Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Email: legcon.sen@aph.gov.au

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To Whom It May Concern,

Submission for the following inquiries:

- **Evidence Amendment Bill 2008**
- **Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008**
- **Family law Amendment (De Facto Financial Matters and Other Measures) Bill 2008**

Please find attached my submission on the above three inquiries.

Yours sincerely,

Wayne Morgan, BA, LLB (hons), LLM (Colum)
Barrister and Solicitor
Senior Lecturer in Law
ANU College of Law
Canberra ACT 0200

Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into certain bills recognising same-sex couples in Commonwealth Law

Wayne Morgan
Senior Lecturer in Law
ANU College of Law

Introduction

This submission addresses the Committee's inquiries into the following proposed legislation:

- *Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008*
- *Family law Amendment (De Facto Financial Matters and Other Measures) Bill 2008*
- *Evidence Amendment Bill 2008*

My expertise with respect to this issue

I have been heavily involved in law reform on sexuality issues for the past 20 years. As an academic, I am also widely published on sexuality issues, including relationship law reform. With respect to the latter in particular, I have been involved in law reform in a number of states and territories, including SA, Tasmania, Victoria and the ACT. I was a consultant to the Tasmanian Attorney General on the drafting of the Tasmanian *Relationships Act* (2003), which the federal Government has repeatedly stated it would like to see copied in other Australian jurisdictions, and I teach courses in law and sexuality at the ANU College of Law.

The principles upon which I base my submission

My submission is based on three overriding principles: simplicity, practicality and respect for diversity. By simplicity I mean that Commonwealth law reform in this area should be based on a simple model which is both easy for members of the public to understand and easy to draft into law. By practicality I mean that the reforms must deal with the many areas of discrimination that make life difficult for same-sex couples and their families. Respect for diversity entails that equally valuable relationships in modern Australia are treated equally in terms of the rights and obligations that attach to them. This applies not only to same-sex relationships but also to interdependent (or "caring" relationships).

I do not intend to address the specifics of the draft bills in detail, although some specific comments on the individual bills are included at the end of this submission. Instead, I intend to set forth a framework upon which I believe all Commonwealth reforms in this area should be based and which achieves respect for the principles mentioned.

The reality of relationships in Australia that Commonwealth law must deal with

The Commonwealth must acknowledge the fact that the forms of intimate relationships that currently exist in Australia go far beyond the two categories of heterosexual marriage and heterosexual de-facto relationships. Furthermore, legal recognition at a state and territory level also goes beyond these two categories and this legal reality must also be reflected in the Commonwealth reforms.

Currently, all Australian states and territories recognize both same sex and opposite sex conjugal relationships under presumptive ("de facto") laws, although the terminology used varies extensively from jurisdiction to jurisdiction. Some states and territories also recognize interdependent relationships under presumptive laws. Tasmania, Victoria and the ACT go further by having civil union registration schemes (the Victorian scheme will not be in force until the end of 2008). Queensland also recently announced it is considering such a scheme and one has also been recommended by the NSW Law Reform Commission. Tasmania and Victoria allow both conjugal and interdependent relationships to be registered. The ACT's law only applies to conjugal partners.

Thus the Commonwealth reforms must deal with both presumptive ("de facto") laws and civil union registration schemes. Ideally, Commonwealth relationship law would also deal with both conjugal and interdependent couples, however, the Commonwealth is currently prevented from comprehensively regulating interdependent relationships because of limitations on Commonwealth constitutional power.

The ideal position: not currently on the agenda

Ideally, the Commonwealth should regulate all intimate relationships (both conjugal and interdependent) by passing a Commonwealth law modeled on the Tasmanian *Relationships Act*. Such a reform is not currently Government policy and, because of limitations on constitutional power particularly with respect to interdependent couples, could not take place without a referral of power from the states (and territories). Despite the fact that this option is not being currently considered, I put it forward as the "ideal" position because it would be the most rational and logical basis on which to achieve national uniformity. Given that the states and territories have been willing to refer their powers over children and

many aspects of intimate relationships to the Commonwealth, achieving agreement on such a referral of power may well be possible.

Before such an option could be achieved, three steps would be necessary. First, the referral of power mentioned above. Secondly, policy determinations would need to be made, in consultation with gay and lesbian groups and carer organisations, with respect to the appropriate rights and obligations under commonwealth law (for example, carers would need to be treated differently under social security law, superannuation and possibly other areas). Thirdly, an "audit" would need to be done of all Commonwealth law, so that the Relationships Act would appropriately amend all areas.

