INQUIRY INTO THE SAME-SEX RELATIONSHIPS (EQUAL TREATMENT IN COMMONWEALTH LAWS – GENERAL LAW REFORM) BILL 2008

SUBMISSION OF THE GAY & LESBIAN RIGHTS LOBBY (NSW)

SEPTEMBER 2008

About the Gay & Lesbian Rights Lobby

Established in 1988, the Gay & Lesbian Rights Lobby (GLRL) is the peak representative organisation for lesbian and gay rights in New South Wales. Our mission is to achieve legal equality and social justice for lesbians and gay men.

The GLRL has a strong history in legislative relationship reform. In NSW, we led the fight for the recognition of same sex de facto relationships, which led to the passage of the *Property (Relationships) Amendment Act 1999* and subsequent amendments. The GLRL was also successful in campaigning for the equalisation of the age of consent in NSW for gay men in 2003 and the first recognition of same-sex partners in federal superannuation law in 2004. In 2006, we conducted one of the largest consultations on same-sex relationship recognition in Australia, with over 1,300 gay, lesbian, bisexual and transgender people in metropolitan, regional and rural NSW.

The rights and recognition of children raised by lesbians and gay men have also been a strong focus in our work for over ten years. In 2002, we launched *Meet the Parents*, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the law reform recommendations outlined in our 2003 report, *And Then … The Bride Changed Nappies*. Several of our recommendations were enacted into law under the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW). We continue to work towards the outstanding recommendations.

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ABBREVIATIONS

ART	assisted reproductive technology
De Facto Bill	Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008
Evidence Bill	Evidence Amendment Bill 2008
GLRL	Gay & Lesbian Rights Lobby (NSW)
HREOC	Human Rights and Equal Opportunity Commission
Same-Sex Relationships Bill	Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008
SDA	*Sex Discrimination Act 1984* (Cth)
Super Bill	Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008

EXECUTIVE SUMMARY AND RECOMMENDATIONS

INTRODUCTION

- The GLRL strongly supports the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 (**'Same-Sex Relationships Bill'**) and recommends its swift passage into law.

- This submission complements our previous submissions and addresses issues concerning the **drafting**, **scope** and **implementation** of the Same-Sex Relationships Bill.

Recommendation 1:

The GLRL strongly supports the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 and recommends its swift passage into law.

PART ONE: DRAFTING OF THE BILL

COUPLE DEFINITIONS IN THE SAME-SEX RELATIONSHIPS BILL (SEE **PART 1.1**)

- ***Acts Interpretation Act 1901*.** The GLRL strongly supports the definition of 'de facto relationship' proposed for **section 22A, 22B and 22C** of the *Acts Interpretation Act 1901* without any further amendment (Same-Sex Relationships Bill, Schedule 2, Part 1). This definition reflects many existing state/territory definitions, equally recognises same-sex and heterosexual couples, promotes federal consistency, applies flexibly to individual relationship circumstances and clarifies the issue of temporary separation.

Recommendation 2:

The proposed definition of a 'de facto relationship' for the *Acts Interpretation Act* should be supported without amendment.

- ***Migration Act 1958***. The GLRL is concerned that the **cohabitation requirement** (in the proposed de facto definition for the *Migration Act 1958*) may not adequately recognise the situation for same-sex couples living in persecutory environments. With homosexuality criminalised in no less than 85 countries, 'living together' with a same-sex partner may not be possible for same-sex couples in **all** circumstances. Indeed, the GLRL's review of 133 recent Australian refugee decisions on the basis of sexual orientation supports this observation. The GLRL is concerned that even with the new inclusive de facto definition, the cohabitation requirement may nonetheless continue to render the definition discriminatory in effect.

Recommendation 3:

For the purposes of eligibility in applying for visas, prior cohabitation should not be a prerequisite for a de facto couple in all circumstances. Discretion should be given to waive the cohabitation requirement where justice demands, such as in compassionate or compelling circumstances.

