themselves sex and gender diverse;
- Further research and reform relating to domestic and family violence account for the particular barriers and forms of abuse experienced within the LGBTI community;
- Reform relating to the Family Court’s welfare jurisdiction proceed only after extensive engagement with the trans, intersex and broader LGBTI community. We recommend to the ALRC a recent submission to the Australian Human Rights Commission made jointly with Intersex Human Rights Australia and other organisations; and
- Oversight and review mechanisms be implemented to ensure the ongoing legal and cultural responsiveness of the Australian family law system to the whole community.

The following pages set out our response to the Discussion Paper in more detail. We would be willing and appreciative of the opportunity to speak with the ALRC further in relation to our submission and the broader family law review.

This submission was prepared by Harrison Turner, with the assistance of Rose Catherine Barrett, Julian Ladd and Odette Malpas-Haussmann.

Yours faithfully,



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Education, awareness and information

The uptake of family relationships services is of course effected by the accessibility, affordability and responsiveness of the services to the needs of families. We identify a number of challenges applicable not only to the LGBTI community, but to the Australian community at large:

- Poor regional and non-metropolitan coverage;
- A failure to ensure prospective service-users are aware of services (this being particularly relevant to minority communities like LGBTI families)
- Culturally and socially inappropriate services, along with actual and perceived discrimination of certain communities when using services.

Services and service providers must be able to respond to all parts of the community. Services tailored to the particular needs of the LGBTI community are desperately needed, particularly in regional centres.

ALRC proposal 2-2

[A] national education and awareness campaign should be developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTI and disability organisations and be available in a range of languages and formats.

We support this proposal but encourage direct community consultation in addition to engagement with community organisations. Family law can be complex for laypeople to navigate and, for example, when issues of parentage are concerned, can be even more so for LGBTI families.² The diversity of LGBTI families demands a well-tailored information package. We recommend the following topics as a starting point:

- Alternative dispute resolution;
- Court process and procedure;

² The term 'LGBTI families' will be used throughout this paper to represent a family unit with parents and/or children who identify as part of the LGBTI community.

- Parentage (particularly for trans and intersex parents);
- Adoption services;
- Custody arrangements;
- Availability of support services;
- Family and domestic violence; and
- How to access further information.

The educational material should be available in a variety of formats, both hard copy and electronic. An online resource with educational materials and a discussion forum, similar to those used by organisations like Beyond Blue, would offer a safe place for LGBTI individuals to share experiences and provide support to one another during family disputes.

Resources developed for the 'general public' should reflect the diversity of Australian families.

The education and awareness campaign should be promoted well in advance of releasing educational material and should be promoted broadly, in both rural and city centres. This could be done through local news media, family law service providers and other support services. Further, the Government should ensure that the campaign is adequately promoted within the LGBTI community. Community service providers such as our Service can assist here.

ALRC proposal 2-5

The Australian Government should convene a standing working group with representatives from government and non-government organisations from each state and territory to: advise on the development of a family law system information package to facilitate easy access for people to clear, consistent, legally sound and nationally endorsed information about the family law system; and review the information package on a regular basis to ensure that it remains up-to-date.

We support the creation of an ongoing working group comprised of government and non-government organisations from each state and territory. The working group should include members of the LGBTI community. The working group would be well positioned to contribute to ongoing system reform.

ALRC proposal 2-8

The family law system information package should be: developed with reference to existing government and non-government information resources and services; developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTI and disability organisations; and user-tested for accessibility by community groups including children and young people, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities, LGBTI people and people with disability.

We recognise the value of a centralised, reliable and authoritative source of information that is easily accessible to the public. There should be a peak information service (such as the National Enquiry Centre), which can also triage inquiries from particular cohorts of the Australian community (for example, LGBTI people).

Parenting and property

ALRC proposal 3-1

The *Family Law Act 1975* (Cth) and its subordinate legislation should be comprehensively redrafted with the aim of simplification and assisting readability, by removing provisions defining parentage for the purposes of Commonwealth law to separate legislation.

