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Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

We enclose a submission to the parliamentary inquiry into child custody arrangements in the event of family separation.

Good Process is a community-based lobby group representing the gay, lesbian, bisexual, transgender and intersex (GLBTI) people of Canberra. We formed in October 2002 in response to the ACT Government's commitment to consider legislative and policy reforms to effect equality for GLBTI people in the ACT. The group consists of a core working group of about 40 people, 20 of whom are actively engaged in the work of the group. There are an additional 50 members of an email information list who are kept aware of developments and have provided information and opinions to the working group through a community forum and via email.

Please do not hesitate to contact Elizabeth Keogh of our group on (02) 6257-6477 or 0438-261-876 if you require any further information in relation to the contents of our submission.

Yours sincerely,

Liz Keogh

Elizabeth Keogh
Good Process

House of Representatives Standing Committee on Family and Community Affairs Inquiry into child custody arrangements in the event of family separation

The Good Process group asks the Committee to take into account the following concerns of gay, lesbian, bisexual, transgender and intersex (GLBTI) parents and their children in addressing the terms of reference of the Inquiry. The following comments assume an understanding of the complexities relating to the legal recognition of GLBTI parents. A discussion of these complexities follows to assist those committee members unfamiliar with them.

The proposed presumption of equal time with each parent

(a) given that the best interests of the child are the paramount consideration:
(i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post-separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstance such a presumption could be rebutted;

The proposal to introduce a presumption that children spend equal time with each parent fails to recognise that in an increasingly diverse society the person or persons who are legally recognised as the parents of a child are not necessarily the people who have been a child's primary carer and are also not necessarily the people who are recognised by the child as their parents. This is particularly true for the children of GLBTI parents who frequently consider a non-biological mother and often a biological and/or non-biological father to be their parents and have regular and ongoing contact with these parents despite the fact that they are not legally recognised as parents. In our view it is important that the Family Court continue to have unfettered jurisdiction to make residence and contact orders that are based on the child's best interests, taking into account the particular structure of their family.

We are also concerned that a presumption that children should spend equal time with each parent will cement an evidentially unsupported myth that children are disadvantaged if they do not have a substantial relationship with both a male and a female parent. We are concerned that the validation of this myth will result in a reluctance, whether on the part of judicial officers determining a matter, or litigants and lawyers negotiating matters, to provide for a child to reside with a same sex couple if there is a heterosexual household available. In relation to our claim that it is an evidentially unsupported myth we refer the Standing Committee particularly to Silverstein and Auerbach's "Deconstructing the Essential Father"[1] which found that "Studies which have posited the detrimental effects of father-absence are in fact explicable as a direct result of maternal poverty, and when poverty is controlled for in studies there is no such detriment".[2] Similarly Golombok, Tasker and Murray found

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[1] Louise Silverstein and Carl Auerbach, "Deconstructing the Essential Father" (1999) 54(6) *American Psychologist 397*

[2] Louise Silverstein and Carl Auerbach, "Deconstructing the Essential Father" (1999) 54(6) *American Psychologist 397* as cited in Jenni Millbank, *Meet the Parents: A Review of the Research on Lesbian and Gay Families*, January 2002, p14, available at www.glrl.org.au

that "Children in the families with no father were no more likely to develop behavioural problems, and felt just as accepted by their mother and peers as children in families where the father lived in the home. There were also no differences in the development of the children between the lesbian and heterosexual mother headed families".[3] As far as we aware there are no equivalent studies examining the impact of growing up in a 'motherless' household.

Contact and other persons

(ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents

In determining in what circumstances a court should order that children have contact with 'other people significant to their care, welfare and development' it is imperative that the Court be aware of and recognise the vital relationship between the child of a GLBTI family and any parent or parents who are not recognised as a 'parent' under the terms of the *Family Law Act*. It is also important that there is no presumption that these 'non-legal' parents have less of a relationship with the child than the legally recognised parent or that they are less likely to be the appropriate residential parent.

(b) whether the existing child support formula works fairly for both parents in relation to their care or, and contact with, their children.