THE QUESTION OF INTERDEPENDENCY (SEE **PART 1.2**)

- **Recognition of caring relationships.** The GLRL strongly believes that the recognition of interdependent or caring relationships and potential reforms in this area should properly be left to a specific inquiry that investigates both the potential positive and negative implications for people in caring relationships. We note that no submissions from people in caring relationships or carer groups have been made in the context of these reforms. This suggests that further inquiry is required before a **couple-like, comprehensive legal status** should be to be afforded to people in caring relationships for the purpose of federal rights and responsibilities. The GLRL would particularly welcome this investigation as people in caring relationships, including people in our own community, should have the opportunity to address much wider issues in relation to their needs than simply issues related to legal definitions.

Recommendation 4:

The recognition of people in interdependent or caring relationships is beyond the scope of the current Bill and deserves a separate and genuine investigation in consultation with affected stakeholders.

DEFINITIONS OF 'CHILD' IN THE SAME-SEX RELATIONSHIPS BILL (SEE **PART 1.3**)

- **Stepchildren.** The GLRL welcomes the inclusive stepchild definition introduced by the Same-Sex Relationships Bill. This definition will ensure children will not be disadvantaged as a result of the marital status of the relationship between their parent and stepparent. The GLRL invites the Committee to consider whether the reasoning in *Commonwealth of Australia v HREOC and Muller* (*Muller's Case*) [1998] 138 FCA will impact on how the definition is interpreted. The GLRL is concerned to ensure that statement made by the Explanatory Memorandum will remedy potential discrimination towards same-sex stepparents in the interpretation of the definition.

Recommendation 5:

We invite the Committee to consider whether the discriminatory outcome reached, as a result of the reasoning in *Commonwealth of Australia v HREOC and Muller* ('*Muller's Case*') [1998] 138 FCA, will be sufficiently remedied by the Explanatory Memorandum statement which says, that the definition of stepchild must be interpreted without regard to whether a partner is capable of marrying their partner under Australian law.

- **Parentage presumption in the *Australian Citizenship Act 2007*.** The GLRL welcomes the inclusive parentage presumption which will be inserted into section 8 of the *Australian Citizenship Act*. The new section 8 will deem the consenting husband or **male or female** de facto partner of the birth mother to a child born through assisted reproductive technology as a parent for citizenship purposes. This amendment reflects the 'best practice' drafting model in a majority of states and territories in Australia for affording co-mothers parental status. It also reflects our vision for inclusive parentage presumptions in federal law and the starting point for replacing the 'product of a relationship' concept.

- **'Product of a relationship' concept.** Although the GLRL supports the **objective** of the new 'product of a relationship' concept which attempts to remove discrimination against children in same-sex families, we reiterate the concerns expressed in our *Super Bill submission* about the concept. The GLRL supports the removal of the concept entirely, particularly in relation to children born through assisted reproductive technology (and who are not the result of a surrogacy arrangement). In its place, the GLRL continues to advocate for its model definition of child (outlined in the *Super Bill submission*), which will equitably recognise children of same-sex families, and children of heterosexual and same-sex couples born through surrogacy.

    - **Problems with the 'production of a relationship' concept.** Despite clarifying examples in the Explanatory Memorandum, the concept remains problematic, unclear and may be both overly inclusive and too restrictive for some families. The 'product of a relationship' concept:

        - **Overly complicates the definition of 'child' for the purposes of children born through regular assisted reproductive technology (ART).** The GLRL believes a simple, inclusive federal parentage presumption would achieve the same purpose as the concept – but with more clarity and consistency.

        - **Invites inconsistency about who is a 'parent' under common law versus statutory law.** There is the potential for inconsistencies in who is recognised as a 'parent' for different legal purposes.

        - **Does not adequately address surrogacy outcomes, particularly where there is conflict between the surrogate mother and the 'commissioning' couple.** The concept does not answer the question of what happens if a surrogate mother does not consent to the relinquishment of her child, after the child's birth.

        - **Does not adequately address surrogacy outcomes where the child is intended to have a sole parent or where neither intended parent is biologically related to the child.** The GLRL is aware of at least one family where the 'product of a relationship' definition will continue to exclude children born through surrogacy arrangements.

