



**AUSTRALIAN  
COALITION FOR  
EQUALITY**

Equality For Australia's Lesbian, Gay, Bisexual, Transgender & Intersex People

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**Combined Submission to**  
**Senate Legal & Constitutional Affairs Committee**

***Inquiry into the Same-Sex Relationship (Equal Treatment in  
Commonwealth Laws-Superannuation) Bill 2008***

***Inquiry into the Family Law Amendment (De Facto Financial  
Matters and Other Measures) Bill 2008 [Provisions]***

***Inquiry into the Evidence Amendment Bill 2008***

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## **Background to inquiries**

In June 2007 the Human Rights & Equal Opportunity Commission (HREOC) commissioned the report Same Sex: Same Entitlements. This report identified fifty-eight pieces of legislation that discriminate against same-sex couples and their families. Following the 2007 election, the Department of the Attorney-General identified approximately forty-seven additional pieces of legislation, bringing the total to around 100.

The government has identified that these 100 pieces of legislation will be amended to remove discrimination against same-sex couples over five pieces of amending legislation. It is understood these bills will be:

- Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008
- Evidence Amendment Bill 2008
- Family law Amendment (De Facto Financial Matters and Other Measures) Bill 2008
- National Employment Standards (Announced, legislation yet to be introduced)
- Same-Sex Relationship – omnibus bill 2 (Details and legislation yet to be announced)

### **Inquiry into the Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008**

The purpose of the Bill is to eliminate discrimination against same-sex couples and the children of same-sex relationships in Commonwealth legislation that provide for reversionary superannuation benefits upon the death of a scheme member, and in related taxation treatment of superannuation benefits. The Bill amends the Commonwealth civilian and military (defined benefit) superannuation schemes, the parliamentary, judicial and statutory legal officer pension schemes, and the pension scheme for the Governor-General, established under the following Acts:

- *Defence Force Retirement and Death Benefits Act 1973*
- *Defence Forces Retirement Benefits Act 1948*
- *Federal Magistrates Act 1999*
- *Governor-General Act 1974*
- *Judges' Pensions Act 1968*
- *Law Officers Act 1964*
- *Parliamentary Contributory Superannuation Act 1948*
- *Superannuation Act 1922*
- *Superannuation Act 1976*

A report deadline of 30<sup>th</sup> September 2008 has been set for the report to be tabled. For the purposes of this submission this Inquiry and bill is referred to as the “Superannuation Bill” or “Superannuation Inquiry”.

## **Inquiry into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 [Provisions]**

The Bill amends the *Family Law Act 1975* (the Act) to provide for opposite-sex and same-sex de facto couples to access the federal family law courts on property and maintenance matters. The Bill also amends the Act to provide for amendments relating to financial agreements between married couples and superannuation splitting, and for an amendment to the Act providing for certificates given in relation to family dispute resolution.

**A report deadline of 27<sup>th</sup> August 2008** has been set for the report to be tabled in the Senate.

**NOTE:** This submission by the Australian Coalition for Equality will only discuss the amendments as they affect same-sex couples and individuals. Our submission regarding the specifics of this inquiry has not been designed to holistically respond to all aspects of the bill.

For the purposes of this submission this Inquiry and bill is referred to as the “Family Law Bill” or “Family Law Inquiry”.

## **Inquiry into the Evidence Amendment Bill 2008**

The Bill will amend the *Evidence Act 1995* to implement the majority of recommendations made by the ALRC, the NSW Law Reform Commission and the Victorian Law Reform Commission as a result of their inquiry into the operation of the uniform Evidence Acts.

**A report deadline of 25<sup>th</sup> September 2008** has been set for the report to be tabled.

**NOTE:** This submission by the Australian Coalition for Equality will only discuss the amendments as they affect same-sex couples and individuals. Our submission regarding the specifics of this inquiry has not been designed to holistically respond to all aspects of the bill.

For the purposes of this submission this Inquiry and bill is referred to as the “Evidence Bill” or “Evidence Inquiry”.

