Submission of the

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION (HREOC)

to the

Senate Legal and Constitutional Affairs Committee

Inquiry into the Evidence Amendment Bill 2008

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Introduction

1. The Human Rights and Equal Opportunity Commission (HREOC) makes this submission to the Senate Legal and Constitutional Affairs Committee in its Inquiry into the Evidence Amendment Bill 2008.

2. This submission deals with several aspects of the Evidence Amendment Bill 2008, relating to:
   - same-sex couples and their children
   - evidence of traditional law and customs of an Aboriginal or Torres Strait Islander group
   - children.

Recommendations

3. HREOC recommends:

   Recommendation 1: The amendments to the *Evidence Act 1995* (Cth) that replace the term 'de facto spouse' with the term 'de facto partner' should proceed.

   Recommendation 2: Registration of a relationship under a state or territory law allowing for the registration of relationships should be included in the list of circumstances to be taken into account in determining whether two people are in a de facto relationship in the *Evidence Act 1995* (Cth).

   Recommendation 3: The amendments to the *Evidence Act 1995* (Cth) that provide exceptions to the hearsay and opinion rule for evidence of Aboriginal and Torres Strait Islander law and customs should proceed.

   Recommendation 4: The amendment to the *Evidence Act 1995* (Cth) that provides a broad definition of the term 'traditional laws and customs' should proceed.

   Recommendation 5: The note to section 59 of the *Evidence Act 1995* (Cth) be amended to remove the reference to 'contemporaneous statements about a

person's health etc (section 72)' and be replaced with 'Aboriginal and Torres Strait Islander traditional law and custom (section 72)'.

Recommendation 6: The amendments to the *Evidence Act 1995* (Cth) that enable a child to give unsworn evidence about a fact should proceed.

Recommendation 7: The amendments to the *Evidence Act 1995* (Cth) that allow certain witnesses to give evidence in a narrative form should proceed.

Recommendation 8: The amendments to the *Evidence Act 1995* (Cth) that provide an exception to the opinion rule based on specialised knowledge of child development and child behaviour should proceed.

Recommendation 9: The amendments to the *Evidence Act 1995* (Cth) that prevent judicial warnings relating to children as a class should proceed.

Same-sex couples and their children

4. In June 2007, *Same-Sex: Same Entitlements*, the report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (the Same-Sex: Same Entitlements Inquiry) was tabled in the federal Parliament.

5. The Same-Sex: Same Entitlements Inquiry found that at least 58 federal laws relating to financial and work-related entitlements discriminated against same-sex couples and their children.

6. The Same-Sex: Same Entitlements Inquiry recommended that:
    - The federal government should amend the discriminatory laws identified by this Inquiry to ensure that same-sex couples and opposite-sex couples enjoy the same financial and work-related entitlements.
    - The federal government should amend the discriminatory laws identified by this Inquiry to ensure that the best interests of children in same-sex and

opposite-sex families are equally protected in the area of financial and work-related entitlements.[1]

7. The *Evidence Act 1995* (Cth) (Evidence Act) was not included in the list of legislation that the Same-Sex: Same Entitlements Inquiry recommended be amended. This is because the Evidence Act did not fall within the terms of reference of the Inquiry as it does not relate to a financial or work-related entitlement.

8. The sections of the Evidence Act that previously discriminated against same-sex couples and their children are those relating to the compellability of witnesses. As explained in the Australian Law Reform Commission report, Uniform Evidence Law (the ALRC report):

> certain categories of witnesses to object to giving evidence against the accused. The witnesses entitled to raise the objection are the accused's spouse, de facto spouse, parent or child. The uniform Evidence Acts provide that the court has the discretion to excuse the witness from testifying after balancing the risk of harm to the witness or to the witness' relationship with the accused against the importance of the evidence.[2]

9. HREOC welcomes the amendments contained in this Bill that relate to same-sex couples and their children.

Definition of 'de facto partner'

10. The Same-Sex: Same Entitlements report argued that the preferred approach for bringing equality to same-sex couples in federal laws is to:
    - retain the current terminology used in federal legislation (for example retain the term 'spouse' in the Evidence Act)

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[1] Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements*, Report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (Same-Sex: Same Entitlements), April 2007.

[2] Australian Law Reform Commission, Uniform Evidence Law, para 4.91.

- redefine the terms in the legislation to include same-sex couples (for example, redefine 'spouse' in the Evidence Act to include a same-sex partner)
- insert new definitions of 'de facto relationship' and 'de facto partner' which include same-sex couples.[3]

11. The amendments contained in the Evidence Amendment Bill 2008 generally follow this approach. The amendments:
    - retain the term 'spouse'
    - replace the term 'de facto spouse' with the term 'de facto partner'
    - insert a new definition of 'de facto partner'.

