



**Australian Government**

**Attorney-General's Department**

**Classification, Human Rights and  
Copyright Division**

08/23326

8 October 2008

Mr Peter Hallahan  
Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
Parliament House  
CANBERRA ACT 2600

Dear Mr Hallahan

**Same-Sex Relationships (Equal Treatment in Commonwealth Laws-General Law Reform) Bill 2008**

I refer to the public hearing held on 23 September 2008 in relation to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the Same-Sex Relationships (Equal treatment in Commonwealth Laws-General Law Reform) Bill 2008. During this hearing, the Attorney-General's Department undertook to provide responses to several questions taken on notice. The Department's responses to these questions are set out below.

*Results of the Audit undertaken by the Attorney-General's Department*

2. Senator Hanson-Young asked whether the result of the audit process undertaken by the Department could be provided to the Committee.
3. The audit was produced for the purpose of Government consideration of discrimination against same-sex couples and their families in Commonwealth laws and programs. The audit process undertaken by the Department included a database search of Commonwealth legislation for terms such as 'partner', 'spouse' and 'de facto' in order to identify potentially discriminatory legislative provisions. This database search identified over 100 Commonwealth Acts containing the relevant search terms. The Departments responsible for the identified legislation were then consulted in relation to whether the laws identified were in fact discriminatory. A list of terms used in the initial database search is provided at **Attachment A**.
4. The results of the audit and departmental consultation formed the basis of the Department's advice to the Government regarding the removal same-sex discrimination from identified Commonwealth laws and programs. Further, in preparing the reforms additional discriminatory laws were identified.
5. A list of Acts identified as possibly discriminatory as part of the audit process is provided at **Attachment B**.

6. Not all of the Acts listed in Attachment B are amended by the General Law Reform Bill or the Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008. There are a range of reasons why certain Acts were not amended, including where:

- on further review Acts were found to not be discriminatory,
- Acts relied on definitions in other Acts which are being amended,
- Acts were determined to have little practical effect,
- Acts raised international comity issues (this is discussed further below),
- subsequent to identification Acts were repealed or are intended to be repealed, and
- Acts are intended to be amended as part of other Government reforms.

#### *Laws Identified in the HREOC report*

7. Senator Hanson-Young questioned the Department about the laws identified by the Human Rights and Equal Opportunity Commission (now known as the Australian Human Rights Commission), in its report *Same-Sex: Same Entitlements* as being discriminatory but which are not being amended by the Bill.

8. At the hearing, the Department provided oral advice to the Committee concerning the laws which are not being amended and provided an explanation as to why those laws are not being amended. The Department further undertook to provide a list of those laws to the Committee.

9. A detailed list of the laws identified in the HREOC report but which are not being amended by the Bill and an accompanying explanatory statement is provided at **Attachment C**.

#### *Acts identified in HREOC Report which raise international comity issues*

10. The Senators also requested a further explanation of those laws which are not being amended on the basis that they raise international comity issues. I am advised by the Department of Foreign Affairs and Trade (DFAT) that the *Diplomatic (Privileges and Immunities) Act 1967* and the *International Organisations (Privileges and Immunities) Act 1963* incorporate into domestic law Australia's obligations under an international instrument or instruments. The expressions and terminology used in each of these Acts are consistent with those used in the applicable international instrument. Amendments to the Acts, for example the addition of new definitions, could have unintended consequences on Australia's international obligations and bilateral relations. The concepts of "family" and "spouse" differ between States and it would be more appropriate to manage the recognition of family members on a bilateral basis, rather than attempt to include in legislation a legal definition of the terms which would apply to all States.

11. The terminology of the international instruments, as reflected in the implementing legislation, provides flexibility to DFAT in recognising the family members of foreign officials posted to Australia. DFAT does not discriminate between officers posted to Australia who are in same or opposite-sex relationships, provided their dependants are formally nominated by the sending State. Subject to their nomination, DFAT accepts dependants of foreign officials without consideration of gender or marital status. This practice will continue regardless of whether any amendments are made to the legislation.

