



**Human Rights and Equal
Opportunity Commission**
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Submission of the

**HUMAN RIGHTS AND EQUAL OPPORTUNITY
COMMISSION (HREOC)**

to the

**Senate Legal and Constitutional Affairs
Committee**

**Inquiry into the Family Law Amendment (De
Facto Financial Matters and Other Measures) 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 Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008.
2. HREOC supports the intention of this Bill to remove discrimination against same-sex couples and their children. We welcome the amendments to the definition of de facto relationship. However HREOC has concerns about the approach taken to the definition of ‘child of a de facto relationship’ in this legislation.
3. 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.
4. 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. These laws breach the *International Covenant on Civil and Political Rights*. Laws that discriminate against the children of same-sex couples and fail to protect the best interests of the child in the area of financial and work-related entitlements also breach the *Convention on the Rights of the Child*.
5. 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

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.

6. The Same-Sex: Same Entitlements Inquiry considered family law matters.
7. Currently, for constitutional reasons, only married couples are able to access the federal Family Court to decide property related matters. The Same-Sex: Same Entitlements Inquiry argued that both opposite-sex and same-sex de facto couples should have access to the federal Family Court for property matters. This Bill implements this reform.
8. The Same-Sex: Same Entitlements Inquiry also noted that while married, opposite-sex de facto and same-sex couples can all access the federal Family Court to resolve child-related matters, some same-sex couples will be at a disadvantage when it comes to the determination of parental responsibility and child support after a relationship breaks down. This disadvantage is not removed by the amendments contained in this Bill.
9. HREOC also notes that the *Child Support (Assessment) Act 1989* (Cth) relies on the definitions contained within the *Family Law Act 1975* (Cth) (Family Law Act). Currently some same-sex parents are disadvantaged under this legislation. This disadvantage is not removed by the amendments contained in this Bill.

Recommendations

10. HREOC recommends:

Recommendation 1: The definition of ‘child of a de facto relationship’ should include any child who is a ‘product of a person’s relationship’, in the same terms as the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008. This definition should apply to the entire *Family Law Act 1975* (Cth).

Recommendation 2: Gay and lesbian couples should have equal rights as opposite-sex couples to apply to adopt an unrelated child.

Recommendation 3: The *Child Support (Assessment) Act 1989* (Cth) should include any child who is a ‘product of a person’s relationship’ with their partner,

in the same terms as the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008.

Definition of ‘de facto relationship’

11. HREOC welcomes the new definition of ‘de facto relationship’ contained in this Bill. This new definition ensures that opposite-sex and same-sex couples have equal access to certain provisions of the Family Law Act.
12. The Same-Sex: Same Entitlements Inquiry report argued that the preferred approach for bringing equality to same-sex couples under the Family Law Act is to:
 - retain the current terminology used in federal legislation (for example retain the term ‘de facto relationship’ or ‘spouse party’ in the Family Law Act)
 - redefine the terms in the legislation to include same-sex couples (for example, redefine ‘spouse party’ in the Family Law Act to include a same-sex partner)
 - insert a new definition of ‘de facto relationship’ which include same-sex couples.²
13. The approach of this Bill is consistent with the recommendations of the Same-Sex: Same Entitlements Inquiry report in that it retains the terms ‘de facto relationship’ and ‘spouse party’, redefining them to ensure that they include same-sex couples.
14. The new definition of ‘de facto relationship’ includes a list of circumstances to be considered in determining whether a de facto relationship exists between two persons.³ This definition is essentially the same as the definition recommended in the Same-Sex: Same Entitlements Inquiry report.⁴ HREOC supports these amendments to the Family Law Act.

² Same-Sex: Same Entitlements, p383.

³ Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, Items 5, 21, inserting new section 4AA.

⁴ Same-Sex: Same Entitlements, p383-384.

Definition of ‘child of a de facto relationship’ and ‘parent’

15. Extending access to the federal Family Court for property and maintenance matters to de facto couples is achieved through the insertion of a new ‘Part VIIIAB—Financial matters relating to de facto relationships’. This part contains a new definition of ‘child of a de facto relationship’.⁵
16. This definition includes:
 - (a) a child of whom each of the parties to the de facto relationship are the parents;
 - (b) a child adopted by the parties to the de facto relationship or by either of them with the consent of the other;
 - (c) a child who under subsection 60H(1) is a child of the parties to the de facto relationship.
17. HREOC has several concerns about this definition, including that the:
 - new definition relies on section 60H of the Family Law Act, the application of which is uncertain
 - extension of section 60H to same-sex couples does not ensure parental status for gay fathers whose child is born through a surrogacy arrangement
 - new definition only applies to property matters and not to matters regarding children.
18. Section 60H(1) of the Family Law Act deals with presumptions about who is the parent of a child born as a result of assisted reproductive technology (ART) procedures. The section provides that a child born to a woman who is married to a man (or in a de facto relationship by virtue of section 60H(4)), is presumed to be the child of that woman and man whether or not the child has a biological connection to either parent.

⁵ New section 90RB, Meaning of child of a de facto relationship.