We support this proposal. The scope of the *Family Law Act 1975* (Cth) should be narrowed so that provisions defining parentage for the purposes of Commonwealth laws are contained in a separate Parentage Act. The word ‘parent’ is not extensively defined in the *Family Law Act 1975* (Cth).³ Further, the recognition of parentage within Part VII of the *Family Law Act 1975* (Cth) is based on a traditional family structure, where the child’s parents are either biological or adoptive.⁴ The parentage provisions within the *Family Law Act 1975* (Cth) are not inclusive of LGBTI families.

Many children may either have one, two or more LGBTI parents, and of course may themselves be LGBTI.⁵ Provisions within the Family Law Act are not inclusive of diverse family structures. For instance, section 69P refers to the recognition of parenthood resulting from marriage through a child born to both a woman and a man. Limitations such as these may deny parenthood to transgender men who may anatomically be able to be pregnant and give birth to a child.⁶

Further, children of LGBTI families may have a combination of biological, gestational, social and adoptive parents.⁷ Parenthood may transpire through assisted conception processes, donor agreements or surrogacy.⁸ Children conceived in this way may not fall within the current ambit of Part VII of the *Family Law Act 1975* (Cth), which appears to be restricted to either biological or adoptive parents.

Redrafted provisions should provide a clear approach, allowing consistent decision making for all children regardless of family structure and means of conception. The substantive content of the provisions defining parentage should be outlined in a manner that reflects the diversity of LGBTI families. A Commonwealth Act, developed in consultation with the states and territories, could also harmonise parenting laws across Australia (including in respect of surrogacy).

Getting advice and support

Services have been and continue to be framed around a heterosexual family model. The lack of specific LGBTI, gender-diverse and non-binary services, combined with long wait lists, has the practical consequence of forcing members of the LGBTI community to turn for support to valuable but imperfect

³ See the definition of parent in s 4 of the *Family Law Act 1975* (Cth), which only provides a definition in relation to child who has been adopted.

⁴ See *In the Marriage of Tobin* (1999) 150 FLR 185, [42]-[45]; *Aldridge v Keaton* (2009) 235 FLR 450, [22]; *Donnell & Dovey* (2010) 237 FLR 53, [92].

⁵ Naomi Cahn and June Carbone, ‘Custody and visitation in families with three (or more) parents’ (2018) 56(3) *Family Court Review* 399.

⁶ Rosie Charter et al, ‘The transgender parent: experiences and constructions of pregnancy and parenthood for transgender men in Australia’ (2018) 19 *International Journal of Transgenderism* 64.

⁷ Felicity Bell (ed), ‘Children and parenting: Who is a parent and why does it matter?’ (2015) 5 *Family Law Review* 177.

⁸ Lea Moalemi, ‘Blood will not justify my relation: Same-sex couples and their battle for standing as de facto parents’ (2018) 56(3) *Family Court Review* 490; Fiona Kelly, Hannah Robert and Jennifer Power, ‘Is there still no room for two mothers? Revisiting lesbian mother litigation in post-reform Australian family law’ (2017) 31 *Australian Journal of Family Law* 1; Adiva Sifris, ‘The Family Courts and parentage of children conceived through overseas commercial surrogacy arrangements: A child-centred approach’ (2015) 23 *Journal of Law and Medicine* 396; Jenni Millbank, ‘Resolving the dilemma of legal parentage for Australians engaged in international surrogacy’ (2013) 27 *Australian Journal of Family Law* 135; Adiva Sifris, ‘Known semen donors: To be or not to be a parent’ (2005) 13 *Journal of Law and Medicine* 230.

sources, such as the internet and social media.⁹ Online resources, including social media, serve an important function but cannot be relied upon to provide quality information.

A 'peak' service provider could establish and maintain safe, reliable online forums for LGBTI and other Australians seeking advice and support.

