Tasmanian Gay & Lesbian Rights Group

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100 Parliament House
Canberra ACT 2600 Australia
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Re: Senate Legal and Constitutional Affairs Committee inquiry into amendments to recognise same-sex partners in superannuation, and inquiries into amendments to the Evidence Act and the Family Law Act

Dear Committee Secretary,

Please find enclosed the Tasmanian Gay and Lesbian Rights Group's submission to your inquiries into same-sex partners and superannuation, the Evidence Act and the Family Law Act. We apologise for not meeting the deadline for submissions. We hope our views will be considered nonetheless.

If you require further information please contact me on the contacts listed above.

Yours Sincerely,
Rodney Croome.

1. The Tasmanian Gay and Lesbian Rights Group

The Tasmanian Gay and Lesbian Rights Group (TGLRG) was founded in 1988 to campaign for the repeal of Tasmania's laws criminalising consenting, adult, sex in private. Following this reform in 1997 the TGLRG also successfully advocated and lobbied for the Tasmanian Anti-Discrimination and the Relationships Acts. In addition, the TGLRG has played a major role in anti-discrimination policy development and implementation within a number of government agencies, is active on national issues affecting the lesbian, gay, bisexual and transgender (LGBT)

community, and conducts community education programs on sexual and gender diversity.

Our work has been recognised by a number of awards including the Tasmanian Award for Humanitarian Activity (1994), the International Felipa da Souza Award (1995) and the National Human Rights Award for Community Groups (1997).

The TGLRG is in contact with LGBT people across Tasmania, and conducts regular consultation with the LGBT community. The outcomes of these consultations form the basis of this submission.

2. Summary and recommendations

a) In relationship to superannuation the TGLRG supports

i) equal entitlements in Commonwealth superannuation schemes for same-sex partners,
ii) equal entitlements for the children of same-sex partners

b) In relationship to evidence and family law the TGLRG supports

iii) equal treatment in laws governing evidence
iv) equal access to the Family Court
v) the equal recognition of de facto and state-registered same-sex partners and their families in these matters

c) In relation to general principles behind recognition of relationships in federal law the TGLRG supports

vi) the recognition of interdependent partners, but not the recognition of same-sex partners in this category
vii) the use of the term “couple relationship” to designate all relationships to be recognised for the purposes of superannuation entitlements
viii) the full and equal recognition of state and territory registered partners

3. Details of our concerns

a) Superannuation

i) Equity for partners

The Tasmanian Gay and Lesbian Rights Group supports equal entitlements for same-sex partners in all Commonwealth public sector superannuation schemes.

This is an urgent reform, particularly for older and retired same-sex partners.

Discrimination against these partners makes it more difficult for them to plan their financial future, including their retirement investments. It also makes it more difficult for them to provide for each other in the event of death.

For the partners themselves, this insecurity creates great emotional distress.

For society and government it increases the number of elderly and retired partners who are at risk of welfare dependence.

For the economy, the financial insecurity created by discrimination reduces the capacity of same-sex partners to take the investment risks necessary to create wealth through, say, the purchase of shares or the establishment of businesses.

ii) Protection for children

The TGLRG support the equal recognition in superannuation of the children cared for by same-sex partners.

Clearly, it is in the interests of the children concerned to have the financial benefits and protection that comes with access to the superannuation entitlements of both parents.

b) Evidence and Family Law

iii) Evidence

The Tasmanian Gay and Lesbian Rights Group supports equal treatment of same-sex and opposite-sex partners provisions governing evidence.

Specifically, where someone in an opposite-sex relationship cannot be compelled to give evidence against his or her partner, the same provisions should apply to same-sex partners.

iv) Family law

The TGLRG supports equal treatment of same-sex and opposite-sex partners in the adjudication of property and other disputes arising from the break down in a relationship.

Currently, disputes over property arising from the break down in a same-sex relationship are dealt with in state Supreme Courts, whereas such disputes between opposite-sex partners are dealt with the in federal Family Court.

