



Gay & Lesbian Rights Lobby

INQUIRY INTO THE EVIDENCE AMENDMENT BILL 2008

SUBMISSION OF THE GAY & LESBIAN RIGHTS LOBBY (NSW)

JULY 2008

About the Gay & Lesbian Rights Lobby

Established in 1988, the Gay & Lesbian Rights Lobby (GLRL) is the peak representative organisation for lesbian and gay rights in New South Wales. Our mission is to achieve legal equality and social justice for lesbians and gay men.

The GLRL has a strong history in legislative relationship reform. In NSW, we led the fight for the recognition of same sex de facto relationships, which led to the passage of the *Property (Relationships) Amendment Act 1999* and subsequent amendments. The GLRL was also successful in lobbying for the equalisation of the age of consent in NSW for gay men in 2003 and the first recognition of same-sex partners in federal superannuation law in 2004. In 2006, we conducted the largest consultation on same-sex relationship recognition in Australia, with over 1,300 gay, lesbian, bisexual and transgender people in metropolitan, regional and rural NSW.

The rights and recognition of children raised by lesbians and gay men have also been a strong focus in our work for over ten years. In 2002, we launched *Meet the Parents*, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the law reform recommendations outlined in our 2003 report, *And Then ... The Bride Changed Nappies*. Several of our recommendations were enacted into law under the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW). We continue to work towards the outstanding recommendations.

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1 INTRODUCTION AND SCOPE OF OUR SUBMISSION

The Gay & Lesbian Rights Lobby (NSW) welcomes the opportunity to make a submission to the Inquiry into the Evidence Amendment Bill 2008 (Cth) ('EA Bill'). Our comments will only consider **Clause 94 of the EA Bill**, relating to the proposed definition of "de facto partner", and other related amendments flowing from this proposed change.

2 THE NEW "DE FACTO" DEFINITION

Clause 94 of the EA Bill replaces the existing definition of "de facto spouse" in the *Evidence Act 1995* (Cth) with a new definition of "de facto partner". Related amendments remove references to "de facto spouse" from the *Evidence Act*, and replace them with the new terminology, "de facto partner".

The chief features of the new **de facto partner** definition are:

- **It includes all couples, including same-sex couples.** The new de facto definition extends recognition to people in opposite-sex and same-sex relationships. (The previous "de facto spouse" definition only applied to opposite-sex de facto couples).
- **It removes the cohabitation threshold requirement for de facto couples.** The new de facto definition removes the current *threshold* requirement that a couple must 'live together'. Rather than a threshold requirement, the EA Bill makes cohabitation *one* relevant factor to consider (and likely to be highly persuasive) in determining whether a couple can be classified as "de facto partners". This may assist some couples who are unable to live together for various reasons, such as cultural or personal reasons. However, we note that even in jurisdictions where 'living together' has been a threshold requirement, courts have taken a more flexible and functional approach to the meaning of 'living together'.¹ For example, recent cases have placed less emphasis on the existence of a common residence if couples can demonstrate 'living together' by sleeping at each other's residences on a regular basis.² In further cases, couples who have been forced to live *apart* for several years due to incarceration³ and caring responsibilities⁴

¹ Jenni Millbank (2006) 'The Changing Meaning of "De Facto" Relationships', Legal Studies Research Paper No 06/43, Sydney Law School at 8.

² For example, in *W v T* (2005) *DFC* 95-317, the Queensland Supreme Court held a de facto relationship existed over a 20 year period, even though the couple only lived in a common residence for the first 4 years. The remaining years involved the male partner staying overnight at the female partner's residence on the nights he was not at work. See Millbank (2006), n1, at 10.

³ For example, in *Howland v Ellis* (2001) 28 *Fam LR* 656 a couple were forced to separate for four years due to male partner's incarceration. The couple were found to be in a de facto relationship. See Millbank (2006), n1, at 9.

have been found to be 'living together' in a de facto relationship. As such, we do not expect this aspect of the change in the definition to have any major impact.

- **It introduces relationship indicia.** The new de facto definition introduces a list of factors a court may consider when determining if (and when) a de facto relationship came into existence. The existing definition of “de facto spouse” in the *Evidence Act* did not provide the court with any statutory guidance in this regard, although common law often filled this gap.⁵ In effect, this aspect of the definition simply codifies existing common law.

Therefore, the only significant change in the de facto definition is the equal treatment of same-sex de facto partners with opposite-sex de facto partners.

3 OUR POSITION ON THE DE FACTO DEFINITION

The GLRL supports the definition of de facto relationship contained in Clause 94 of the EA Bill. The “de facto partner” definition in the EA Bill is a simple reflection of long-established definitions existing under state and territory laws, which include same-sex couples for (almost) all purposes. The definition in Clause 94 of the EA Bill moves the Commonwealth in line with reforms that have taken place over the last decade in **all** other state and territory jurisdictions.⁶

Furthermore, identical amendments to the EA Bill (including the current de facto definition) have already passed in NSW under the *Evidence Amendment Act 2007* (NSW). The GLRL believes any unnecessary amendments to the EA Bill at the Commonwealth level will move us further away from the overall goal of greater harmonisation in evidence law across Australia. This has been a significant and long-held goal, as highlighted by the considerable joint work conducted by the Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission. The GLRL believes there is **no good reason** to create inconsistencies between jurisdictions on the de facto definition in evidence law.