## **About Australian Coalition for Equality**

The Australian Coalition for Equality (ACE) is dedicated to achieving equality for lesbian, gay, bisexual, transgender and intersex (LGBTI) people in Australian national law and policy. ACE is an LGBTI advocacy and lobbying network with a focus on outcomes. Its mandate is international human rights law and it is made up of LGBTI advocates with a proven track record in achieving equality in their respective fields.

Currently ACE is the only LGBTI human rights organisation dedicated to a wide range of national issues including equality for same-sex couples in areas like superannuation, workplace benefits and marriage, national sexuality and gender identity anti-discrimination laws, and equality for families headed by same-sex couples.

## General Comments across all inquiries

### Same-Sex Couples in Australia

**24,683 same-sex defacto couples in Australia** were recorded from the 2006 Census. This is made up of 26, 027 in a male same-sex couple and 23,339 in a female same-sex couple<sup>1</sup>.

**4,386 children live in same-sex families** in Australia (ABS, 2007). This figure does not include children of non-resident or single lesbian or gay parents, or adult children living out of home. It is estimated that 20% of lesbians and up to 10% of gay men are parents.<sup>2</sup>

The Australian Bureau of Statistics acknowledges these figures are an underestimate as some couples may be reluctant to publicly disclose their same-sex relationship status.

### Support for reform within the Australian community

There has been increasing support within the Australian community for recognising same-sex couples equally as defacto opposite-sex couples. This can be shown through the various state reforms over the past 10-15 years. It is perhaps best encapsulated in the June 2008 GetUp! commissioned Galaxy Poll, that found **71% of Australian's** agreed that "same-sex partners should have the same legal rights as those in heterosexual defacto relationships".<sup>3</sup>

Further, within the LGBTI community there has been an overwhelming support for legal recognition of same-sex relationships. In 2005 the Victorian Gay & Lesbian Rights Lobby report "Not yet Equal" identified **98% of respondents supported some form of legal recognition.** <sup>4</sup>

ACE remains disappointed at the continued policy of both parties not to provide equal marriage to all Australians who share a mutual commitment for life. We acknowledge however that the reforms before the Senate Inquiry are related to defacto relationships and do not address the issue of equal marriage. We would welcome the future opportunity to discuss this matter in the future.

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<sup>1</sup> <http://www.coalitionforequality.org.au/2006census.pdf>

<sup>2</sup> HREOC , p 16 – 17; see also *Meet the Parents: A Review of the Research on Lesbian and Gay Families*, p 20 – 21. ([http://www.girl.org.au/publications/major\\_reports/meet\\_the\\_parents.pdf](http://www.girl.org.au/publications/major_reports/meet_the_parents.pdf))

<sup>3</sup> Galaxy Poll June 16-17 2007 <http://beta.getup.org.au/files/media/equalityforsamesexcouples.pdf>

<sup>4</sup> <http://www.vgrrl.org.au/files/VGLRL%202005%20-%20SSRS%20Report.pdf>

## Legislative terminology to recognise same-sex couples

In 2004 the Howard Government reformed superannuation laws to allow same-sex couples access to entitlements under a broad definition of interdependency. To date, interdependency has been the only legislative term by which same-sex couples have been recognised in Federal law. The general response from the LGBTI community in Australia was one of profound concern at the suggestion their relationships were nothing more than “companions”.

LGBTI Australians do not see their relationship as “companions”. Rather they see themselves as loving sexual ‘defacto’ or ‘registered’ relationships (dependant on their individual circumstances and the forms of legal recognition available to them). HREOC recognised this discomfort within the LGBTI community and included numerous reasons for why same-sex couples should be recognised as de facto relationships in Federal Law.

These included<sup>5</sup>:

- An ‘interdependency’ relationship may impose different criteria than a couple relationship
- An ‘interdependency’ relationship mischaracterises a same-sex relationship
- A federal ‘interdependency’ category creates inconsistencies with state and territory laws

It is with the strongest emphasis, therefore that the Australian Coalition for Equality urges the committee to support the original HREOC recommendations. It may be argued that opposite-sex couples recognised under the current definition of de facto may also be fit the criteria of the current definition of interdependent relationships. However, it has not been suggested that opposite sex defacto relationships be placed on the same legal footing with “two aunts living together”. As such, to force same-sex couples under a definition of interdependency would amount to legislative discrimination, by creating two different terminologies, one for same-sex and one for opposite-sex couples.