12. For DFAT staff posted overseas, the recognition by the receiving State of the posted officer's spouse from a de facto relationship, whether same-sex or opposite-sex, or the dependants of such a

relationship, depends on the practice and laws of the receiving State. Amendment to Australian law would not alter this situation.

#### *Approach to the concept of child / parent*

13. The Senators asked what options might be available to incorporate the expanded concept of parent-child relationships proposed for the *Family Law Act 1975* into other Commonwealth legislation. As the Attorney-General stated in his concluding comments on the Bill in the House of Representatives on 24 September 2008, the Government is considering what options are available for adopting the Family Law Act approach in other Commonwealth laws.

14. At present, in relation to the both the General Law Reform Bill and the Superannuation Bill, one option would be to remove references to children who are the ‘product of a relationship’ and replace them with references to a child of a person within the meaning of the Family Law Act.

15. This approach would incorporate all of the apparatus of the Family Law Act for determining parent-child relationships and would allow future refinements to take effect without requiring consequential amendments to numerous other Acts. This approach is now possible given the Committee's bipartisan support for the amendments to section 60H of the Family Law Act. The expanded concept of parent-child relationships proposed for the Family Law Act will include children:

- born to a woman as the result of an artificial conception procedure while that woman was married to, or was a de facto partner of another person (whether of the same or opposite-sex), and
- who are children of a person by virtue of a parentage order of a State or Territory court made under a State or Territory law prescribed for the purposes of proposed section 60HB of the Family Law Act, giving effect to a surrogacy agreement.

#### *Surrogacy*

16. During the hearing Senator Barnett enquired as to the current state of the Standing Committee of Attorneys-General (SCAG) consideration of issues concerning surrogacy.

17. The issue of surrogacy was included on the agenda of the November 2006 meeting of SCAG at the request of the then Attorney-General. SCAG agreed to consider the harmonisation of surrogacy laws in Australia. At its July 2007 meeting, SCAG agreed to establish a Joint Working Group, including members of the Community and Disability Services Ministers' Advisory Council and Health officials, to identify areas for agreement. The Joint Working Group prepared a draft Consultation Paper which was approved at the SCAG meeting on 27-28 March 2008. It is expected that the Consultation Paper will be released after it is approved by the Community and Disability Services Ministers' Advisory Council.

18. Each State and Territory is responsible for designing and implementing laws governing surrogacy. This has resulted in laws and practices that differ from jurisdiction to jurisdiction. In its 2007 report *Inquiry into Gestational Surrogacy* the South Australia Parliamentary Social Development Committee stated that:

“In Australia, five jurisdictions have legislation regulating surrogacy: Victoria, South Australia, Queensland, Tasmania and the Australian Capital Territory. Surrogacy arrangements in each of the five jurisdictions are not legally enforceable. In other words, no part of a surrogacy contract is legally binding. It is unlikely therefore, that the courts would force a surrogate mother to relinquish a child to

the commissioning parents solely because this was agreed as part of a surrogacy arrangement. In all of these jurisdictions commercial surrogacy arrangements are expressly prohibited.

In most Australian jurisdictions the legal parentage of the child born through surrogacy arrangements rests with the surrogate mother and her partner. However, the Australian Capital Territory is the only jurisdiction that allows for the transfer of legal parentage from the surrogate mother to the commissioning parents through a legal mechanism as part of the court process.”

19. Although in NSW the *Assisted Reproductive Technology Act 2007* prohibits commercial surrogacy and voids all surrogacy agreements, the NSW Legislative Council Standing Committee on Law and Justice is currently conducting an inquiry into whether NSW legislation requires amendment to better deal with altruistic surrogacy. The Committee intends to issue its report in May 2009.