The existing child support scheme acts very inequitably in relation to GLBTI parents and their children. The most common circumstance in which this inequity arises is when a lesbian couple with children separate. As the non-biological mother is not recognised as a parent under the *Child Support (Assessment) Act* the biological mother will not be able to pursue child support from her. Notably this will be the case even where the non-biological mother is recognised as a parent under State and Territory law (as would be the case under Western Australian law and under anticipated legislation in Tasmania and the ACT).

While it is arguably possible for the biological mother to pursue a civil action for financial support[4] this is far more costly, time-consuming, stressful and uncertain than the administrative child support scheme, with consequent detrimental impacts on the children. Similarly it is possible for same sex parents to enter into agreements or contracts for the payment of child support in the event of separation but the expense involved in entering into these agreements, and in enforcing them, limit their usefulness as a means of ensuring that support is provided for the children. In addition, same-sex parents who agree about child support arrangements on separation do not have the benefit of arranging for their child support arrangements to be administered by the Child Support Agency.

Similarly in circumstances where a gay male couple parent together (whether as a result of one of them adopting the child or one of them being a biological father to the

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[3] Susan Golombok, Fiona Tasker and Clare Murray, "Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers" (1997) 38 *Journal of Child Psychology, and Psychiatry and Allied Disciplines* 783

[4] see for example W v G (1996) 20 Fam LR 49

child) only one of the fathers will be recognised as a parent under the *Child Support (Assessment) Act*. In addition in some 'more than two parent' families all three or four parents agree to accept financial responsibility for the child yet in the event of those relationships breaking down (whether through the separation of either couple or conflict between the couples) these obligations will not be enforceable under the *Child Support (Assessment) Act*.

Additional issues

While it is not within the ambit of this inquiry we consider that it is important to bring to the committee's attention that there are a number of other areas of legislative discrimination within Commonwealth law which disadvantage the children of GLBTI people. In particular the lack of recognition of same-sex partners and the parental role of a the non-biological parent in a same-sex relationship within Commonwealth legislation dealing with superannuation entitlements results in children of GLBTI people not being appropriately provided for from their non-biological parents superannuation death benefits and pension entitlements, whether as a direct beneficiary or through the benefits received by their surviving parent. Similarly the failure by the government to include same-sex couples in the referral of powers in relation to de-facto property settlement will mean that the children of same-sex relationships will be subjected to the flow-on effects of their parents experiencing the greater costs and uncertainty arising from resolving their property settlement under a different legislative scheme from all other families and in a different court from the children's matters. These flow-on effects will be exacerbated by the fact that the Court's that deal with defacto property settlement matters do not provide the same opportunities for the use of primary dispute resolution as an alternative to litigation.

Recommendations

We recommend that the difficulties and inequities faced by GLBTI parents and their children be addressed through comprehensive reform of Commonwealth legislation to remove all discrimination against GLBTI people. We also recommend that consideration of other amendments to the *Family Law Act* and *Child Support (Assessment) Act* take into account the needs and interests of the children of GLBTI parents and in this respect advise against the introduction of a presumption that children spend equal time with each of their legally recognised parents.

Background

The *Family Law Act 1975* and the *Child Support (Assessment) Act 1989* do not recognise the diversity of family forms that exist in contemporary Australian society, and in particular, which exist among the GLBTI people of Australia. In inquiring into and reporting on the terms of reference it is important that the Standing Committee be aware of the legal position of GLBTI parents to ensure that any legislative reforms reduce, rather than increase the discrimination suffered by GLBTI parents and their children.

As the Good Process group is primarily focused on reforms of ACT legislation we do not have a complete understanding of the legislation in the States and the Northern Territory which underpin the recognition of GLBTI parents in Commonwealth legislation. It is our understanding that legislation in all States except Western Australia operate in the same way as current ACT legislation. We understand that Western Australian legislation operates in the way that it is anticipated the ACT legislation will operate if the ACT government upholds their recent promise to introduce amending legislation later this year. We also understand that the Tasmanian government has recently introduced legislation which will operate in the same way as the existing Western Australian and promised ACT legislation. However we would recommend that the committee consult with representatives from similar organisations in the States and Northern Territory to ascertain whether our understandings in relation to the legislation in those jurisdictions are accurate.