This is unfair because of the greater cost associated with Supreme Court actions, as well as the general lack of mediation services and reduced levels of privacy associated with Supreme Courts.

Other inconsistencies between the treatment of same and opposite-sex couples include the fact that disputes over child custody can be resolved in the Family Court regardless of the gender of disputing parents, and that same-sex couples have equal access to the West Australian state Family Court.

Equal Family Court access would benefit not only the partners involved, but also the children in their care.

v) Equal recognition for de facto and state-registered partners

The TGLRG supports full and equal recognition of same-sex de facto and state-registered partners.

When the Commonwealth's Evidence and Family Law Acts are amended to provide equal recognition of same-sex partners and their children, this recognition must be of both de facto same-sex partners, and same-sex (and opposite-sex) partners registered under a state or territory scheme for the registration of relationships.

The reasons for this are outlined below.

We understand that the recognition of state-registered partners for the purposes of the Family Law Act will require a referral of powers from the states to the Commonwealth.

c) General principles for the recognition of same-sex and other relationships

vi) Interdependency

The Tasmanian Gay and Lesbian Rights Group supports the recognition of interdependent partners, but opposes the recognition of same-sex partners as interdependents.

More than any other NGO, the TGLRG was responsible for lobbying and advocating for the Tasmanian Relationships Act 2003.

This Act gives virtually equal relationship entitlements to a wide range of non-conjugal partners, both presumptively and through a relationship registry.

These partners are called "caring" partners. Generally caring partners can be understand to be partners in companionate or familial relationships.

In principle, we also endorse the recognition of companionate and familial partners as interdependents in Commonwealth law.

This is because we believe all personal relationships between adults are worthy of entitlement and protection, regardless of their conjugality.

It is true that only a handful of caring relationships have been registered in Tasmania.

In this regard we note that the Tasmanian Government has done nothing whatsoever to explain or promote the benefits of registration to caring partners. We also note that caring partners are entitled and protected presumptively, without the need for registration.

We recognise that presumptive recognition of interdependent partners in Commonwealth law may have profound and unwelcome impacts on these partners, particularly in areas such as social security.

We suggest an alternative may be the recognition of interdependent partners who have nominated themselves for entitlements through a state or territory relationship registry.

If this latter course is chosen, the benefits (and potential costs) of recognition to interdependents partners must be better explained and promoted.

Another consideration regarding the recognition of interdependent partners is that the current inquiry is not framed to examine all the implications of this recognition, financial, social and cultural.

We recommend that such an inquiry be established.

We also strongly recommend that the passage of the superannuation amendments which are the subject of this inquiry not wait until the matter of recognising interdependent partners is resolved.

Interdependency is a matter which requires detailed consideration. This consideration should not be allowed to delay the recognition of same-sex partners.

The TGLRG opposes the recognition of same-sex partners as interdependents.

Equating same-sex partners to companions is to mischaracterise both.

Same-sex relationships are properly seen as conjugal or “marriage-like” because they involve a sexual element.

For many years, those who have been uncomfortable with sexual relations between people of the same sex have attempted to mischaracterise same-sex partners as “long-time companions” or “just good friends”.

Not surprisingly, many same-sex partners have a very strong and negative reaction to the prejudice that underlies these demeaning terms.

In the Tasmanian Relationships Act the conjugality of same and opposite-sex relationships is recognised through the labelling of these relationships as “significant relationships”, as opposed to the “caring relationships” mentioned above.

We strongly endorse this model of according diverse relationships equal entitlements, but within relationship categories which properly reflect the nature of those relationships. This brings us to the next point.

vii) Couple relationship

The TGLRG strongly endorses the recognition of a range of relationships under the umbrella term, “couple relationship”.

We understand this range to be married relationships, registered and de facto same and opposite-sex relationships, and potentially interdependent relationships.

The use of this umbrella term allows a quick and simple way to ensure all relevant

statutory entitlements flow equally to partners in a wide range of relationships.