In most parts of modern Australian society, a partner, regardless of gender, is recognised as the partner of the individual in question. They are recognised as two halves of the whole. The same form of recognition is not provided to the scenario of two aunts. Instead, two aunts are recognised as two individual people who share a large part of their lives together.

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<sup>5</sup> Section 4.3, HREOC Same-Sex: Same Entitlements [http://www.humanrights.gov.au/human%5Frights/samesex/report/Ch\\_4.html#3](http://www.humanrights.gov.au/human%5Frights/samesex/report/Ch_4.html#3)

***Recommendation : Same-Sex Couples are defactos, not interdependents***

*That the committee adopt the principals of equality by recognising same-sex couples as defacto relationships and not interdependent relationships. and does not make any amendment that would include a loving-sexual same-sex relationship under broad definitions designed to include interdependent relationships.*

**Formalised Recognition of same-sex couples**

Relationship registers provide an option for formal recognition of a couple’s relationship. Relationship registers are open to both same-sex or opposite sex relationships. These registers have been created over the years either by local councils or by state/territory governments. In some cases they are also open to registration of caring or interdependent relationships. Registered couples are automatically recognised for the purposes of rights and responsibilities articulated in state law. They no longer require or desire presumptive recognition of their relationship. In practical terms, registered couples are not required to prove the existence of their relationship through such documentation as bank statements, evidence of cohabitation etc. Instead their certificate or deed of registration is recognised as conclusive proof of their relationship’s existence.

The Superannuation Bill recognises state or territory recognised relationships as “couple relationships”. A definition of those state or territory registered relationships is prescribed by the regulations to the Judges Pension Act. It is presumed that the Government will continue to recognise registered relationships in future bills. It is suggested that the Acts Interpretation Act may be a better place for reference to registered relationships, to ensure consistency across all pieces of legislation.

***Recommendation: Recognition of relationship registers should be via the proclamation of the Acts Interpretation Act***

*That amendments to the current legislation be drafted to remove reference to the registers prescribed by the “Judges Pension Act” and replaced with registers prescribed by the “Acts Interpretation Act”.*

**Amendment of bill to include interdependent relationships**

It has been suggested by the Opposition during the lower house debate on this bill that the definition of “couple relationship” could be expanded to include interdependent relationships. ACE acknowledges that there members of the LGBTI community in non-sexual

interdependent situations with companions or family members. ACE would however like to highlight a few points to the committee when considering the inclusion of a distinct category of interdependent relationships:

- Interdependent relationships are made up of two or more people who support one another in times of needs. People in interdependent relationships are recognised as sharing their lives together in a platonic, non-sexual manner.
- There are broad range of people who would fall under the term interdependent, however two of the key segments of this demographics are:
  - Two companions or family members living together in later years of life
  - A carer and the person that requires full-time permanent care

It should be noted that whilst the latter category has peak bodies such as Carer's Victoria, the former and other types of interdependent relationships do not seem to have a formalised representative body to represent their views.

- Many individuals who may fall under the definition of interdependent relationships may be overrepresented in the lower socio-economic demographics of Australian society. As such, any changes to those in this financial situation (due being assessed as a "couple") would be more strongly felt than the broader community.
- Subject to the definition used for interdependent relationships, some people who may fall within that definition may not self-identify as an interdependent relationship. As such the introduction of presumptive definitions for interdependent relationships may impose unfair rights and responsibilities to individuals who have neither requested nor desired such laws.
- Consideration of changes to Federal law for interdependent relationships should occur as part of holistic interdependent reform. Changes should not occur without a substantial holistic inquiry. An example of the danger with adhoc inquiry is should the committee amend legislation for Superannuation definitions, this may financially benefit the individuals in an interdependent relationship.

However when then considering applying the principals of equality for interdependent relationships against the Social Security Act, it may be that a high number of interdependent couples would be overall financially worse off.