19. The application of section 60H is currently uncertain. Judicial interpretation of section 60H has held both that a donor father is not a parent (*Re Patrick* (2002)) and that a donor father is to be considered a parent (*Re Mark* (2003)).⁶
20. Section 90RB(3) seeks to extend the application of section 60H(1) to a same-sex couple in a de facto relationship. This means that for property and maintenance matters, a child born as a result of ART procedures should be treated in the same way regardless of whether the child's parents are of the opposite or the same sex.
21. HREOC welcomes the effect of this amendment. However, a preferable approach, as recommended in the Same-Sex: Same Entitlements Inquiry, would be to amend section 60H so that it is expressed in gender neutral language. This would mean that section 60H would apply equally to lesbian and opposite-sex couples throughout the Family Law Act.
22. The new section 90RB or an amended section 60H will include all children born to lesbian couples. However, it will not include children born to gay couples through surrogacy arrangements. HREOC acknowledges that surrogacy arrangements are extremely rare in Australia as all states other than NSW and the ACT either prohibit surrogacy agreements or limit access to the ART necessary to fulfil a surrogacy arrangement.
23. An alternative approach would also recognise gay co-fathers. This would involve uniform reform of state surrogacy laws and the recognition in federal laws of anyone who is recognised as a parent in state laws in the following manner:
 - introduction of uniform state surrogacy laws that recognise gay co-fathers and provide a mechanism for the transfer of legal parentage from the birth mother
 - amendment of the Family Law Act to recognise parental status conferred by state laws
 - amendment of the definition of 'child' in the Family Law Act include children born through intercourse, children lawfully adopted, children of parents recognised under section 60H and children of parents recognised by state laws
 - extension of the Family Law Act definition of 'child' to apply to all federal laws that grant rights or obligations based on a parent-child relationship.

⁶ *Re Patrick* (2002) 28 Fam LR 579; *Re Mark* (2003) 31 Fam LR 162.

24. However, there is no guarantee of uniform amendment of state surrogacy laws, or that these amendments would include same-sex couples.
25. Consequently, HREOC prefers the approach of the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, which includes in the definition of ‘child’, any child who is a ‘product of a person’s relationship’ with their partner.
26. This definition of ‘child’ does not appear to oust the legal parentage of a donor (as do the state parenting presumption laws). HREOC recommends development of a legislative or administrative mechanism that creates certainty as to who is legally a person’s child.
27. **Recommendation 1:** The definition of ‘child of a de facto relationship’ should include any child who is a ‘product of a person’s relationship’, in the same terms as the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008. This definition should apply to the entire *Family Law Act 1975* (Cth).
28. Further, as it is unlikely that a gay couple will become parents through a surrogacy arrangement within Australia, adoption is also an important mechanism for gay couples. However, a same-sex couple can only adopt an unrelated child in Western Australia and the Australian Capital Territory.
29. **Recommendation 2:** Gay and lesbian couples should have equal rights as opposite-sex couples to apply to adopt an unrelated child.

Parental responsibility on separation

30. The extension of the parenting presumptions contained in section 60H to same-sex de facto couples is restricted to the new ‘Part VIIIAB—Financial matters relating to de facto relationships’.

31. This means that for Part VII of the Family Law Act, relating to children, the lesbian co-mother of a child born following an ART procedure is not considered to be a parent. Neither is a gay co-father.
32. As outlined in the Same-Sex: Same Entitlements Inquiry report, section 12.5, this narrow approach will put same-sex couples at a disadvantage when it comes to the determination of parental responsibility following separation.
33. As noted above, if Family Law Act definition of ‘child’ included any child who is the ‘product’ of a person’s relationship, there would be equal treatment of gay co-fathers. If this definition is applied to the entire Family Law Act as set out in Recommendation 1, then provisions regarding parental responsibility on separation would apply equally to same-sex and opposite-sex couples.

Child support

34. The provisions of the *Child Support (Assessment Act) 1989* (Cth) are directly related to those of the Family Law Act.
35. The definition of parent under this Act includes ‘a person who is a parent of the child under section 60H of the Family Law Act 1975’.⁷
36. As outlined in the Same-Sex: Same Entitlements Inquiry report, section 12.4, the current operation of this definition may place a member of a same-sex relationship at a disadvantage when pursuing child support.
37. If a same-sex couple separates, and the child resides with the lesbian co-mother or the gay co-father, that person can pursue child support from the birth mother or birth father. However, if the child resides with the birth mother or birth father, that parent cannot pursue the lesbian co-mother or gay co-father for child support.
38. As noted above, HREOC’s preferred approach is the amendment of section 60H of the Family Law Act so that it is expressed in gender neutral language; uniform

⁷ *Child Support (Assessment) Act 1989* (Cth), s5.

reform of surrogacy laws including same-sex couples; and recognising in the federal law parental status as conferred by state laws.

39. However, in the absence of these reforms, HREOC recommends the approach of the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, which includes in the definition of ‘child’, any child who is a ‘product’ of a person’s relationship with their partner.
40. **Recommendation 3:** The *Child Support (Assessment) Act 1989* (Cth) should include any child who is a ‘product’ of a person’s relationship with their partner, in the same terms as the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008.

Conclusion

41. HREOC welcomes the new definition of ‘de facto relationship’ contained in this Bill. However, as a consequence of the concerns outlined, HREOC recommends further amendment of the definition of ‘child of a de facto relationship’.