- **Our model definition of 'child'.** The GLRL believes its model definition of 'child' (outlined in our *Super Bill submission*) would adequately replace the 'product of a relationship' concept, and we address the concerns raised by the Attorney-General's Department in this regard. Our model definition would see the recognition of children born through intercourse, adopted children and children born through ART (including surrogacy) in a consistent and certain fashion. Our model definition:

    - Could help exhaustively define who is a 'parent' for the purposes of federal law following judicial uncertainty in this regard;

    - Would ensure children born through ART could be recognised via a centrally-located, non-discriminatory, **federal** parentage presumption (applying to consenting **male and female** partners of birth mothers) which is reflected across all federal law;

    - Would address the challenge of recognising children born through surrogacy arrangements, by automatically recognising *existing* surrogacy schemes whilst also providing interim formal recognition to parenting orders (which have been issued by the Family Court with the best interests of the child as the paramount consideration).

Recommendation 6:

Remove all references to 'product of a relationship' in the various definitions of 'child' under the Same-Sex Relationships Bill;

Whilst the GLRL believes the concept should be removed entirely, we particularly believe it should be removed for children born through assisted reproductive technology (and who are not the result of a surrogacy arrangement);

Instead, insert a new federal definition of 'child' which recognises:

• Children born through intercourse

• Adopted children

• Children born through regular assisted reproductive technology (recognised via a *federal* parentage presumption which includes lesbian co-mothers)

• Children recognised under prescribed state or territory surrogacy parentage transferral schemes

• *In the interim*, children born through surrogacy arrangements recognised under parenting orders

• Where appropriate *and for specific relevant purposes*, children under the care of a person who is acting in the position of a parent ('in loco parentis') or children normally resident in the household.

PART TWO: SCOPE OF THE BILL

- The GLRL supports the Same-Sex Relationship Bill's implementation of the same-sex reforms in an omnibus form.

THE 58 LAWS HIGHLIGHTED BY THE SAME-SEX: SAME ENTITLEMENTS INQUIRY (SEE **PART 2.1**)

- Taken together, the Same-Sex Relationships Bill, Super Bill, Evidence Bill, De Facto Bill and proposed National Employment Standards appear to faithfully implement most of the recommendations of the *Same-Sex: Same Entitlements* Inquiry. However we list some omissions from the Same-Sex Relationships Bill in **Table 1** of this submission.
- The GLRL would be keen for the Committee to review:
    - Whether all the recommendations of the HREOC *Same-Sex: Same Entitlements* Inquiry have been implemented;
    - Whether any further action is required to ensure equality for same-sex couples in the areas highlighted by HREOC,
    - Whether there may be any possible future discrimination by not reforming Acts, which although have been superseded by new Acts, have nonetheless not been entirely repealed.

Recommendation 7:

We recommend the Committee reviews whether all the recommendations of *Same-Sex: Same Entitlements* have been incorporated (to the extent possible) by this Bill or proposed reforms and whether any further action is required to ensure equality for same-sex couples and their children in federal law.

Recommendation 8:

We recommend the Committee reviews whether there may be any possible future discrimination against same-sex couples by not reforming Acts, which although have been replaced by new Acts, have nonetheless not been entirely repealed.

- **Diplomatic, consular and international immunities.** Of particular concern to the GLRL are the omissions of the *Diplomatic Privileges and Immunities Act 1967*, *Foreign States Immunities Act 1985* and *International Organisations (Privileges and Immunities) Act 1963* from the Same-Sex Relationships Bill. These Acts implement Australia's international obligations, by providing immunities for diplomatic and consular staff, Heads of State and family members. Unlike other terms contained in the annexed international agreements under these Acts, which *are* given localised Australian legal meanings; terms such as 'family', 'spouse', 'dependent relatives' and 'child' are left undefined. This could render such terms discriminatory against same-sex couples and

their children.

Recommendation 9:

The interpretations section of the *Diplomatic Privileges and Immunities Act 1967* should be amended to define the term 'family' as including, but not limited to, same-sex couples and their children.

Recommendation 10:

The interpretations section of the *Foreign States Immunities Act 1985* should be amended to define the term 'spouse' as including, but not limited to, a de facto partner within the meaning of the *Acts Interpretation Act 1901.*

Recommendation 11:

The interpretations section of the *International Organisations (Privileges and Immunities) Act 1963* should be amended to define the terms 'dependent relatives' and 'children' to include, but not be limited to, same-sex couples and their children.