## Legislative structure for inclusion of interdependent relationships

Should the committee choose to include interdependent relationships, ACE would refer the committee to the legislative structure of the Tasmanian Relationships Act 2004 where two separate definitions for couple or personal relationships and interdependent or caring relationships are collectively referred to through a separate umbrella term. It would be suggested that this would be the most appropriate model of legislative drafting to ensure simplicity of legislative terminology (one term to refer to within the bill) whilst maintaining separate definitions for these separate forms of relationships. ACE is happy to discuss this matter further upon request from the committee.

### ***Recommendation: Interdependent relationships require an independent inquiry.***

*That the committee does not include interdependent relationships as part of this bill. Rather, that the committee recommends the Government commissions an inquiry through an independent body to investigate the issue of interdependent relationships in Federal Law.*

## Retention of “marriage like” terms

The Australian Coalition for Equality believes in the principle of all relationships being treated equally in law. We support the individual decision by many Australians to make a personal choice about the type of recognition they wish to place on their relationship.

In 2008 two loving committed opposite sex couples may choose to recognise their relationship through one of the following mechanisms:

- Marriage – a formalised recognition of their relationship
- Registered relationship – a formalised recognition of their relationship
- De facto – an informal recognition of their relationship

Whilst we recognise the historical significance of marriage to society, we also note that over the past 15 years many Australians have chosen to recognise their relationship through one of the other forms, primarily “de facto” status. It is the firm belief of ACE that these three forms of recognition deserve equal protections and should be afforded the same rights and responsibilities in law. The form of recognition for an individual’s relationship is a personal decision. It should not be inferred that one of these relationships are more or less valuable

than the other. It is about personal choice of the model by which you elect to recognise your relationship.

In 2006, de facto partners represented 15% of all people living as socially married - that is, all those either in a registered marriage or a de facto relationship - up from 12% in 2001 and 10% in 1996.<sup>6</sup> We have also seen a decrease in the number of marriages performed by Ministers of religion decrease from 59.5% in 1986 to only 38.6%. This further highlights the changing landscape of relationship recognition in Australia.

It is appropriate therefore that the Australian Parliament, whilst maintaining positive reinforcement for married relationships, provide equal rights and responsibilities to those who elect not to enter into a formalisation of their relationship through marriage. To not do so would lead to discrimination by both opposite sex and same-sex couples who chose not or are prevented from entering into a formalised recognition of their relationships.

With the above in mind, ACE believes that it would be inappropriate to retain “marital” terms. To do so would continue to create two classes of relationships. This has been identified to not only go against the principals of human rights but may also present issues of legal interpretation when two classes of relationships exist in law.

***Recommendation: Keep non-discriminatory terminology***

*That the committee does not include separate terms for marital relationship, husband or wife. Rather that the committee support inclusive, non-discriminatory terminology of “couple relationship” when referring to defacto couples and “partner” when referring to an individual in that relationship.*

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<sup>6</sup> <http://www.abs.gov.au/ausstats/ABS@.nsf/7d12b0f6763c78caca257061001cc588/D5F4805AD4C3E03ECA2573D2001103E0?opendocument>

## Superannuation Inquiry – Specific Discussion Points

### **Superannuation reform is urgent**

Superannuation is perhaps the largest asset, second to a couple's home, that a couple may have upon retirement. This asset provides financial security for retired Australians and their families. Same-sex couples are no different in this regard. Upon retirement and in the twilight years of life, LGBTI Australians, like other Australians plan for various scenarios in their life. One such scenario may be should they pass away, how would their partner be provided for.

Current superannuation laws, in particular Commonwealth defined benefit schemes, do not provide security for retirement planning to older LGBTI Australians. Current laws do not provide equal access to benefits available to opposite-sex couples. As some of the most financially disadvantaged segments of Australian society, this lack of equal access has an enormous impact on same-sex Australians.

ACE supports the expeditious passage of the Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008 by the parliament.

### **Children in same-sex relationships deserve equal recognition**

ACE supports the recognition of children in the Superannuation Bill. Children born into a relationship between parents of the same gender currently may not access their non-biological parent's Superannuation. This lack of equal access through lack legal recognition of the parent/child relationship discriminates against same-sex families.

