Tasmanian Gay & Lesbian Rights Group

September 10th 2008

Rodney Croome
Campaign Co-ordinator
Rm 20, Lvl 1
McDougall Bdg, Ellerslie Rd
Battery Pt, 7004
03 6224 3556

Wayne Morgan
Senior Lecturer in Law
ANU College of Law
Australian National University
Legal Consultant to the TGLRG
02 6125 8355

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

Re: Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008

Dear Committee Secretary,

Please find enclosed a submission to your inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008.

We believe we could have provided the inquiry with more relevant information if there had been more time available. The short duration of this inquiry was quite inadequate for the important issues at stake.

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

Yours Sincerely,
Rodney Croome & Wayne Morgan.

1. Who are we?

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.

Mr Wayne Morgan is a senior lecturer in law at the Australian National University. His areas of academic expertise include human rights and sexuality law. Mr Morgan has advised the Tasmanian Gay and Lesbian Rights Group for many years. He was intimately involved in the drafting of the Tasmanian Relationships Act 2003.

2. Summary and recommendations

We strongly support the principle of the Bill.

We seek full and equal recognition of relationships formalised at a state and territory level, alongside de facto and married relationships, and put forward a way for this to be achieved.

We support the principle of recognising of genuine interdependent partners, but not in this Bill at this time because the issue requires further consideration and consultation.

We raise two matters regarding equal protections for families and children.

We are concerned about the discrepancy between discriminatory statutes identified by HREOC and those included in this Bill.

We support education of relevant parties in relation to the rights and responsibilities bestowed by this Bill.

3. Support for the Bill

The Tasmanian Gay and Lesbian Rights Group supports equal recognition and entitlements for same-sex partners in all Commonwealth laws.

This is an urgent reform in the areas covered by the current Bill, particularly for older and retired same-sex partners, and partners with children.

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 and their children 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 partners and families who are at risk of welfare dependence.

There are several aspects of the Bill we have detailed concerns about. We shall deal with each of these separately below.

4. Equal recognition for state-registered partners

a) Why recognition is important

The TGLRG believes that relationships formalised through state or territory relationship registries should be given full and equal recognition, alongside de facto and married relationships, in federal law.

We believe this because,

i) 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.

ii) 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.

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

b) Why the current Bill is flawed

The current Bill provides greater recognition of registered relationships than has previously been the case (for example in the Family Law and Superannuation amendments recently reviewed by this Committee). We welcome this development. Schedule 2 of the current bill proposes amendments to the Acts Interpretation Act inserting new definitions of de facto relationship (proposed sections 22A-22C). Registered relationships are designated a type of de facto relationship, although in a separate category and under a separate section to “presumptive” de facto relationships. Under 22B, a registered relationship is defined as a relationship that is registered under a prescribed law of a state or territory as a prescribed kind of relationship. The explanatory memoranda to the Bill makes clear that only “conjugal” registered relationships will be prescribed for the purposes of this definition.

Although neither the Bill nor the explanatory memoranda say so, the legal affect of these amendments will be that a certificate of registration is conclusive proof of the existence of a relationship to the same extent as a marriage certificate is conclusive proof of a marriage. We welcome these amendments and the decision by the government to treat registered relationships as (substantively) separate from "presumptive" de facto relationships. The effect of this will be that those people in registered relationships will not have to show that they satisfy any of the indicative criteria specified for "presumptive" de facto relationships under the proposed s.22C.

However, we are still concerned by the classification of formalised (registered) state and territory unions as a type of de facto relationship. This is for the following reasons.

i) The criteria for entering into registered relationships are significantly different to those for de facto relationships. In Tasmania 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 that the two categories are fundamentally different (legally speaking) and it is illogical to categorise them both as a "de facto" relationship, which traditionally in our legal system has only referred to the "presumptive" category.

ii) 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.

iii) 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.

iv) 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 de facto union.

v) 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.

c) Our recommendations

We understand that the Commonwealth has chosen to consider a registered relationship as a type of de facto relationship rather than a relationship in its own right because of concerns about constitutional power and the scope of the referrals of power by the states to support the current Bill. This seems to be the position of the Attorney General's department as reflected in this Committee's recent report in to the Family Law Act amendments. However, as the explanatory memoranda to the current bill states (referred to above), only those relationships which are "conjugal" will be prescribed for the purposes of s 22B of the Acts Interpretation Act. Thus

there is no constitutional reason why registered relationships cannot be treated as an independent category in federal law. The current referrals of power would support such an approach, so long as "carer" registered relationships are excluded by the regulations (as the explanatory memoranda states).

We therefore recommend that the Commonwealth should use a different "umbrella" term in proposed s 22A. For example the term "couple relationship" could be used to describe both registered and de facto relationships, while the term "partner in a couple relationship" could be used to describe both registered and de facto partners. This would not give state registered relationships the full and equal recognition they deserve, and it would wrongly reinforce a unique legal status for marriage, but it would at least remedy the mischaraterisation that registered relationships are a subset of the broader category of de facto relationships.

5) Interdependency

a) In-principle support for the recognition of interdependent partners

The Tasmanian Gay and Lesbian Rights Group supports the recognition of interdependent partners, but opposes the recognition of same-sex partners as interdependents, as well as the recognition of genuine interdependents in this Bill at this time.

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 understood 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.

b) Same-sex partners are not "companions"

However we oppose 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.

c) The recognition of interdependent relationships requires further consideration

We oppose the recognition of interdependent partners in this Bill at this time for several reasons.

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

An alternative may be the recognition of interdependent partners who have nominated themselves for entitlements through a state or territory relationship registry. However, this would require a referral of powers from the states and territories which may take some time to occur.

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. In particular, no consultation has yet occurred with those people most directly affected by the recognition of interdependent relationships.

We recommend that an inquiry be established into the recognition of interdependent relationships in federal law.

We also strongly recommend that the passage of the Bill which is 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.

6. Children and families

There are two matters regarding children and families about which we have concerns.

a) Children in families headed by same-sex couples must be protected equally. The Human Rights and Equal Opportunity Commission, together with your Committee, has recommended the recognition of non-biological parents in same-sex relationships across federal law, including in areas such as family law and child support. I support this recommendation.

b) The Government has created a new term, “relationship parent”, to describe non-biological same-sex parents in the areas of social security and taxation. Without the

changes in point 3, this implies that a non-biological parent in a same-sex relationship is different or less than the non-biological parent in an opposite sex relationship. It is in the best interests of the child that both of their same-sex parents are recognised equally before the law.

7. Laws not amended

In its report on same-sex entitlements, the Human Rights and Equal Opportunity Commission identified several discriminatory laws which are not part of the Bill. We are keen to know why these have not been included in the Bill, and ask the Committee to seek an explanation from the Government.

8. Education

The changes to federal law proposed in this Bill impose a raft of new rights and responsibilities on same-sex couples. In order for same-sex couples and their families, NGOs, service providers, professionals, and government agencies to be adequately prepared for these changes, it is important for an extensive education campaign to be prepared and implemented by the Federal Government.