ALRC proposal 4-4

Local service providers, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTI and disability organisations, specialist family violence services and legal assistance services, including community legal services, should play a central role in the design of Families Hubs, to ensure that each hub is culturally safe and accessible, responsive to local needs, and builds on existing networks and relationships between local services.

We support the creation of Families Hubs. Consultation with LGBTI organisations and the community is imperative. Families Hubs must establish professional relationships with local support services, particularly to build referral networks for the LGBTI and other sections of the community.

Dispute resolution

ALRC proposal 5-9

The Australian Government should work with providers of family dispute resolution services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTI and disability organisations to support the further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters.

The LGBTI Legal Service supports this proposal. Our experience is that there are deficiencies in the present family dispute resolution system.¹⁰ Professionals and organisations working within the system may not understand the law as it applies to LGBTI families, for example with respect to parenting.¹¹ Further, there may be a lack of understanding of the experiences of LGBTI families engaged in dispute resolution processes, or the impact of non-inclusive delivery models.¹²

The Australian Government should work with LGBTI organisations to support and further develop culturally appropriate and safe models of family dispute resolution for LGBTI families. Dispute resolution services must be provided by professionals and organisations that understand the law as it applies to LGBTIQ families and their experiences.

ALRC proposal 5-10

The Australian Government should work with providers of family dispute resolution services, private legal services, financial services, legal assistance services, specialist family violence services and

⁹ Rainbow Families Victoria, *Submission to the Australian Law Reform Commission Family Law System Review* (May 2018) Rainbow Families < <http://www.rainbowfamilies.org.au/wp-content/uploads/2018/07/Rainbow-Families-Victoria-ALRC-Family-Law-System-Review-2018.pdf>>.

¹⁰ Luke Gahan, 'Separated same-sex parents' experiences and views of services and service providers' (2017) 17(2) *Journal of Family Strengths* 1.

¹¹ *Ibid.*

¹² *Ibid.*

Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTI and disability organisations to develop effective practice guidelines for the delivery of legally assisted dispute resolution (LADR) for parenting and property matters. These Guidelines should include the application of approaches to support effective participation for LGBTI families.

We support this proposal and recommend the Australian Government work with LGBTI organisations to develop effective practice guidelines for the delivery of legally assisted dispute resolution. The right guidelines will encourage effective participation by LGBTI families. Again, guidelines must accommodate non-binary family structures, use inclusive language, and account for the impact of prejudice and discrimination. Guidelines likewise need to respond to particular manifestations of domestic and family violence in the LGBTI community.¹³

Adjudication

There has been a shift over time in many jurisdictions in how the legal system handles family law disputes, particularly those involving children. Australia's family dispute resolution regime is more collaborative and interdisciplinary than it has been in the past, but there is room for improvement. A particular challenge is the proliferation of statutory and other parties in the dispute process.

ALRC proposal 6-2

The triage process should involve a team-based approach combining the expertise of the court's registrars and family consultants to ensure initial and ongoing risk and needs assessment and case management of the matter, continuing, if required, until final decision.

This team should include the children's advocate or separate legal representative (per proposals 7-8, 7-10) and a cultural competency advisor as relevant to the parties in the matter.

ALRC proposal 6-3

Specialist court pathways should include: a simplified small property claims process; a specialist family violence list; and the Indigenous List.

We support this proposal and do not consider a dedicated LGBTI List to be necessary at this point in time. That said, we emphasise the importance of well trained, informed and supported staff (as outlined and discussed elsewhere in this submission).

ALRC proposal 6-12

The Australian Government should ensure that all family court premises, including circuit locations and state and territory court buildings that are used for family law matters, are safe for attendees, including ensuring the availability and suitability of: waiting areas and rooms for co-located service providers, including the extent to which waiting areas can accommodate large family groups; safe waiting areas and rooms for court attendees who have concerns for their safety while they are at court; private interview rooms; multiple entrances and exits; child-friendly spaces and waiting rooms; security staffing and equipment; multi-lingual and multi-format signage; remote witness facilities for

¹³ Samantha Hardy, Olivia Rundle and Damien W Riggs, 'Working with trans or gender diverse, intersex and/or non-heterosexual clients: advice for mediators' (2017) 28 *Australasian Dispute Resolution Journal* 35; Linda Fisher, 'Working with gay and lesbian partners – process and practice issues' (2004) 15 *Australasian Dispute Resolution Journal* 273.

witnesses to give evidence off site and from court-based interview rooms; and facilities accessible for people with disability.