THE ADDITIONAL AMENDMENTS (SEE **PART 2.2**)

- The Same-Sex Relationships Bill also amends some pieces of legislation outside the terms of the *Same-Sex: Same Entitlements* Inquiry. We thank the Government for auditing and reforming these further areas of federal law which discriminate against same-sex couples and their children. **Table 2** of this submission lists these further laws. The purpose of **Table 2** is to show the incredible breadth of these reforms, and emphasise our later discussions about the importance of public education, as they bring both new rights and *significant obligations* on same-sex couples (see **part 3** of this submission).

- **Inconsistency in the *Sex Discrimination Act*.** One of the additional Acts listed for amendment by the Same-Sex Relationships Bill is the *Sex Discrimination Act 1984* ('**SDA'**). This amendment will extend very limited discrimination protection to employees with same-sex partners and families who are **dismissed** from their employment on the basis of family responsibilities.

  However, the amendments to the SDA do not change the discriminatory definition of 'spouse' for the purposes of **marital status** discrimination. This leaves two inconsistent definitions of 'spouse' for the purposes of the SDA. The effect of this omission is that people who are single, divorced, separated, married or in *heterosexual* de facto relationships are protected from marital status discrimination, whilst same-sex de facto partners are not. By contrast, every state and territory (with the exception of South Australia) currently recognises same-sex couples under the marital status ground. The GLRL believes there is no reason to leave two inconsistent definitions of 'spouse'

  It is important to note that even if discrimination on the basis of marital status included same-sex couples, this would not protect same-sex couples from discrimination on the basis of **sexual orientation** at the federal level. Following the spirit of the Same-Sex

Relationships Bill, the GLRL believes it is time to consider enacting a federal discrimination act that protects from discrimination on the basis of sexual orientation and gender identity.

Recommendation 12:

The definition of 'marital status' in the *Sex Discrimination Act* should be amended to include same-sex de facto couples.

Recommendation 13:

We recommend the enactment of federal discrimination legislation to protect from discrimination on the basis of sexual orientation and gender identity.

Future discrimination against same-sex couples (see **part 2.3**)

- The GLRL welcomes this momentous time in Australia's human rights history. We are keen to ensure that future legislation does not discriminate against same-sex couples and their children.

Recommendation 14:

We recommend the Committee consider appropriate measures to ensure future legislation does not include provisions which discriminate on the basis of sexual orientation or marital status.

Part Three: Implementation of the Bill

Public education campaign (see **part 3.1**)

- **Lesbian, gay, bisexual and transgender Australians.** The GLRL is very concerned that same-sex couples are not presently aware of their status under the law or even how to claim rights to which they are already entitled. With this reform, federal and state law will increasingly merge towards a consistent, comprehensive recognition of same-sex partners as equal to opposite-sex de facto partners. These reforms will also impose new obligations on same-sex couples – including negative financial implications as a result of social security changes. For these reasons, it is essential to educate lesbian, gay, bisexual and transgender Australians about their new (and existing) rights under the law.

- **Commonwealth services providers and decision-makers.** Many frontline staff of federal agencies, such as Centrelink, may find that they are dealing with openly lesbian, gay, bisexual and transgender clients for the very first time. Training and education for Commonwealth service providers on how to sensitively deal with these clients is needed to ensure same-sex couples have the confidence to assert their rights without fearing hostility.

- **Professionals.** Many day-to-day professionals, such as accountants, lawyers, migration agents and employers, will be grappling with the consequences of the reforms for their

clients and employees in same-sex relationships. In some cases, there may be liability for negligent advice as a result of poor comprehension of the law.

Recommendation 15:

A public education campaign should educate:

• Lesbian, gay, bisexual and transgender Australians

• Commonwealth service providers and decision-makers, and

• Professionals working in the areas of the reforms

about the effect of the reforms and how same-sex couples can assert their rights under the law.

SOCIAL SECURITY REFORM (SEE **PART 3.2**)

- Although same-sex couples aspire for *equal* rights, not *special* rights – we are concerned that the proposed changes to the *Social Security Act 1991* will **remove** benefits currently enjoyed by same-sex partners. The impacts of these changes will be felt heavily by people who are among the most economically vulnerable in our community.
- The GLRL would like to see a departmental policy where affected same-sex couples are given time and support to readjust their finances, without automatically attracting harsh penalties for an inability to comply with the new laws.

