

The Standing Committee on Legal and Constitutional Affairs,
The Senate,
PO Box 6100, Parliament House, Canberra A.C.T. 2600.

Wednesday, 9 July, 2008.

From: Kendall Lovett and Mannie De Saxe,
Lesbian and Gay Solidarity (LGS) Melbourne,
PO Box 1675,
Preston South, Victoria 3072.

SUBMISSION
TO THE INQUIRY INTO THE EVIDENCE AMENDMENT BILL 2008

Preamble

It is pleasing to see that the federal government has seen fit to undertake the amending of the Evidence Act 1995 following recommendations made by the Australian, NSW and Victorian Law Reform Commissions. It is especially pleasing to discover that this Bill includes reforms to make it easier for children and people with impairments to give credible evidence as well as control over the cross-examination of vulnerable witnesses. It also further clarifies hearsay and opinion evidence particularly in relation to the oral tradition of Aboriginal and Torres Strait Island people as well as the distinction between sworn and unsworn evidence.

Expert Witness testimony

The inclusion of additional information about the admissibility of expert witnesses with specialised knowledge of the development and behaviour of children generally and that of those who have been victims of sexual offences, or offences similar to sexual offences, certainly should be viewed as opinion and requires clarification of the meaning attached to 'offences similar to sexual offences.'

In respect of children and their development, LGS was interested to note that the Bill repeals the previous definition of lawyer which now includes an overseas-registered foreign lawyer as well as an Australian-registered foreign lawyer. Such lawyers may find the current media concern over a child's ability to consent to being photographed naked, extremely odd when the age-of-consent for sex in a country they may come from is as low as 12 (e.g. Philippines, Mexico) while in other countries such as Spain, Japan and Argentina it's 13, in Italy, Israel, Serbia, Germany it's 14, and 15 in France. In all these countries it applies equally to same sex couples as well, so perhaps Australia undervalues the intelligence of its children.

Same Sex Partnerships

The Attorney-General's use of the word 'compellability' to add weight to the Bill's provisions which ensure that same sex couples are treated in the same manner as de facto spouses by replacing 'de facto spouse' with a gender neutral phrase 'de facto partner,' is effective but less than equal treatment as the Commonwealth is claiming elsewhere. It looks as though it's a federal government ruse to reduce any couple receiving a government pension and living in the same house from single rate each to that of a married couple.

One of the problems associated with the de facto change to gender neutral term is that although there are two types of legitimate hetero relationships between a man and a woman –married and de facto—there is with this Bill only one legitimate relationship for same sex couples –de facto. The Federal Government has to be prepared to give same sex couples an equivalent registration certificate to the marriage licence. Only that will equate with equal treatment. Until then same sex partners always will be required to prove they are in a committed relationship which is unnecessary for married couples. Their marriage is recorded lawfully. Even business partnerships have to be recorded (licensed) to be lawful.

Of course, as with hetero couples who don't wish to marry but live together in a de facto relationship, there would be plenty of same sex couples who would prefer to do the same. Nevertheless, there would be just as many committed to a licensed partnership. It is therefore unfair of the federal government to refuse them equality with a woman and a man's licensed relationship.

Mandatory versus Discretionary

One of the provisions in the Bill that substitutes 'discretionary and mandatory exclusion of evidence' in place of the present Act's 'gives courts discretions to exclude evidence' (15 Chapter 3 (Introductory note) is the subject of a claim by the Attorney-General in his Explanatory Memorandum. He says that Section 137 is a mandatory and not a discretionary exclusion. In the Bill (Part 3.11 –Discretionary and mandatory exclusions) there is no mention of the contents of Section 137. In view of the number of anti-terrorism laws which place severe restrictions on individuals interrogated, mandatory exclusion would possibly mean that a jury would be required to disregard what an at risk witness may have said about treatment by interrogators even though it may have been extremely relevant. This concern is raised here for consideration.

The BILL
Specific comments on certain amendments

Schedule 1 –Uniform evidence amendments
Part 1 –Amendments: Evidence Act 1995

3 Section 13: Repeal the section, substitute Competence: lack of capacity;
Re: paragraph (8): please refer to the LGS preamble under 'Expert Witness testimony.'

5 Subsection 18(2): substitution of 'de facto partner' in place of existing 'de facto spouse' is fine as far as it goes but you are referred to the LGS preamble under 'Same Sex Partnerships.' Same comment applies to:-
6 Paragraph 20(3)(a)
7 Subsection 20(4)
8 Paragraphs 20(4)(b) and 20(5)(b).

13 Section 41: Repeal the section, substitute Improper Questions;
Re: (1)(d) in the examples of stereotyping the word "sexuality" should also be included because "sex" does not cover lesbian, homosexual/gay, or transsexual/transgender people who are the butt of bullying and stereotyping in many ways. Same comment applies to:-

(2)(a) because "gender" does not cover lesbian, homosexual/gay, or transsexual/transgender people and therefore gender/sexuality should be used rather than simply "gender," in view of the fact that the addition to the Bill at 94 Part 2 of the Dictionary 11(4) and (5)(a)(b) recognises that two persons having a relationship as a couple can be of different sexes or of the same sex and legally married to someone else or in another de facto relationship –refer to the LGS preamble under 'Same Sex Partnerships,' par.3.

15 Chapter 3 (Introductory note): the substitution wording for Part 3.11 now provides for mandatory exclusion of evidence where as originally it gave just the courts the discretion to exclude. The Attorney-General claimed (see LGS preamble under 'Mandatory versus Discretionary') that Section 137 is the reason for this change because 137 is a mandatory and not a discretionary exclusion. The content of Section 137 is not included in the Bill probably because it contains no alterations. However, LGS thinks it should be included because of the number of mandatory exclusions in most of the anti- terrorism Acts which limit a citizen's democratic right to free speech, and are contrary to good government.

38 At the end of section 79 (2)(b)(ii): the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences: it is this latter phrase which is of concern particularly

sub03.txt

as it is being used in relation to a person (expert witness?) with specialised knowledge of child development and child behaviour. LGS considers that "offences similar to sexual offences" must surely be sexual offences and therefore should be spelt out in the Bill and not vaguely referred to in this way; otherwise the phrase should be deleted as confusing and unnecessary.

Division 4 –Persons with specialised knowledge

108C Exception: evidence of persons with specialised knowledge

(2)(a): suggest that in this subsection after (sic) child behaviour that the following words be added: particularly those before the age of ten years.

This suggestion is made because it is understood that before the age of 10yrs the police may not lay charges against a child for any offence committed. One would have to assume that at 10 years a child of either sex is capable of understanding that an offence has been committed.

(2)(b)(ii): also it is suggested that this same additional wording be added in this subsection before (sic) who have been victims. LGS also refers you to the final sentence concerning "offences similar to sexual offences" in its comment on 38 At the end of section 79(2)(b)(ii) which it considers should apply here also.

94 At the end of Part 2 of the Dictionary

add

11 References to de facto partners

(5)(a) whether the persons are of different sexes or the same sex it is specifically recommended that the following should be added: or if one or both persons are transsexual/transgender;

LGS is concerned that post-operative transgender people have been omitted from the de facto category altogether and in our opinion should be included because the majority of them form relationships or are already in relationships as a couple before realignment and are subject to the same Acts including the Evidence Act as any other couple in Australia.

Signed: Kendall Lovett,
For Lesbian & Gay Solidarity (LGS) Melbourne.

1