We support this proposal, which will help ensure vulnerable members of the community are protected from harm and discrimination. Safe spaces should be available for all court attendees, including secluded spaces where necessary. A dedicated support person with a comprehensive understanding of issues faced by the LGBTI community should be available at every family court building. Time-limited appointments could be used to manage service demand.

All family court premises should feature LGBTI-inclusive facilities, including bathrooms.

Children in the family law system

Participation

It is incumbent on the family law system to provide a degree of protection for children from emotional, developmental and physical harm. The family law system in Australia is not culturally safe and responsive to children's needs because, among other reasons, it fails to appreciate and understand the needs of LGBTI parents and children.

The Family Court is required by both Australian and international law to hear the views of children in family proceedings.¹⁴ There is a strong body of evidence to suggest that the most harmful aspect of the family law system to children is being exposed to parental conflict.¹⁵ This of course has significant ramifications on the child's ability to develop and adjust in a healthy way.¹⁶ There is a tension between the need to hear a child's views in relation to the proceedings and the need to protect their wellbeing by minimising exposure to conflict. Conflict resolution should be a primary consideration when contemplating how the Australian Family Law system can better support children.

In addition to the outcomes of a given dispute, there can be a considerable impact on the mental health and wellbeing of LGBTI families when hetero-normative values and beliefs about child-rearing, parenting practices, family forms, and the roles of individuals within a family unit inform professional and system-level responses.¹⁷ To improve the experience of participants in the Family Court system, an environment must be created in which all people (including children) can express their opinions as their true and fullest self, whilst their emotional wellbeing is protected.

Advising children of outcomes

There is nothing in the current legislation requiring any party to communicate the outcome of court processes to children. The UN Committee on the Rights of the Child stated that children should be given feedback about how their views have been considered in decisions made.¹⁸ In practice, the approach taken to keep children informed of decisions made by the court, is to generally have the independent

¹⁴ *Convention on the Rights of the Child*, opened for signature on 20 November 1989, (entered into force 2 September 1990) 1557 UNTS 3, Art 9 and 12. *Family Law Act 1975* (Cth) s 60CC(3)(a).

¹⁵ Jennifer McIntosh, 'Enduring Conflict in Parental Separation: Pathways of Impact on Child Development' (2014) 9 *Journal of Family Studies*, 63-80.

¹⁶ Michael Lamb, Kathleen Sternberg & Ross Thompson, 'The effects of divorce and custody arrangements on children's behaviour, development and adjustment' (1997) 35(4) *Family and Conciliation Courts Review*, 393-404.

¹⁷ Gahan, Luke 'Separated Same-Sex Parents' Experiences and Views of Services and Service Providers' (2017) 17(2) *Journal of Family Strengths*.

¹⁸ Megan Mitchell, 'Ever Seen or Heard? The Voice of Children in Family Law' (Speech delivered at the 16th National Family Law Conference, Sydney) 8 October 2014.

children’s lawyer (or other appropriate person) the outcome to the child. This approach is not always consistent and therefore could be seen not to be in the child’s best interests. We recommend that it be a requirement of the court, considering all relevant circumstances of the case, if and how this is done in an age appropriate manner.

Information sharing

Our experience indicates there is currently a lack of communication between the agencies and individuals working with children involved in Family Court proceedings.

Section 121 of the *Family Law Act 1975* (Cth) restricts information sharing, which risks the loss or alteration of the child’s views due to confusion or disengagement. We support measures to enable information sharing between relevant agencies in the best interest of the child.

The “best interests” standard

The fundamental principle in both international and Australian law concerning children is that all decisions made and actions taken concerning a child should be in their “best interests”.