The legal position of GLBTI parents

In understanding the legal position of GLBTI parents it is important to first recognise the diversity of family structures among GLBTI people. Perhaps the most commonly considered situation in which GLBTI people become parents is when a lesbian couple conceive a child via artificial insemination. In most such circumstances the lesbian couple intend to be the only two parents to the child, whether the sperm is provided by an anonymous or known donor.

However in some instances the lesbian couple and the 'donor' intend for the biological father to be a parent to the child, with varying degrees of involvement in the child's life and varying intentions in relation to financial responsibility for the child. In some instances the father's partner is also intended to be a parent to the child, thus creating 3 or 4 parent families. Gay male couples also sometimes become parents without the ongoing involvement of the birth mother, although these circumstances are significantly more unusual.

GLBTI people also become parents as step-parents to children from their partner's previous relationships. As with heterosexual couples in some instances the step-parent will assume the role of a full parent. This may be because the original parent is no longer alive, because they are no longer involved in their child's life or because their partner conceived the child as a single parent. Unlike heterosexual parents though, GLBTI step-parents are not able to formalise this parent-child relationship through adoption.

It is also worth noting that in some instances lesbian couples (or indeed single women) conceive a child through vaginal intercourse with the express intent that the sexual relations be conducted only for the purpose of conception and with the intention that the biological father play no role in the child's life, or play only a limited role in the child's life. The legal implications of choosing this conception method (rather than artificial insemination) are discussed below as they are illogical to the layperson given that the intentions in relation to parenting roles are the same.

For ease of understanding the discussion below primarily addresses the legal situation of lesbians and gay men. While the difficulties in relation to legal recognition of a parent are essentially the same, it is worth noting briefly at the outset the factual ways in which these problems arise for bisexual and transgendered people. Bisexual men and women will experience the same difficulties as gay men and lesbians in attaining recognition of their parental relationships with their children if they are in relationships with someone of the same sex. However they will not experience these difficulties if they are in a relationship with someone of the opposite sex. Similarly the legal recognition of a transgendered person's role as a parent will depend upon whether the law recognises their gender of identification and hence whether they are considered to be in a same sex or heterosexual relationship. As with lesbians and gay men, bisexual and transgendered people can be members of 'more than two parent' families and can become parents through adoption or step-parenting. The position of transgendered parents is discussed further below.

The birth mother

Where a child is born to a lesbian couple as a result of an artificial conception procedure to which the non-biological mother consented, the birth mother will be legally recognised as a parent of the child under State and Territory law, under the *Family Law Act* and under the *Child Support (Assessment) Act.*

The non-biological mother

In all States except Western Australia the non-biological mother will not be legally recognised as a parent of the child. In Western Australia she would be conclusively presumed to be a parent of the child, as she would if she were a male partner of the mother who was biologically unrelated to the child. Legislation has been tabled in Tasmania to introduce similar presumptions of parenting in relation to lesbian couples and the ACT Government has promised to introduce reforming legislation to this effect later this year. We understand that similar reforms are also being considered in other States and Territories.

The non-biological mother's status under the *Family Law Act* is less clear. s60H of the Act sets out a series of presumptions of parentage in relation to children who have been conceived through artificial conception. This section refers back to State and Territory legislative definitions of 'parent' but cannot accommodate a finding that a child has two parents who are other than 'a man' and 'a woman'. In obiter comments in the case of *B v J*[5] Fogarty J expressed a view that this is not an exhaustive definition of 'parent' in the context of artificial conception and accordingly that a same-sex non-biological parent could be recognised as a legal parent under the *Family*

[5] In the Matter of B and J, (Artificial Insemination) No. ML 4677 of 1996

Law Act 1975. Similarly in *Re Patrick*[6] Guest J referred to the biological and non-biological mothers without determining legally (as it was not at issue in the proceedings) whether they were parents of Patrick. Accordingly it is by no means clear whether a non-biological mother would be recognised as a parent under the Family Law Act, even if she were legally recognised under State or Territory law.