Given that this option is not being considered, it is necessary to put forward a scheme which allows rational reform in the area of conjugal relationships (the reforms currently being undertaken by the Government, the first round of which is the subject of these senate inquiries).

The appropriate framework for Commonwealth reform

Even if the Commonwealth cannot currently regulate interdependent relationships comprehensively because of constitutional limitations, the same limitations are not present with respect to same-sex couples and their families. Because of existing heads of power in the commonwealth constitution and the referrals of power that have already been made by the states and territories, in my opinion, the Commonwealth now has constitutional power to regulate all aspects of same-sex couple rights in federal law. Even though the referrals from the states and territories may not be comprehensive, the Commonwealth has plenary power with respect to same-sex families because of determinations made by the UN Human Rights Committee concerning Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR). The *Young* decision, in particular, means that the external affairs power may be used to enact Australia's obligations with respect to same-sex couples under the ICCPR.

It should be noted that the *Young* decision also makes it Australia's legal obligation to pursue reform in this area.

As stated above, at the state and territory level, same-sex relationships are currently recognized in two ways: under presumptive ("de facto") laws and under civil union registration schemes. Thus, for the purposes of Commonwealth law, the Commonwealth must recognize and treat equally three different categories of relationship: marriage, heterosexual and same-sex de facto relationships, and heterosexual and same-sex registered relationships.

The most rational model to achieve such recognition would be along the following lines.

The Commonwealth should adopt an "umbrella" term to refer to all three categories of relationship, for example the term currently used in the bills under review "couple relationship". That term should then be defined to include:

(a) a valid marriage under Australian law
(b) a de facto relationship
(c) a registered relationship

"De facto relationship" and "registered relationship" would then be subject to further definitions. The former would be defined along the lines recommended by The Human Rights and Equal Opportunity Commission in its *Same-Sex, Same Entitlements* report of last year. "Registered relationship" could be defined along the following lines:

> A relationship between two persons registered under a relationship registration law.

"Relationship registration law" would be defined to mean those laws prescribed by regulation under the Act for the purposes of the definition. The regulations would in turn list the state and territory (and commonwealth if any were to be enacted) registration laws that it applies to.

These definitions would be inserted into the Commonwealth's *Acts Interpretation Act* and would apply to all commonwealth laws. This proposal achieves simplicity, practicality and respect for diversity. Where it is appropriate for all three categories of relationship to have the same rights and obligations, individual pieces of legislation would simple use the term "couple relationship" (or appropriate variants such as "partner in a couple relationship"). Where it is appropriate to distinguish between the three categories, this could also be achieved simply, by individual pieces of legislation using the individual terms "marriage", "de facto relationship" and/or "registered relationship".

Note that, in my opinion, all three categories should be treated equally for nearly all purposes. Minimal distinctions only should be drawn between them under commonwealth law.

It should be noted that the above proposal treats "registered relationships" quite differently from the way in which they are treated in the current bills and in the HREOC report referred to above. Indeed, the HREOC report recommends that registered relationships be treated as a subset of de-facto relationships and the Government is considering adopting this model in the second round of reforms it has announced to complete the removal of discriminatory provisions in commonwealth law. This approach is fundamentally flawed and should not be pursued. It is not appropriate to recognize registered relationships as a subset of de-facto relationships, as the two legal regimes are directed at fundamentally

different types of individual behaviour. As already noted de-facto law is based on a "presumptive" model, to catch all couples regardless of whether they take positive steps to have their relationship recognized by the state. Civil union registration schemes, on the other hand, are directed at couples who wish to have such formal recognition and actively pursue it. It thus does not make sense to regulate registered relationships under de facto models.

Furthermore, legal problems could result if registered relationships are treated as a sub-category of de facto. This is because relationships can be registered under state and territory schemes that would not satisfy the requirements for a presumptive de facto relationship. For example, evidence of cohabitation is not required for registration whereas this is a factor to prove a de facto relationship under the presumptive criteria.

Finally, whilst commenting on the substance of the Committee's terms of reference, it is necessary to address the issue of whether same-sex relationships should be recognized under the category of "interdependency". This has been the practice up until now under commonwealth law and I believe that some members of the coalition prefer this option.

The reality of social life in modern Australia is that same-sex couples form conjugal relationships in the same way that heterosexual couples do. If they could, many same-sex couples would marry. Given that this is prohibited, the only forms of recognition open to us are presumptive recognition and civil union registration schemes. Same-sex conjugal relationships are therefore appropriately categorized (as all state and territory jurisdictions categorize them) along with heterosexual de-facto and registered relationships. The category of "interdependency" is a broader category where the relationships involved are fundamentally different in that they do not involve "conjugality". The rights and obligations between partners in such relationships are different to those in the other relationships under consideration. Thus it is not appropriate that same-sex relationships be covered under an "interdependency" ground.