20. Similarly, other jurisdictions are also considering surrogacy laws. For example, the Victorian Parliament is currently considering legislation which would allow ART services to be carried out as part of a surrogacy arrangement where the surrogacy arrangement has been approved by the Patient Review Panel. The Parliament of Western Australia was considering a surrogacy Bill prior to the 2008 Western Australia election.

21. The Queensland Parliament in February established a select committee to inquire into the decriminalisation of altruistic surrogacy in Queensland and a range of associated issues. The committee is due to report on 9 October 2008.

#### *Step-parents – definition in the Family Law Act*

22. Senator Barnett asked if the definition of ‘step-parent’ in the Family Law Act included the same-sex partner of a parent of a child by a previous union.

23. The definition of ‘step-parent’ in the Family Law Act does not include the same-sex de facto partner of the parent of a child by a previous union.

24. ‘Step-parent’, in relation to a child, is defined in subsection 4(1) of that Act as a person who:

- is not a parent of the child
- is or has been married to a parent of the child, and
- treats, or at any time during the marriage treated, the child as a member of the family formed with the parent.

25. This definition excludes both the same-sex and opposite-sex de facto partner of the parent of a child by a previous union.

#### *Step-parents – parental responsibility under the Family Law Act*

26. Senator Barnett also queried whether the step-parent of a child has parental responsibility for that child under the Family Law Act. The Family Law Act does not automatically confer parental responsibility on a step-parent of a child. Subsection 61C(1) of the Act provides that each parent of the child who is not 18 has parental responsibility for that child. Parental responsibility is not affected by any changes in the nature of the relationship of the child’s parents (eg by either or both

of the parents separating or re-marrying), unless a parenting order made by a court provides otherwise.

27. A step-parent of a child may apply for a parenting order in relation to that child as a person 'concerned with the care, welfare or development of the child' under paragraph 65C(c) of the Act. This provision allows applications for parenting orders to be made by litigants who are not considered to be parents for the purposes of the Act.

28. The Act expressly provides that in proceedings for a parenting order in relation to a child, the court must regard the best interests of the child as the paramount consideration. In determining what is in the child's best interests, the court can take into account a range of factors.

29. I trust this information is of assistance to the Committee. The action officer for this matter is Peter Thomson who can be contacted on (02) 6250 6039.

Yours sincerely



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## ATTACHMENT A –SEARCH TERMS USED IN THE AUDIT

Term	Comments
Associate	The audit did not identify any discriminatory uses of the term ‘associate’ beyond those identified by HREOC.
Carer	The audit did not identify any discriminatory uses of the term ‘carer’ beyond those identified by HREOC.
Child	If a child is born to a same-sex couple, it is unclear whether the member of the couple who is not the child’s biological parent will be classified as the child’s legal parent. HREOC regards definitions of children that included adopted children as discriminatory, as same-sex couples generally cannot adopt children. See HREOC Report at 5.24 for further detail.
Couple	There are definitions contained in Acts of ‘member of a couple’ that either require that the couple is married, or require that each member is of the opposite sex and that the couple is in a ‘marriage-like relationship’. Such definitions are discriminatory because same-sex couples cannot marry and same-sex relationships are not likely to be interpreted as being ‘marriage-like’. See HREOC Report at 4.23 and 4.24 for further detail.
De facto	‘De facto’ is normally used along with ‘spouse’, so the issues involved in using the term ‘spouse’ (see below) apply in such cases. Some acts define a ‘de facto couple’ as a couple comprising persons of the opposite gender. See HREOC Report at 4.22 and 4.23 for further detail.
Dependant	Some definitions of ‘dependant’ expressly exclude same-sex partners. Other definitions include a dependant being a spouse or child.
Family	Some definitions may exclude by implication same-sex couples and their children, or at least do not make it clear that such families are included.
Husband / Wife	Same-sex couples are not able to marry and thus cannot be a husband or wife. Some acts define ‘spouse’ or ‘de facto spouse’ as including a person who lives with another person in a bona fide relationship as their husband/wife. This is likely to exclude same-sex partners. See HREOC Report at 4.23-4.24 for further detail.
Marital	Same-sex couples are not able to marry, thus references to marriage are likely to be discriminatory.
Marriage-like	‘Marriage-like relationships’ are likely to be interpreted as only those relationships with de facto partners of the opposite sex. See HREOC Report at 4.23-4.24 for further detail.