The non-biological mother is not a 'liable parent' pursuant to the *Child Support (Assessment) Act*. The Act states that a parent means "(b) when used in relation to a child born because of the carrying out of an artificial conception procedure – a person who is a parent of the child under section 60H of the *Family Law Act 1975*". As discussed above that section refers back to State and Territory legislative definitions but cannot accommodate a finding that a child has two parents who are other than 'a man' and 'a woman'. In *B v J*[7] Fogarty J held that the use of the word "means" rather than "includes" in the *Child Support (Assessment) Act* means that the definitions contained in s60H of the *Family Law Act* are exhaustive and accordingly that a non-biological mother in a same sex relationship cannot be found to be a liable parent under the *Child Support (Assessment) Act*. It appears that this would be the case even if she were recognised as a parent under State and Territory law.

The biological father and his partner

The legal situation of the biological father of a child conceived via artificial conception is somewhat clearer but may not accord with the social reality of the man's relationship with the child. The man is conclusively presumed not to be a parent of the child under all State and Territory laws. In *Re Patrick* Guest J held that the biological father of a child conceived via artificial conception could not be considered a parent of the child pursuant to the *Family Law Act*, whatever the social relationship with the child and whatever the intention of all the social parents in relation to whether he was to considered a 'parent' of the child. Similarly in *B v J* Fogarty J held that, pursuant to the operation of the definition of 'parent' in the *Child Support (Assessment) Act* and s60H of the *Family Law Act* the biological father of a child conceived via artificial conception could not be a 'liable parent' for the purposes of the *Child Support (Assessment) Act*.

In many circumstances the finding that the biological father is not the legal father of the child will be entirely appropriate as the semen was donated anonymously or by a known donor who never intended, and was never intended by the mother (or mothers) to be a parent of the child. However in some instances the biological father of a child conceived by a lesbian couple (or by a single lesbian woman) via artificial insemination is intended by all parties to be a parent of the child. Similarly it is not uncommon for lesbian couples to co-parent with a gay couple, with the intention that all four adults be recognised as parents of the children. The non-biological father in this situation is not recognised as a parent of the child under any laws. Equally a female partner of the biological father would also not be recognised as a parent of the child, regardless of the intention of the parties.

Children from GLBTI families have, from birth, often two and sometimes three or even four social parents yet the legal recognition of these parents varies depending on

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[6] Re Patrick: (An Application Concerning Contact) [2002] Fam CA 193

[7] In the Matter of B and J, (Artificial Insemination) No. ML 4677 of 1996

which law is being applied, and in most instances only one of those parents will be legally recognised. In our opinion neither the *Family Law Act 1975* nor the *Child Support (Assessment) Act* would allow for the recognition of more than two parents even if the necessary changes were made to State and Territory legislation.

Conception through intercourse

The conception method used by GLBTI people to conceive can have significant and seemingly illogical legal consequences. In the recent case of *ND and BM*[8] a lesbian couple and a 'known donor' conceived a child via vaginal intercourse with the intention that the women would be parents to the child and accept financial responsibility for the child and that the father would not have a parental role and would not have financial responsibility for the child. The parties even went so far as to enter into a written agreement to this effect. Kay J held that in the absence of an adoption having taken place or the child having been conceived by artificial conception the word 'parent' has its ordinary meaning under the *Child Support (Assessment) Act* and the *Family Law Act*, that is, the biological parent of the child, and that it was impossible for reasons of public policy for the father to 'contract' out of his child support liability. To an ordinary person without specialist legal knowledge this outcome would seem illogical, given that the father would not have been recognised as a parent had the child been conceived via artificial insemination, notwithstanding that the intentions would not have been any different and notwithstanding that there were two parents willing to accept financial responsibility for the child. Public policy would, in our view, have been far better served, in this instance, by a legal structure which allowed financial responsibility for the child to rest with the two people who it was agreed would be parents.