It has been suggested that these changes alter the traditional family model. Further it has been suggested that the best situation to raise a child is within a marriage between a male and female parent. ACE holds the view that **love makes a family**. Throughout Australia there are many different forms of existing family structure. Some with one parent, some with two. Some parents have broken up, some parents stay together. Through all these different types of families, two single themes are consistent – love within a family and that all parents look out for the best interest of their child.

ACE notes some concerns identified regarding the wording of the definition of "child". Whilst we are not providing interpretational advice as part of this submission, we would welcome consultation with the committee on any amendments to this definition, if deemed necessary.

***Recommendation : All family models should be recognised equally in law***

*That the committee recognise equally the multiple forms of relationships within Australia. As such, that the committee retain the current definition of child, which is inclusive of child born into and raised by same-sex couples.*

**Private superannuation funds should have mandatory recognition**

The current Superannuation bill before the Senate Inquiry does not require private superannuation funds, through the Superannuation Industry Supervision Act to recognise same-sex defacto relationships. Rather the individual trustee of the superannuation fund would be required to elect to recognise same-sex fund members.

**Family Law Inquiry – Specific Discussion Points**

**Current Access to the Family Court**

Same-sex and opposite sex defacto couples currently appear before the Family Court of Australia for issues relating to the children in their care. Married couples access the Family Court for property division, maintenance and matters related to children.

All states excluding South Australia and Western Australia have referred matters of property division and maintenance to the federal government for the purpose of granting defacto couples access to the Family Court.

**Family Court has most appropriate dispute resolution process**

One of the primary reasons this court has been designated with this responsibility is their alternative dispute resolution process. A majority of cases are understood to be resolved in this manner without the need for a costly and often traumatic trial process. Family Court cases are also confidential and not a matter of public record, as such privacy for all parties involved is assured.

**Inappropriate to discriminate against childless, defacto couples**

A relationship breakdown is an emotional time in someone's life. The Family Court recognises the sensitivities in these matters in providing this alternative dispute resolution process. Given 15% of social marriages is a defacto relationship, the Australian Coalition for Equality can see no reason why defacto couples (including same-sex couples) should not be provided access to the Family Court of Australia to resolve their property and maintenance disputes.

***Recommendation: Provide equal access to Family Court of Australia***

*That the committee recommend the passage of the legislation to provide equal access to the Family Court of Australia to both opposite sex and same-sex defacto couples.*

**Evidence Amendment Inquiry – Specific Discussion Points**

**Appropriate for partners not to give evidence against one another**

The Australian Coalition for Equality recognises the special bond between two individuals in a loving caring relationship. Whilst some individuals may not be able to or choose not to be married, this should not diminish in the eyes of the law, the love and commitment share between those individuals. As such the Australian Coalition for Equality fully supports the amendments to evidence procedures in extending compellability provisions to defacto couples (both opposite and same-sex).

***Recommendation: Retain compellability provisions for same-sex defacto couples.***

*That the committee recognise the special status of all loving relationships between two committed individuals to a shared life by retaining provisions within the Act that provide equal access to defacto couples (including same-sex couples) compellability provisions currently available to married couples*

**Conclusion**

The Australian Coalition for Equality urges the Committee to keep in mind the following key points:

- 15% of social marriages are defacto couples. This is an increase of 5% in the past 10 years. These relationships deserve the same rights and responsibilities in Federal law as that afforded to married couples.
- Same-sex relationships are “defacto” relationships. They are not “interdependent” relationships and to characterise them as such would be a gross misrepresentation of the love between two people. Same-sex couples deserve the same rights and responsibilities in Federal law as afforded to opposite-sex defacto couples.
- **24,683 same-sex defacto couples** in Australia were recorded from the 2006 Census. **4,386 children live in same-sex families** in Australia (ABS, 2007). It is estimated that 20% of lesbians and up to 10% of gay men are parents.
- **71% of Australian’s agree** that “same-sex partners should have the same legal rights as those in heterosexual defacto relationships”