⁴ For example, in *PY v CY* (2005) DFC 95-323, a couple lived together for 9 years, then lived apart for 3 years as the female partner was forced to move away to care for her ill parents. The couple were found to be in a de facto relationship. See Millbank (2006), n1, at 9.

⁵ See for example, *Roy v Sturgeon* (1986) 11 NSWLR 454.

⁶ See for example the first sweeping reforms in each state and territory: *Property (Relationships) Legislation Amendment Act 1999* (NSW), *Statute Law Amendment (Relationships) Act 2001* (Vic); *Discrimination Law Amendment Act 2002* (Qld); *Acts Amendment (Lesbian and Gay Reform) Act 2002* (WA); *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT); *Legislation (Gay, Lesbian and Transgender) Amendment Act 2003* (ACT); *Sexuality Discrimination Legislation Amendments Act 2004* (ACT); *Relationships Act 2003* (Tas); *Statutes Amendments (Domestic Partners) Act 2006* (SA).

4 THE IMPACTS OF REMOVING DISCRIMINATION

The de facto definition in Clause 94 will ensure that genuine couples, whether of the same or opposite sex, will have a right to object to being compelled to give evidence against their partners in criminal proceedings under section 18 of the *Evidence Act 1995* (Cth).

If a de facto partner objects to being compelled, the Court will consider the circumstances of the case⁷ to determine whether the likelihood of harm to the relationship outweighs the desirability of having the evidence given: *Evidence Act*, s 18(6). If the potential harm to the relationship outweighs the desirability of the evidence being given, then the de facto partner will not be compelled to give evidence. As the Australian Law Reform Commission highlights, the chief purpose of this section is to ensure that couple and parent-child relationships are not unnecessarily jeopardised in the enforcement of the criminal law.⁸ There is no good reason why evidence law in relation to criminal matters should only protect the relationships between de facto partners of the opposite sex, but not those of the same sex. In fact, the GLRL supports the Australian Human Rights and Equal Opportunity Commission's observation that the different treatment of same-sex couples and opposite-sex de facto couples is discriminatory⁹, and in contradiction of Australia's international human rights obligations.¹⁰

It is important to note that the right to object to being compelled to give evidence currently extends to married spouses, *heterosexual* de facto spouses, parents and children¹¹. The EA Bill extends this right to same-sex partners – and in that sense, is truly a minimal change to the law – but of enormous significance to same-sex partners who may face appearing as witnesses in some criminal Commonwealth trials.

5 THE RECOGNITION OF OTHER RELATIONSHIPS

As to the question of including people in other relationships, such as caring relationships, within the ambit of the right to object to being compelled, the GLRL believes there has been no empirical case made at this stage to justify delaying equality for same-sex couples.

⁷ The court must consider a non-exhaustive list of factors under section 18(7) of the *Evidence Act 1995* (Cth).

⁸ Australian Law Reform Commission (2005) *Uniform Evidence Law* (Report 102), Sydney: ALRC, at 115-6.

⁹ HREOC (2007) *Same-Sex: Same Entitlements – National Inquiry into Discrimination Against People in Same-Sex Relationship: Financial and Work-Related Entitlements and Benefits*, Sydney: HREOC, p. 43.

¹⁰ Following the reasoning in *Young v Australia*, (488/92) UN Doc. CCPR/C/50/D/488/92.

¹¹ The parent-child relationship is broadly defined to include adopted children and children who are living in the household as a member of the family (e.g. foster children, children in the care of the parents): *Evidence Act*, Dictionary, Part 2, s 10.

We note that even those who have submitted their opposition to recognising same-sex couples (or even, *any* de facto couples¹²), have not raised similar concern about recognising people in other relationships, such as caring relationships. In fact, the tenor of many submissions is *against* giving people in a wider class of relationships the ability to object to being compelled against each other.¹³

The GLRL believes that:

- Investigating whether other relationships should be recognised under compellability provisions is not a reason to delay equality for same-sex de facto couples where rights are already afforded to heterosexual de facto couples.
- The broader recognition of other relationships may have impacts on issues such as the availability of evidence in criminal trials. This warrants a careful and measured approach in first determining how many people are in fact in these other types of relationships, and therefore likely to be covered by broader relationship definitions.
- Further empirical evidence and inquiry may be required to ascertain whether the recognition of people in other relationships is needed in other areas, and if so, for which specific purposes. There is no empirical evidence at this stage to accurately assess the impact of broader relationship recognition reforms, and potential *negative* impacts on people in other relationships.

6 IN SUMMARY

In conclusion, we submit:

- The GLRL supports the de facto definition contained in Clause 94 of the EA Bill.
- The inclusion of same-sex couples under this definition is a minimal legal change which will ensure the equal and non-discriminatory treatment of all partners in compellability provisions under the *Evidence Act*.
- At this stage, there has been no empirical case made for the inclusion of broader classes of relationship under compellability protection provisions in the *Evidence Act*.

¹² See for example Martin Bleby (Submission No. m6); Various (Form Submission No. f2).

¹³ See for example, Mrs Valda Collison (Submission No. m10); Michael Setter (Submission No. m13).