12. The new definition of 'de facto partner' is based upon the definitions of 'de facto spouse' contained in state and territory legislation. It is generally consistent with the definition recommended in the Same-Sex: Same Entitlements report.[4]

13. These amendments remove discrimination against same-sex couples.

14. **Recommendation 1:** The amendments to the *Evidence Act 1995* (Cth) that replace the term 'de facto spouse' with the term 'de facto partner' should proceed.

15. The Evidence Amendment Bill 2008 does not include registration of a relationship under a state or territory law in the circumstances to be taken into account in determining whether two people are in a de facto relationship.

16. The Same-Sex: Same Entitlements Inquiry recommended that such registration should be considered evidence of the existence of a relationship. This approach is also consistent with that taken in the amendments to the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008.

17. **Recommendation 2:** Registration of a relationship under a state or territory law allowing for the registration of relationships should be included in the list of

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[3] Same-Sex: Same Entitlements, section 18.5.1, p383.

[4] The definition in Same-Sex: Same Entitlements suggested two further criteria: 'whether there is a sexual relationship' between the de facto partners and 'the performance of household duties'.

circumstances to be taken into account in determining whether two people are in a de facto relationship in the *Evidence Act 1995* (Cth).

Definition of 'child'

18. The Evidence Amendment Bill 2008 does not alter the definition of 'child'.

19. However, the definition of 'child' contained within the Evidence Act includes 'a child living with the person as if the child were a member of the person's family'.[5]

20. This definition would probably include a child in a same-sex relationship, especially if the definition of 'de facto spouse' is replaced with 'de facto partner'.

Traditional law and custom

21. In the *Native Title Report 2005* and the *Native Title Report 2007*, the Aboriginal and Torres Strait Islander Social Justice Commissioner expressed his support for the Australian Law Reform Commission's (ALRC's) recommendations to amend the rules of evidence for proving Aboriginal and Torres Strait Islander traditional law and custom.[6]

22. The amendments to the Evidence Act which implement the ALRC's recommendations, will remove an injustice that Aboriginal and Torres Strait Islanders face in the Australian legal system because of their oral tradition of knowledge. As Lee J in *Ward v Western Australia* considered:[7]

> …the disadvantage faced by Aboriginal people as participants in a trial system structured for, and by, a literate society when they have no written records and depend upon oral histories and accounts, often localised in nature. In such circumstances,

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[5] *Evidence Act 1995* (Cth), Schedule 1, s10(1)(b).

[6] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, p36 and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, pp174-178. Available online at: http://www.humanrights.gov.au/social_justice/nt_report/index.html.

[7] *Ward v Western Australia* (1998) 159 ALR 483 per Lee J.

application of a rule of evidence to exclude such material unless it is evidence of general reputation may work substantial injustice.

23. The current application of the Evidence Act, without exceptions to the hearsay and opinion rules, has been particularly problematic for Aboriginal and Torres Strait Islander peoples claiming native title. A successful determination of native title requires the claimants to prove the continuous observance of traditional law and custom from the date of sovereignty until today. This can require proof of traditional law and custom for over 150 years.

24. This has resulted in the absurd situation that the success of a group's native title claim often depends on written European evidence of the Aboriginal and Torres Strait Islander traditional law and custom. This was seen recently in the *Wongatha* case for native title over the goldfields region in Western Australia. In this case, Justice Lindgren dismissed the claim, and in doing so commented that:[8]

> … in the present case, the claimants must prove what indigenous laws and customs were being acknowledged and observed in the Goldfields at the date of sovereignty – 1829. But the first explorer did not reach any part of the Wongatha claim area until 1869, and, in substance, European settlement did not occur there until the gold rush in the 1890s. In other words, the first substantial written records we have of Aboriginal people anywhere in the Wongatha Claim area relate to the last decade of the nineteenth century, yet the claimants bear the onus of proving what the position was there in 1829. By contrast, in a case relating to an area where settlement of a colony first occurred, there will be written records relating to Aboriginal laws and customs as they existed at sovereignty.
>
> … any lack of proof or inference as to what the position was in the Goldfields in 1829 tells against the claimants, who bear the onus of proving all the elements of their claims.

25. The application of the Evidence Act to native title proceedings contributes to the virtually insurmountable burden of proof that Aboriginal and Torres Strait Islanders are subject to, a factor which the United Nation's Committee on the

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[8] Lindgren J's summary attached to *Harrington-Smith on behalf of the Wongatha people v Western Australia (No 9)* [2007] FCA 31, p3.

Elimination of Racial Discrimination commented on in its 2005 Concluding Observations on Australia.[9]

26. At times, the courts have recognised the extremely difficult situation that Indigenous Australians are placed in when trying to prove traditional laws and customs while still being subject to the Evidence Act, and have applied the Act in different ways to allow for oral evidence of tradition. The result has been an inconsistent approach to evidence which differs depending on the judge, the case at hand, and the opposing party's willingness (or not) to object.