Further, under commonwealth law, "interdependency" categories usually entail extra requirements to be satisfied before legal recognition can occur, and it is discriminatory to require that same-sex couples satisfy these extra requirements when heterosexual couples do not have to.

Fall back position

Based on the submissions made above, I am obviously of the opinion that registered relationships should not be defined as a sub-category of de facto relationships. If, however, the Government decides to pursue this route, at the very least, proof of registration of a relationship under a state or territory law must be conclusive proof of the existence of a de facto relationship under commonwealth law, without the need to prove the usual criteria that must be

proved before a (presumptive) de facto relationship is taken to exist (such as co-habitation).

It is noted that proof of registration may not be the only requirement in all circumstances. For example, under commonwealth superannuation laws that are the subject of the current Superannuation Bill, a marriage certificate is not necessarily conclusive proof of entitlement to a benefit based on dependency. In some circumstances, married couples must also satisfy other criteria such as periods of cohabitation. It is submitted that registered relationships would be subject to the same requirements as marriage in these circumstances.

Specific submissions on the three bills before the Committee

All three bills under consideration should be amended to fully recognize all three types of relationship as outlined above. This is currently not the case. The current bills are particularly flawed with respect to registered relationships. If they are recognized at all, they are currently recognized only obliquely. For example under the *Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008*, registered relationships are recognized obliquely under the amendments to the *Judicial Pensions Act*, with recognition in some other areas by cross referencing to the *Judicial Pensions Act*.

The reforms under the *Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008*, with respect to the *Superannuation Industry Supervision Act* (SIS Act) also need further consideration. Whilst I recognize that the SIS Act is generally not prescriptive with respect to the Trust Deeds which govern private funds, there are concerns within the gay and lesbian community that the Government's reforms will not *require* private funds to amend their Deeds so as to recognize same-sex couples. Without inserting a prescriptive provision, funds could be encouraged to make such reforms by inserting two extra provisions into the SIS Act. First, a provision should be inserted stating that, to maintain compliance, a private fund must not discriminate in its Trust Deed on the basis of sex, race, sexuality, disability, age etc, except where such discrimination can be justified on an actuarial basis. Secondly, a provision should be inserted making clear that an amendment to Trust Deeds so as to recognize same-sex couples will not amount to a resettlement of the fund. The latter provision is necessary because under the common law, such an amendment may amount to a resettlement which may have significant tax implications for the fund's members.

The *Family law Amendment (De Facto Financial Matters and Other Measures) Bill 2008*, is also flawed with respect to its recognition of registered relationships. The Bill would insert a new definition of "de facto relationship" in clause 4AA. Subclause 2 contains 9 factors to be taken into account, one of which (para (g)) is registration. To treat registered relationships as just one factor to be considered in proving a de facto relationship is demeaning to registered couples,

is impractical, and may lead to significant legal problems as outlined earlier in this submission. It is imperative that this Bill be amended to fully and independently recognize registered relationships. At the very least, a registration must be stated to amount to conclusive proof of the existence of the relationship, without the need to prove any of the other factors listed in this subclause.

I make no specific submissions with respect to the *Evidence Amendment Bill 2008*, except to state, once again, that it should be amended to reflect a scheme such as that outlined in this submission that properly recognizes registered relationships.

Recommendations the Committee should make

The Committee should recommend that:

1. The Government seeks a referral of power from the states (and territories) over all areas of same-sex and interdependent (carer) relationships, so that the Commonwealth has power to pass legislation modeled on the Tasmanian *Relationships Act*.
2. If the Government does not pursue the comprehensive reform proposed under recommendation 1, it should insert a definition into the *Acts Interpretation Act* of "couple relationship" which covers the three independent categories of marriage, de-facto relationships and registered relationships and applies to all areas of commonwealth law.
3. If the Government rejects both of the above recommendations, at the least, the registration of a relationship under a state or territory law must be taken as conclusive proof of the existence of a de-facto relationship under commonwealth law.
4. Same-sex couples should not be recognized under a category of "interdependency".
5. All three bills before the Committee should be amended to adopt an umbrella category of relationship ("couple relationship"), with marriage, de facto relationships and registered relationships given full and independent recognition under the umbrella term.
6. With respect to the Superannuation Bill, the Government should also include the provisions specified in this submission to encourage private funds to recognize same-sex couples.

Wayne Morgan
Senior Lecturer in Law
ANU College of Law
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