## **ATTACHMENT B –ACTS IDENTIFIED DURING AUDIT PROCESS**

### **Department of Agriculture, Fisheries and Forestry**

*Australian Meat and Live-Stock Industry Act 1997*  
*Dairy Adjustment Act 1974*  
*Dairy Industry Service Reform Act 2003*  
*Farm Household Support Act 1992*  
*Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000*  
*Pig Industry Act 2001*

### **Attorney-General's Department**

*Administrative Decisions (Judicial Review) Act 1977*  
*Age Discrimination Act 2004*  
*Australian Federal Police Act 1979*  
*Bankruptcy Act 1966*  
*Copyright Act 1968*  
*Crimes Act 1914*  
*Crimes (Superannuation Benefits) Act 1989*  
*Customs Act 1901*  
*Evidence Act 1995*  
*Family Law Act 1975*  
*Federal Magistrates Act 1999*  
*Foreign States Immunities Act 1985*  
*High Court Justices (Long Leave Payments) Act 1979*  
*Judges (Long Leave Payments) Act 1979*  
*Judges' Pensions Act 1968*  
*Law Officers Act 1964*  
*Passenger Movement Charge Collection Act 1978*  
*Proceeds of Crime Act 1987*  
*Proceeds of Crime Act 2002*  
*Service and Execution of Process Act 1992*  
*Sex Discrimination Act 1984*  
*Witness Protection Act 1994*

### **Department of Broadband, Communications and the Digital Economy**

*Australian Postal Corporation Act 1989*  
*Broadcasting Services Act 1992*  
*Postal and Telecommunications Commissions (Transitional Provisions) Act 1975*  
*Telstra Corporation Act 1991*

### **Department of Defence**

*Defence Act 1903*  
*Defence Force (Home Loans Assistance) Act 1990*  
*Defence Force Retirement and Death Benefits Act 1973*  
*Defence Forces Retirement Benefits Act 1948*  
*Defence Forces Special Retirement Benefits Act 1960*

*Defence (Parliamentary Candidates) Act 1969*  
*Defence Reserve Service (Protection) Act 2001*  
*Military Superannuation and Benefits Act 1991*  
*Royal Australian Air Force Veterans' Residences Act 1953*  
*War Gratuity Act 1945*

### **Department of Education, Employment and Workplace Relations**

*Education Services for Overseas Students Act 2000*  
*Higher Education Funding Act 1988*  
*Higher Education Support Act 2003*  
*Judicial and Statutory Officers (Remuneration and Allowances) Act 1984*  
*Long Service Leave (Commonwealth Employees) Act 1976*  
*Safety, Rehabilitation and Compensation Act 1988*  
*Seafarers Rehabilitation and Compensation Act 1992*  
*Social Security Act 1991*  
*Student Assistance Act 1973*  
*Workplace Relations Act 1996)*

### **Department of Families, Housing, Community Services and Indigenous Affairs**

*A New Tax System (Family Assistance) Act 1999*  
*A New Tax System (Family Assistance) (Administration) Act 1999*  
*Aboriginal Councils and Associations Act 1976*  
*Aboriginal Land Grant (Jervis Bay Territory) Act 1986*  
*Child Support (Assessment) Act 1989*  
*Corporations (Aboriginal and Torres Strait Islander) Act 2006*  
*Data Matching Program (Assistance and Tax) Act 1990*  
*Social Security Act 1991*