Step-parents and adoption

GLBTI people also become parents by step-parenting children their partner brings to a relationship, whether those children are from a former relationship or were born to the existing parent as a single parent. In most instances, as with heterosexual couples, there will be no intention for the step-parent to have the legal status of a parent. However, like with heterosexual couples, there are instances in which this will be desirable whether because the child has only ever had one parent, because one of the child's original parents is no longer alive or because one of the original parents no longer has any involvement in the child's life and is willing to make the child available for adoption. Currently it is not possible for a same-sex partner to adopt their partner's child in any State other than Western Australia, although legislation to this effect has been tabled in Tasmania and has been promised by the ACT Government. It is therefore not possible in any State other than Western Australia for a same-sex step-parent to attain legal recognition as a parent. In the event of a child being adopted by a same-sex couple, whether as a step-parent adoption or a 'stranger' adoption, both parents would be recognised as parents under State and Territory law, the *Family Law Act* and the *(Child Support Assessment) Act.*

Transgendered people

Transgendered people's ability to be legally recognised as a parent to their children will depend largely on the gender under which they are legally recognised, and hence whether they are viewed as being in a same-sex or opposite sex relationship. There

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[8] *In the Matter of ND and BM* [2003] FamCA 469

are significant uncertainties in relation to the legal recognition of gender for transgendered people both in State and Territory legislation and in the interpretation of Commonwealth legislation. The result of this is uncertain and inappropriate recognition of parents under State and Territory laws, the *Family Law Act* and the *Child Support (Assessment) Act.*

In some States and Territories (including the ACT) transgendered people are able to change the sex on their birth certificates if they have undergone sex reassignment surgery and in this event they are recognised as being of that gender for the purposes of all laws in that State or Territory. As a result of provisions providing for reciprocal recognition they will also be recognised as being of that gender in another State or Territory which has equivalent provision for changing birth certificates. However they will not be recognised as being of that gender in a State or Territory that does not permit such changes to birth certificates. Hence a transgendered person may be deemed to be of one gender, and hence in a heterosexual relationship, in one State and of a different gender, and hence in a same-sex relationship, in another State.

Legal recognition of the gender of transgendered people, and hence whether they are considered to be in a same-sex or heterosexual relationship, is also uncertain at the Commonwealth level. In *Re Kevin*[9] Chisholm J held that for the purposes of the *Marriage Act 1961* a person's gender should be their gender as at the time of marriage rather than as at the time of birth. However it is not known whether Chisholm J's reasoning would be applied in determining a person's gender for the purposes of applying the *Family Law Act* or the *Child Support (Assessment) Act.* However even if this reasoning was applied it would still not provide any certainty for transgendered people as there is no mechanism for registering their gender of identification for the purposes of Commonwealth legislation and hence their claim to a particular gender, and thereby their claim to legal parentage, will require a judicial determination of what their legal gender is, based on consideration of factual matters such as how they present, how long they have presented as their gender of identification, what level of surgery or hormone treatment they have undertaken and how they are perceived by their friends and associates. It is entirely possible that a transgendered person could be held to be of one gender under State and Territory law and of another gender under Commonwealth law.

In the event that they are considered under State or Territory law to be in a same-sex relationship they will not, in any State other than Western Australia, be recognised as being the parent of child conceived by their partner via artificial conception. They will also not, in any State or Territory other than Western Australia, be able to adopt the child of their partner, whether they are a step-parent to the child or whether the child was conceived via artificial conception during the relationship.

As discussed in relation to non-biological mothers above, if a transgendered person who is a social parent to a child conceived by their partner via artificial insemination is determined to be of a gender that results in them being viewed as being in a same-sex relationship for the purposes of the *Family Law Act* and the *Child Support Assessment Act,* they <u>may</u> be recognised as a parent under the *Family Law Act* but will <u>not</u> be recognised as being a parent under the *Child Support (Assessment) Act.* If a

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[9] *Re Kevin (validity of marriage of a transsexual)* [2001] FamCA 1074

transgendered person in this situation is considered, under the *Family Law Act* and the *Child Support (Assessment) Act* to be in a heterosexual relationship they will be recognised as a parent under both the *Family Law Act* and the *Child Support (Assessment) Act* but only if they are also recognised as being a parent under State or Territory law relating to artificial conception (which would require, in all States and Territories other than Western Australia, that they also be viewed under State and Territory law, as being in a heterosexual relationship.)