The principle that of the “child’s best interests” is derived from Article 3(1) of the United Nations Convention on the Rights of the Child:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The “best interests” threshold is a widely used legal basis for policy and decision making involving incompetent persons such as children.¹⁹ There are, of course, many ways to think about the child’s best interests. A child’s interest is multi-dimensional and includes continuity, emotional security, structure and safety. This points to the primary challenge with the “best interest” concept, it’s indeterminacy.

Despite its unpredictability, the “best interests” standard carries a number of obvious advantages. First, it relies on individual determinations for specific family situations, not broad generalisations about what is good for all children or the average child. Secondly, it focuses decision making on the child. Thirdly, it allows flexibility in decision-making.²⁰

We are of the view that the “best interests” approach is a generally desirable one in relation to children, and supports the suggestion to amend this to “safety and best interests”. Such a definition could help clarifying the scope and function of the “best interests” concept.

Education, awareness and training should be offered to employees of legal and support services in the family law sphere to better understand what “best interests” considerations might apply in cases involving LGBTI individuals.

¹⁹ L. Kopelman, ‘The Best-Interests Standard as a Threshold, Ideal and Standard of Reasonableness’ (1997) 22(3) *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine*, 271-289.

²⁰ Katherine Bartlett, ‘Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child’s Best Interests’, (1999) 35(3) *Willamette Law Review* 467.

In this vein, the LGBTI Legal Service adopts the approach taken by Rainbow Families Victoria in defining a “child’s rights and best interests” to include consideration for the:²¹

- Diverse family form the child has been raised and lives in,
- Diverse roles adults take on in the child’s life - beyond definitions defined purely by biology or constrained by only having the option of listing two parents on a birth certificate;
- Range of sibling relationships and relationships with extended family members that a child may have, regardless of biology or whether siblings live in one home or across many homes;
- Need to be culturally-responsive to the child, both as a member of the LGBTIQ, gender diverse and non-binary communities and of being part of a rainbow family within those communities; and
- The fact that a child or young person may themselves be LGBTI.

Guidance reflecting these considerations would be very valuable for professionals and service-providers.

ALRC proposal 7-8

Children involved in family law proceedings should be supported by a ‘children’s advocate’: a social science professional with training and expertise in child development and working with children. The role of the children’s advocate should be to: explain to the child their options for making their views heard; support the child to understand their options and express their views; ensure that the child’s views are communicated to the decision maker; and keep the child informed of the progress of a matter, and to explain any outcomes and decisions made in a developmentally appropriate way.

The LGBTI Legal Service supports the creation of a ‘children’s advocate’, when careful consideration is undertaken by the court considering all relevant circumstances of the case before it. However, we emphasise the need for the children’s advocate to have some education and training about the unique experiences faced by LGBTI children and children from LGBTI families.

ALRC Proposal 7-10

The *Family Law Act 1975* (Cth) should make provision for the appointment of a legal representative for children involved in family law proceedings (a ‘separate legal representative’) in appropriate circumstances, whose role is to: gather evidence that is relevant to an assessment of a child’s safety and best interests; and assist in managing litigation, including acting as an ‘honest broker’ in litigation.

We are generally supportive of a separate legal representative for children but caution against the proliferation of statutory parties given it may become overwhelming for children. As such, the “appropriate circumstances” referred to in the proposal should be prescribed in the legislation to prevent this and also to minimise unnecessary expenditure and provide certainty to the Courts and to parties. Appropriate circumstances certainly includes instances of alleged family violence.

²¹ Rainbow Families Victoria, *Submission to the Australian Law Reform Commission Family Law System Review* (May 2018) <<http://www.rainbowfamilies.org.au/wp-content/uploads/2018/07/Rainbow-Families-Victoria-ALRC-Family-Law-System-Review-2018.pdf>>.

ALRC Proposal 7-13

There should be a Children and Young People’s Advisory Board for the family law system. The Advisory Board should provide advice about children’s experiences of the family law system to inform policy and practice development in the system.