### **Department of Finance and Deregulation**

*Airports (Transitional) Act 1996*  
*Australian Industry Development Corporation Act 1970*  
*CFM Sale Act 1996*  
*Commonwealth Electoral Act 1918*  
*CSL Sale Act 1993*  
*Medibank Private Sale Act 2006*  
*Members of Parliament (Life Gold Pass) Act 2002*  
*Papua New Guinea (Staffing Assistance) Act 1973*  
*Parliamentary Contributory Superannuation Act 1948*  
*Parliamentary Entitlements Act 1990*  
*Superannuation Act 1922*  
*Superannuation Act 1976*  
*Superannuation Act 1990*

### **Department of Foreign Affairs and Trade**

*Australian Passports Act 2005*  
*Consular Privileges and Immunities Act 1972*  
*Diplomatic Privileges and Immunities Act 1967*  
*Export Market Development Grants Act 1997*  
*International Organisations (Privileges and Immunities) Act 1963*



*Overseas Mission (Privileges and Immunities) Act 1995*  
*Trade Representatives Act 1933*

### **Department of Health and Ageing**

*Aged Care Act 1997*  
*Health Insurance Act 1973*  
*Health Insurance Commission (Reform and Separation of Functions) Act 1997*  
*National Health Act 1953*  
*Prohibition of Human Cloning Act 2002*  
*Research Involving Human Embryos Act 2002*

### **Department of Immigration and Citizenship**

*Australian Citizenship Act 2007*  
*Immigration (Education) Act 1971*  
*Immigration (Education) Charge Act 1992*  
*Immigration (Guardianship of Children) Act 1946*  
*Migration Act 1958*  
*Migration Regulations 1994*

### **Department of Infrastructure, Transport, Regional Development and Local Government**

*Airports Act 1996*  
*Civil Aviation (Carriers' Liability) Act 1959*  
*Navigation Act 1912*

### **Department of Innovation, Industry, Science and Research**

*Pooled Development Funds Act 1992*

### **Department of the Prime Minister and Cabinet**

*Governor-General Act 1974*  
*Ombudsman Act 1976*  
*Privacy Act 1988*

### **The Treasury**

*A New Tax System (Goods and Services Tax) Act 1999*  
*A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Act 1999*  
*Corporations Act 2001*  
*Financial Sector (Shareholdings) Act 1998*  
*Foreign Acquisitions and Takeovers Act 1975*  
*Fringe Benefits Tax Assessment Act 1986*  
*Income Tax Assessment Act 1936*  
*Income Tax Assessment Act 1997*  
*Income Tax (Transitional provisions) Act 1997*  
*Insurance Acquisitions and Takeovers Act 1991*  
*Life Insurance Act 1995*  
*Medicare Levy Act 1986*  
*Qantas Sale Act 1992*  
*Retirement Savings Accounts Act 1997*  
*Small Superannuation Accounts Act 1995*

*Superannuation (Government Co-contribution for Low Income Earners) Act 2003*  
*Superannuation Industry (Supervision) Act 1993*

**Department of Veterans' Affairs**

*Compensation (Japanese Internment) Act 2001*  
*Defence Service Homes Act 1918*  
*Military Rehabilitation and Compensation Act 2004*  
*Papua New Guinea (Members of the Forces Benefits) Act 1957*  
*Veterans' Entitlements Act 1986*  
*Veterans' Entitlements (Clarke Review) Act 2004*