It also sends out the important message that all of these relationships are, in the eyes of the law, worthy of equal respect.

In this regard we note there have been objections to the classification of married relationships under the umbrella term, and the subsequent “erasure” of matrimonial terms such as “husband” and “wife” from relevant statutes.

We do not share this objection.

It is demeaning to unmarried partners to have their married counterparts given special recognition and status in law.

We agree that marriage is a distinct institution, with its own special legal requirements and cultural connotations.

However, this does not warrant special, and some would say privileged, legal recognition.

If marriage bestowed a range of legal rights and protections unavailable to partners in other legal relationships, a case could be made to quarantine it from umbrella recognition.

However, this is no longer the case. If marriage is “special” its special-ness is culturally defined and the law has no role in upholding it.

In regard to the “erasure” of matrimonial terms, we note that it was the Tasmanian Relationships Act which led the way.

This Act removed terms such as “husband”, “wife” and “spouse” from Tasmanian law, and put newer, more inclusive terms like “significant partner” in their place.

We also note that one of the organisations which most strongly objects to removing matrimonial terminology, the Australian Christian Lobby, has repeatedly stated its support for the Tasmanian Relationships Act and the registry it created.

This would seem to be inconsistent.

We now turn to discuss the recognition in Commonwealth law of relationships formalised through that registry.

viii) The recognition of state and territory registered relationships

The TGLRG strongly supports the full and equal recognition of state and territory registered relationships in Commonwealth laws which bestow relationship entitlements.

Where there is an absence of umbrella relationships terms which cover state-registered relationships, we believe it is important for these relationships to have full and equal recognition that is independent of the recognition of other relationships, including de facto relationships.

We support this for the following reasons.

Regarding full and equal recognition of registered relationships,

Partners in state or territory registered relationships have full recognition in state and territory law, and in the law of other nations such as the United Kingdom. They deserve the same equal recognition in federal law.

In the absence of a national registry or equal marriage, the recognition of state and territory registries in national law is the only way for same-sex partners to nominate themselves for federal entitlements.

The recognition of state and territory registered partners in Commonwealth law is a way to encourage the states and territories to establish registries.

Regarding the recognition of registered relationships in their own right and not as a way to prove the existence of a de facto relationship,

The criteria for entering into registered relationship are significantly different to those for de facto relationships.

It is not necessary to be in a de facto relationship, or any kind of pre-existing relationship, to enter into a registered relationship.

This means some registered couples may not qualify as de facto couples, and their entitlements may be open to challenge.

The social and cultural reality is that partners who enter a registered relationship do so because they do not wish to be considered de facto partners.

The decision to enter a registered relationship is an important life decision that reflects an experience of commitment, and a desire for public and official recognition, not necessarily associated with de facto relationships.

On this basis, Australian state and territory registered relationships are recognised in some other countries such as the United Kingdom as civil unions, not de facto or common law unions.

The decision to enter a registered relationship should be respected in national, as well as local and foreign law.

With the establishment of relationship registries in Tasmania and the ACT, soon Victoria, and possibly Queensland, the number of registered partners will increase from hundreds to thousands.

This will inevitably highlight the discordance between the reality of registered relationships as formalised relationships and any mis-characterisation of them in federal law as a type of presumed, de facto union.

In short then, a registered relationship is neither a de facto relationship with a certificate (nor a marriage by another name) but a new type of relationship recognition which deserves equal and distinct recognition wherever de facto and

married relationships are also distinctly recognised.

We understand that in some areas (such as family law) this may require a referral of powers from the states.

We also understand that in some areas (such as immigration) a state or territory Deed of Relationship, may only be able to provide a rebuttable presumption of the existence of a relationship, in the same way as a marriage certificate.

However, in general we believe the principle of treating all relationships with equal respect, a principle which informs our recommendations on interdependency and “couple relationship”, must also apply to state and territory registered relationships.