We support this recommendation and emphasise the importance of ensuring diversity in Board Membership. Members who identify as part of the LGBTI community should be appointed to this Board, to ensure that policy is appropriately informed and effective practice development can occur.

Other recommendations

We recommend the following steps be taken to ensure that children’s experiences of participation in the court process can be improved:

- Prepare family reports at an early stage of proceedings so that the court has information about the family dynamic at the beginning of the proceedings;
- Facilitate information sharing between the courts and other agencies involved in the family court process to minimise the burden on children;
- Provide specialist training to family consultants and the independent children’s lawyer about the experiences and challenges faced by LGBTI parents and children;
- Provide funding for consultants to act as contact points between the court, the independent children’s lawyer and the family for the duration of the proceeding and for a period of time after the conclusion of the proceeding; and
- Ensure the family consultant works collaboratively with the independent children’s lawyer for the duration of the proceeding, to ensure the views of children are taken into account.

Domestic and Family Violence

ALRC proposal 8-1

The definition of family violence in the *Family Law Act 1975* (Cth) should be amended to: clarify some terms used in the list of examples of family violence and to include other behaviours (in addition to misuse of systems and processes (Proposal 8– 3)) including emotional and psychological abuse and technology facilitated abuse; and include an explicit cross-reference between the definitions of family violence and abuse to ensure it is clear that the definition of abuse encompasses direct or indirect exposure to family violence.

We agree with this proposal, but would add that the definition should be couched in gender neutral language to encompass the experiences of LGBTI individuals who experience family violence. The research proposed under Proposal 8-2 below should include references to technology facilitated abuse.

The proposal to broaden and clarify the definition of family violence and its scope to be consistent with greater societal understanding of family violence is an important issue to address the experiences faced by LGBTI families and children in these situations.

The current definition of family violence in the *Family Law Act 1975* (Cth) is couched in different terms to the Queensland legislation and is broad enough to include certain members of the LGBTI community. However, several of the examples under this definition include references to “his” or “her” rather than

gender-neutral terminology. We suggest these be amended encompass the experiences of transgender and intersex individuals through the use of gender-neutral terminology and the removal of references to “his” and “her”.

The experiences of LGBTI families in relation to family violence have largely been ignored or marginalised from a policy perspective and under-researched from an academic and practical point.²² Aside from the general examples included in the definition of family violence, which are applicable to LGBTI families, there are a number of more community-specific examples of violence and abuse. These must be captured in the definition of family violence.

We support proposals to align state and federal legislation. There are several reforms that would better capture the particular forms of abuse experienced in the LGBTI community. A commonly cited example of such abuse, which is outlined in *Domestic and Family Violence Protection Act 2012* (Qld), is ‘outing’ as a form of emotional and psychological abuse. “Emotional and psychological abuse” is defined in the Queensland legislation as including “threatening to disclose a person’s sexual orientation to the person’s friends or family without the person’s consent”.²³ Two other aspects of family violence in the LGBTI community relate to the disclosure of a person’s HIV status, or withholding medication or hormones from a person.²⁴ These forms of abuse should be captured in Commonwealth laws.

We support proposals to align definitions of ‘assault’ and ‘repeated derogatory taunts’ with state legislation.

ALRC proposal 8-2

The Australian Government should commission research projects to examine the strengths and limitations of the definition of family violence in the *Family Law Act 1975* (Cth) in relation to the experiences of Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, and LGBTI people.

We agree with this proposal. As noted in the ALRC Discussion Paper,²⁵ the experiences of the LGBTI community are not well understood in the context of family violence and efforts need to be made to address this. Government-commissioned research could help address this gap.

ALRC proposal 8-3

The definition of family violence in the *Family Law Act 1975* (Cth) should be amended to include misuse of legal and other systems and processes in the list of examples of acts that can constitute family violence in s 4AB(2) by inserting a new subsection referring to the ‘use of systems or processes to cause harm, distress or financial loss’.