## ATTACHMENT C – LAWS IDENTIFIED BY THE HREOC REPORT AND NOT AMENDED BY THE BILL

Laws Identified in HREOC Report	Reason/s why laws were not amended by Same-Sex Relationships Bills
<i>Aboriginal Councils and Associations Act 1976</i>	This Act was repealed by the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> .
<i>Child Support (Assessment) Act 1989</i>	The <i>Child Support (Assessment) Act</i> relies on the parenting presumptions in the <i>Family Law Act 1975</i> . The Government has proposed amendments to section 60H of that Act to remove discrimination against same-sex couples and their children.
<i>Defence Act 1903</i>	On further review this Act was considered to not discriminate against same-sex couples or their children
<i>Diplomatic Privileges and Immunities Act 1967</i>	This Act incorporates Australia's obligations under international instruments into domestic law. A more detailed explanation in relation to this Act is provided above.
<i>Family Law Act 1975</i>	The Government has proposed amendments to section 60H of the <i>Family Law Act 1975</i> to remove discrimination against same-sex couples and their children. Other amendments in relation to property division and maintenance are being made by the <i>Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008</i> .
<i>Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 (seeking to amend the Federal Magistrates Act 1999)</i>	Amendment to this Bill is not possible as it was passed prior to the 2007 election. The <i>Federal Magistrates Act 1999</i> is amended by the Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008.
<i>Foreign Acquisitions and Takeovers Regulations 1989</i>	It is not normal practice for Regulations made under Commonwealth Acts to be amended by an Act of Parliament. Amendments will be made to the <i>Foreign Acquisitions and Takeovers Regulations 1989</i> as part of a separate process.
<i>Foreign States Immunities Act 1985</i>	The section / term identified as being potentially discriminatory in the HREOC Report refers to the <i>Diplomatic Privileges and Immunities Act 1967</i> , which is not being amended for reasons outlined above. In light of this, no amendment to this Act was required.
<i>Higher Education Funding Act 1988</i>	This Act is obsolete, and is planned to be repealed.
Income Tax Regulations 1936	The regulation identified by the HREOC report, regulation 8A, was repealed in 2007.
<i>International Organisations (Privileges and Immunities) Act 1963</i>	This Act incorporates Australia's obligations under international instruments into domestic law. A more detailed explanation in relation to this Act is provided above.
<i>Medicare Levy Act 1986</i>	Amendments to this Act are not necessary because the relevant terms are defined by reference to the <i>Income Tax Assessment Act 1936</i> definitions, which are amended by the Bill.

Migration Regulations 1994	It is not normal practice for Regulations made under Commonwealth Acts to be amended by an Act of Parliament. Amendments to the Migration Regulations must fall under the scope of the Migration Act. It is intended that the relevant amendments will be made to the Regulations following enactment of the General Law Reform Bill.
Military Superannuation and Benefits Trust Deed (made under s 5(1) of Military Superannuation and Benefits Act 199)	Legislation is not necessary to amend this instrument as it can be amended by a legislative instrument made by the Minister for Defence
Remuneration Tribunal Determination 2006/14: Members of Parliament – Travelling Allowance	The Remuneration Tribunal is an independent statutory authority. Both these determinations were made by the Tribunal under section 7 of the Remuneration Tribunal Act 1973. While Remuneration Tribunal determinations are tabled in Parliament, the Tribunal is a separate and independent entity to Parliament. Principal determinations such as those identified by HREOC are usually altered by an amending determination, which can only be made by the Tribunal. Following the passage of the Bills through Parliament, the Department of Finance and Deregulation will pursue the need for consequential amendments to relevant Determinations with the Remuneration Tribunal Secretariat.
Remuneration Tribunal Determination 2006/18: Members of Parliament – Entitlements	
Superannuation (Public Sector Superannuation Accumulation Plan) Trust Deed (made under s 10 of the <i>Superannuation Act 2005</i> )	Legislation is not necessary to amend this instrument. It is intended that this instrument will be amended to remove discrimination against same-sex couples and their children.
<i>Superannuation Act 1990</i>	The Public Sector Superannuation Scheme is being amended by delegated legislation.
<i>Superannuation Industry (Supervision) Regulations 1994</i>	Amendments to the <i>Superannuation Industry (Supervision) Regulations 1994</i> are not required, as the relevant terms are defined in the <i>Superannuation Industry (Supervision) Act 1993</i> , which are amended by the Bill.
<i>Workplace Relations Act 1996</i>	This Act is being amended as part of the Government's workplace relations reforms.