27. The exceptions to the hearsay and opinion rule provided in the Evidence Amendment Bill 2008 will go some way to removing these injustices. It will clarify the law and in doing so, will provide a level of certainty to Aboriginal and Torres Strait Islanders about how the courts will treat their oral tradition evidence.

28. HREOC supports the provisions of the Evidence Amendment Bill 2008 which provide exceptions to the hearsay rule and the opinion rule for evidence of Aboriginal and Torres Strait Islander traditional law and custom.

29. **Recommendation 3:** The amendments to the *Evidence Act 1995* (Cth) that provide exceptions to the hearsay and opinion rule for evidence of Aboriginal and Torres Strait Islander law and customs should proceed.

30. The broad and non-exhaustive definition of 'traditional law and custom' provided in the Evidence Amendment Bill 2008 is positive. Such a definition will ensure that the exceptions are applicable to the many different contexts in which it is relevant, and will ensure contemporary Indigenous knowledge is covered.

31. **Recommendation 4:** The amendment to the *Evidence Act 1995* (Cth) that provides a broad definition of the term 'traditional laws and customs' should proceed.

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[9] United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN doc CERD/C/AUS/CO/14, United Nations, Geneva, 2005.

32. The note to section 59 of the *Evidence Act 1995* (Cth) refers to the current section 72 exception to the hearsay rule for contemporaneous statements about a person's health. Item 34 of the Evidence Amendment Bill 2008 repeals section 72 of the *Evidence Act 1995* (Cth) and replaces it with the exception to the hearsay rule for Aboriginal and Torres Strait Islander traditional law and customs. However, the Bill does not amend the note. The Evidence Amendment Bill should amend the note to section 59 to remove the current reference 'contemporaneous statements about a person's health etc (section 72)' and replace it with 'Aboriginal and Torres Strait Islander traditional law and custom (section 72)'.

33. **Recommendation 5:** The note to section 59 of the *Evidence Act 1995* (Cth) be amended to remove the reference to 'contemporaneous statements about a person's health etc (section 72)' and be replaced with 'Aboriginal and Torres Strait Islander traditional law and custom (section 72)'.

Children

34. In 1997, the ALRC and HREOC inquired into children and the legal process. The report of the inquiry, *Seen and heard*, made several recommendations to improve children's access to, and appropriate participation in, the legal process.[10]

35. *Seen and heard* outlined three types of barriers that prevent or limit children's participation in legal system.[11] These barriers relate to:

- child development and the capacity of children to participate
- assumptions made by the legal system about children's capacity to participate
- the legal system using processes that were designed by and for adults.

[10] Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, *Seen and heard: priority in the legal process* (1997) (Seen and heard).

[11] Seen and heard, p91.

36. HREOC encourages a balance between providing children with the ability to participate in the legal process and taking into account the capacity of a child to give factual evidence.

37. HREOC supports the amendment of section 13(4) of the Evidence Act which enables a child to provide evidence about a fact even though the child may not understand the concept of 'truth'. HREOC also agrees that the court should be tasked with determining the weight to be given to a child's unsworn evidence.

38. **Recommendation 6:** The amendments to the *Evidence Act 1995* (Cth) that enable a child to give unsworn evidence about a fact should proceed.

39. HREOC encourages the legal system to develop processes that enable the participation of children. The development of child-centred processes that take into account child perspectives and communication styles are crucial for the meaningful participation of children.

40. HREOC supports the proposed amendments to section 29(2) to the *Evidence Act 1995* (Cth) that allow witnesses in certain circumstances to give evidence in a narrative or story-telling form.

41. HREOC also understands that expert evidence about child development and behaviour will greatly assist in challenging adult assumptions about a child's capacity to participate in legal processes.

42. HREOC supports the amendment of section 79(2) of the Evidence Act which provides an exception to the opinion rule where expert evidence relating to child behaviour and development is provided.

43. **Recommendation 7:** The amendments to the *Evidence Act 1995* (Cth) that allow certain witnesses to give evidence in a narrative form should proceed.

44. **Recommendation 8:** The amendments to the *Evidence Act 1995* (Cth) that provide an exception to the opinion rule based on specialised knowledge of child development and child behaviour should proceed.

45. HREOC welcomes the amendments regarding the credibility and reliability of evidence given by children.

46. In *Seen and heard,* HREOC cautioned against discriminating against children simply because they are not adults.[12] *Seen and heard* also referred to studies regarding cognitive abilities of children and that variations in capacity do not depend solely on age.[13]

47. HREOC recommends that general rules about children should be avoided and that the ability and capacity of each individual child should be assessed. This position is reflected in article 12 of the *Convention on the Rights of the Child*.

48. HREOC supports the addition of section 165(A) to the Evidence Act which prevents the judge from warning the jury that the evidence of children as a class is unreliable or less credible than the evidence of adults.

49. **Recommendation 9:** The amendments to the *Evidence Act 1995* (Cth) that prevent judicial warnings relating to children as a class should proceed.

[12] Seen and heard, p93.

[13] Seen and heard, p92.