

29 April 2011

Committee Secretary Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Email: legcon.sen@aph.gov.au

Dear Committee Secretary,

**Family Law Legislation Amendment (Family Violence and Other Measures)
Bill**

We are writing to recommend further improvements to the changes to the *Family Law Act* proposed in the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* to ensure that the amendments to the family law system are accessible to Lesbian, Gay, Bisexual, Transgender and Intersex families and do not jeopardise the safety of children who have experienced family violence.

We strongly support the measures proposed in the Bill to provide better protections for people who have experienced family violence within the family law system and believe that the proposed amendments are essential to placing the safety and protection of children and family members at the forefront of the *Family Law Act*.

Our recommendations are based on our expertise in providing legal advice to people living in the inner city and to Lesbian, Gay, Bisexual, Transgender and Intersex communities across NSW.

Inner City Legal Centre (ICLC)

ICLC provides specialist legal services to anyone in New South Wales who is lesbian, gay, bisexual, transgender, or intersex (**LGBTI**). ICLC provides a wide range of legal

advice, representation and education to LGBTI communities in areas such as family law, domestic violence, homophobic vilification, discrimination and employment.

The Safe Relationships Project (**SRP**) was established by the ICLC in the last two years to meet the need of LGBTI communities experiencing or escaping domestic violence. The SRP provides a court assistance scheme for people who are LGBTI seeking a domestic violence order.

Support for key changes

1. In particular, we strongly support:

- Same sex couples are explicitly mentioned in the definition of de facto and so for those couples sharing an address or children, they will continue to be protected under the proposed changes
- Broadening the definition of 'family violence' to include elements of coercion and control, a wider range of behaviour and removing the objective test of 'reasonableness' so that family violence can be properly considered whenever the victim actually fears for their safety
- A broader definition and understanding of child abuse that includes exposure to violence
- Prioritising family violence when considering what is in the best interests of the child
- Removing the 'facilitation' aspects of the 'friendly parent provision'
- Repealing section 117AB about costs orders relating to false allegations or denials of violence

Further changes that are needed

Definition of family

As noted above, same sex couples are explicitly mentioned in the current definition of de facto and so for those couples sharing an address or children, they will continue to be protected under the proposed changes. The difficulty arises for those people who do not share an address but are in a relationship. This situation may affect all communities but our experience of providing family law advice to LGBTI communities shows that it will disproportionately affect people from the LGBTI communities.

We urge you to consider amendment to the definition of family violence to include intimate partner violence for those people not living together.

We see this as necessary based on the following:

a. Consistency

Current NSW legislation specifically provides for diverse family structures and casts rights and responsibilities associated with being part of a family structure. It is both bad policy and unfairly discriminatory to deny people experiencing family violence the attendant protection from family associated violence because they do not fit into the limited definition of member of a family. To deny individuals protection against family violence because they do not share an address is unjust and inconsistent.

b. Exclusions and exemptions

Historically LGBTI communities have been excluded from legislative protections. While many changes have been made to remedy these exclusions there remain both implicit and explicit exclusions and exemptions that weaken the protections provided to LGBTI communities.

Examples of these exclusions and exemptions include:

- only a man and woman can marry¹;
- if individuals do not live with their partner their legal rights are diminished;
- if a person who has been married needs to transition into a different gender then they must divorce to be able to access appropriate identification, and
- LGBTI communities have not definitively secured the right to adopt as faith-based exemptions are included in many jurisdictions (for example: the *Adoption Amendment (Same Sex Couples) Bill 2010 (No. 2)*²)

The basis for many of these exclusions and exemptions remain connected to ideas of family. Historically the family law system has excluded same-sex couples because same-sex relationships were not recognised as 'family'. As shown above, current legislation that deals with adoption and marriage continues to marginalise the LGBTI communities. While the recasting of domestic violence to family violence has some benefits, the ongoing legal exclusion of the LGBTI communities from related areas of law ought to be addressed so that the LGBTI communities are explicitly included in this beneficial legislation.

In our view, amendments to the *Family Law Amendment (family violence) Bill 2010* can address these historical and existing exclusions and exemptions when defining

¹ *Marriage Act 1961* s. 5

² *Schedule 2 Amendment of other legislation*

and describing families. If examples of family violence are included in the amendment, we support examples that reinforce the *diverse* nature of families. We also urge that LGBTI communities are explicitly noted in the definition of family to counter both historical exclusions and current legal exemptions.

c. Extra burden of proof

ICLC is a specialist legal centre with particular expertise in providing advice and representation to the LGBTI communities. Our support for a more inclusive definition of family is to prevent the Act from creating further burdens for LGBTI victims of family violence.

If the definition of family violence is broadened it may be possible to avoid a situation where individuals would need to prove both 'family' and 'violence' when asserting family violence.

Further amendments

We believe that a number of further changes are necessary to better protect the safety of children and their family in the family law system. In particular, we recommend that:

- The safety and protection of children should be prioritised above all else. Its priority should not be subject to proving an inconsistency with other considerations.
- The Act should make it clear that exposure to family violence is a form of family violence and that it applies to behaviour by the person perpetrating violence, and not the victim of the violence.
- There should be no presumptions in family law – every family should be treated as unique. This means that there should be no presumption of equal shared parental responsibility and the courts should not be required to start from any particular care arrangement.
- The Act should protect the safety of the primary carer as this increases children's safety.

Conclusion

Based on the extensive experience of the Inner City Legal Centre and the evidence presented in numerous research reports over the last few years, we strongly recommend you support the amendments suggested in this letter and the expeditious passage the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*.

If you have any questions or would like further information about our position on this issue please call Daniel Stubbs or Amy McGowan at the Inner City Legal Centre.

Yours faithfully,

Daniel Stubbs
Director