²² Monica Campo and Sarah Tayton, ‘Intimate partner violence in lesbian, gay, bisexual, trans, intersex and queer communities’ (Report, Australian Institute of Family Studies, 2015) 2.

²³ *Domestic and Family Violence Protection Act 2012* (Qld) s 11.

²⁴ ACON, ‘Tales From Another Closet: *Personal stories of domestic violence in same-sex relationships*’ (Report, ACON, 2010) 18; Brisbane domestic Violence Advocacy Service and Healthy Communities, *Queer Without Fear: Domestic and Family Violence in Lesbian, Gay, Bisexual and Transgender (LGBT) Relationships* (Booklet, Brisbane domestic Violence Advocacy Service and Healthy Communities, 2013); Gay and Lesbian Health Victoria and Our Watch, ‘Primary Prevention of Family Violence Against People from LGBTI Communities - An Analysis of Existing Research’ (Report, GLHV and Our Watch, 2017) 49.

²⁵ Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) 190 [8.38].

We submit that that this should also form part of the research commissioned by the Australian Government and should include consideration of how systems abuse impacts particular sections of the Australian community, including LGBTI families.

The welfare jurisdiction

ALRC question 9–1

In relation to the welfare jurisdiction:

Should authorisation by a court, tribunal, or other regulatory body be required for procedures such as sterilisation of children with disability or intersex medical procedures? What body would be most appropriate to undertake this function?

In what circumstances should it be possible for this body to authorise sterilisation procedures or intersex medical procedures before a child is legally able to personally make these decisions?

What additional legislative, procedural or other safeguards, if any, should be put in place to ensure that the human rights of children are protected in these cases?

A tribunal should have oversight of approval for intersex medical procedures only where there is an issue with capacity, and with a particular view to ensuring sterilisation and other invasive and profoundly affecting procedures progress only where medically necessary. It is critical to understand here that ‘medical necessity’ is a widely contested concept, and extensive further engagement with the intersex community is necessary before the ALRC finalise any reform proposals.

There has been some concern regarding therapeutic, as opposed to non-therapeutic procedures, with the former being open for parents to approve without Court oversight.²⁶ Therapeutic procedures are those administered to appropriately and proportionally prevent, remove, or ameliorate “a cosmetic deformity, a pathological condition or a psychiatric disorder”. Non-therapeutic procedures those which are “inappropriate or disproportionate”.²⁷ This does not provide sufficient clarity to guide decision-makers, and creates a major risk for children.

We agree with the view expressed by Intersex Human Rights Australia that “[a]ny non-deferrable interventions which alter the sex characteristics of infants and children proposed to be performed before a child is able to consent on their own behalf” should require authorisation from an independent body.²⁸ We are of the view that the authorisation should be provided by a tribunal except where there is a matter of “particular legal complexity” in which case the matter should be heard in the Family Court.²⁹ This assessment should be made by a tribunal in the first instance, with advice from all professionals engaged in the relevant person’s treatment and welfare.

One of the key recommendations of the Senate Standing Committee for Community Affairs in their *Inquiry into the Involuntary or Coerced Sterilisation of Intersex People in Australia* was that “all proposed intersex medical interventions for children and adults without the capacity to consent should

²⁶ *Re Carla* [2016] FamCA 7; *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218.

²⁷ *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 269.

²⁸ Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) 232 [9.100].

²⁹ Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or Coerced Sterilisation of Intersex People in Australia* (2013) 99 [5.29].

require authorisation”.³⁰ We support this recommendation, but emphasise this should apply only in cases of medical necessity. As noted by the Australian Human Rights Commission, greater emphasis needs to be placed on the capacity of the child to consent.³¹ Where there is no need for the procedure (i.e. where it is not medically necessary), there is no need for any tribunal to make a decision; and treatment should be deferred until the child has the capacity to make the decision for themselves.

A skilled and supported workforce

ALRC proposal 10-3

The identification of core competencies for the family law system workforce should include consideration of the need for family law system professionals to have: cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTI people.

We strongly support this proposal. Studies indicate that LGBTI families experience a lack of understanding when engaging with family law professionals.³² This can be addressed by including cultural competency as a core requirement.

The introduction of cultural competency as a core requirement should extend to education and training that fosters a greater understanding of non-binary family forms, inclusive language use, the impact of prejudice and discrimination and a greater understanding of the forms family violence that may manifest.³³ The LGBTI Legal Service Inc. believes that cultural competency is key to ensuring a skilled and supportive workforce that is capable of serving the needs of LGBTI families.

ALRC proposal 10-14

The Family Law Act 1975 (Cth) should be amended to provide that in parenting proceedings involving an Aboriginal or Torres Strait Islander child, a cultural report should be prepared, including a cultural plan that sets out how the child’s ongoing connection with kinship networks and country may be maintained.

ALRC question 10-6

Should cultural reports be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child?

We consider that cultural reports should also be mandatory in all parenting proceedings involving children in LGBTI families.³⁴ Presently, a lack of awareness has resulted in a misunderstanding of the role of parents in LGBTI families, such as misusing the word of ‘father’ or referring to anonymous

³⁰ Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) 233 [9.105]; Senate Standing Committee for Community Affairs, Parliament of Australia, *Inquiry into the Involuntary or Coerced Sterilisation of Intersex People in Australia* (2013) 99 [5.30].

³¹ Australian Law Reform Commission, *Protecting the Human Rights of People Born with Variations in Sex Characteristics in the Context of Medical Interventions*, Consultation Paper (2018) 17 [86].

³² Gahan, above n 14.

³³ See Emily Kazyak et al, ‘Law and family formation among LGBQ-parent families’ (2018) 56(3) *Family Court Review* 364 and Amanda K Baumle, ‘The practice of law with LGBT-parent families’ (2018) 56(3) *Family Court Review* 423 for discussion that illustrates the importance of cultural competency.

³⁴ Australian Law Reform Commission, *Review of the Family Law System*, Discussion Paper No 86 (2018) 262 [10.104].

donors as ‘fathers’ of children.³⁵ A specialist report outlining the needs of children in LGBTI families would provide courts exercising family law jurisdiction, with a better understanding of the nature and form of LGBTI families. This approach would ensure the best interests of the child are paramount in all parenting proceedings, regardless of that child’s particular family structure.

System oversight and reform evaluation

A family law system that continues to respond to the needs of the entire Australian community can only be realised if an enduring oversight and reform mechanism is put in place. There is no easy way to pinpoint each and every weakness in a complex area of law that has remained largely unchanged for some 40 years, and it is even more difficult to accurately predict how the strains on the system will change over time. The *Family Law Reform Act 1995* generated significant confusion about the state of the law, with reports of conflicting interpretations being provided by judges, lawyers, counsellors, parents and Centrelink staff.³⁶ Consequences of this type must be considered when developing future reform, which again reiterates the need for careful oversight and review.

ALRC proposal 12-8

The Australian Government should develop a cultural safety framework to guide the development, implementation and monitoring of reforms to the family law system arising from this review to ensure they support the cultural safety and responsiveness of the family law system for client families and their children. The framework should be developed in consultation with relevant organisations, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, and LGBTI organisations.

We emphasise the importance of a strategic framework to guide and underpin and measure the effectiveness of any reform efforts. The framework should seek to define a set of core principles for the cultural safety of the Australian Family Law system. This framework should be developed in consultation with LGBTI organisations and the community.

Further measures to ensure responsive reform

The LGBTI Legal Service Inc. recommends the commission of a report on the effectiveness of any reform efforts, akin to that produced by the University of Sydney with respect to the Family Law Reform Act 1995. This would provide for hard, scientific data to be gathered that could be used to assess and evaluate reform efforts, which would then benefit and inform further reform.

³⁵ See *Lustio & Lustio* [2011] FMCAfam 55.

³⁶ Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: the first three years* (2000) <<https://www.fact.on.ca/dofj/cca2001/famlaw.pdf>> 8.