Recommendation 16:

We invite the Committee to investigate:

• Whether any further transitional measures should be inserted into the Same-Sex Relationships Bill to ensure same-sex couples affected by social security changes have sufficient time readjust their finances,

• What Centrelink can do to provide support and time in sensitively assisting affected same-sex couples in the transition to equality.

CONCLUSION

- The GLRL sincerely welcomes the Same-Sex Relationships Bill and hopes to see its speedy passage through both Houses of Parliament. Our recommendations fine-tune the objects of the Bill, which we support without qualification.

INTRODUCTION

The Gay & Lesbian Rights Lobby (NSW) ('**GLRL**') welcomes the opportunity to provide a submission for the Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 (**'Same-Sex Relationships Bill'**).

The GLRL would be pleased to provide the Committee with further written or oral submissions as requested.

Our submission with respect to the Same-Sex Relationships Bill compliments our earlier submissions with respect to the:

- Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 (**'Super Bill'**)
- Family Law Amendment (De Facto Matters and Other Measures) Bill 2008 ('**De Facto Bill**')
- Evidence Amendment Bill 2008 ('**Evidence Bill**').

The GLRL strongly supports the Same-Sex Relationships Bill and recommends its swift passage into law. In this submission, we recommend some specific ways in which the Same-Sex Relationships Bill may be improved with respect to the:

- **Drafting of the Bill**, including various definitions of 'de facto relationship' and 'child',
- **Scope of the Bill,** including some omissions with respect to the Same-Sex Relationships Bill,
- **Implementation of the Bill**, including the need for a public campaign to educate same-sex couples and their children about their new rights and responsibilities under federal law.

We congratulate and sincerely thank the Attorney-General's Department, and every Commonwealth department, for this historic and comprehensive undertaking of human rights reform. In no way do we wish our recommendations to undervalue the significance of this achievement.

Recommendation 1:

The GLRL strongly supports the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 and recommends its swift passage into law.

PART ONE: DRAFTING OF THE BILL

1.1 COUPLE DEFINITIONS IN THE SAME-SEX RELATIONSHIPS BILL

The GLRL has already made extensive submissions about the importance of recognising same-sex couples as de facto couples and the deficiencies of the interdependency model for same-sex couple recognition (see *Super Bill submission*, part 1.3; *De Facto Bill submission*, part 1.1; *Evidence Bill submission*, part 2, 3 and 5). We strongly support the Same-Sex Relationships Bill's inclusion of same-sex couples within the various de facto definitions to be introduced into federal law.

In this part, the GLRL will provide specific comments in relation to:

- The uniform de facto definition to be introduced into the *Acts Interpretation Act 1901*,[1]
- The specific de facto definition to be introduced for the purposes of the *Migration Act 1958*.[2]

1.1.1 ACTS INTERPRETATION ACT DEFINITION

The GLRL strongly supports the definition of 'de facto relationship' proposed for **section 22A, 22B and 22C** of the *Acts Interpretation Act 1901* without any further amendment.

We note:

- **This de facto definition is identical in many respects to existing state and territory de facto definitions, thereby ensuring greater consistency and clarity of meaning**.[3] The similarities in this definition with existing de facto definitions will ensure that an extensive range of common law will remain relevant for interpreting the definition and providing greater clarity in its application. In particular, we note that terms such as 'living together', as well as the indicia of a relationship (proposed s 22C(2)), have received considerable common law consideration over several decades.[4] This definition will ensure this judicial effort is put to beneficial use.
- **The definition explicitly and equally recognises same-sex and heterosexual de facto couples.** The definition of 'de facto partners' (proposed s 22A) ensures that definition of 'de facto relationship' applies whether the partners are of the same or opposite sex. Recognising same-sex couples as 'partners' rather than 'dependents'

[1] Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 ('Same-Sex Relationships Bill'), Schedule 2, Part 1.

[2] Same-Sex Relationships Bill, Schedule 10, Part 2, Division 1, Clause 20.

[3] *Property (Relationships) Act 1984* (NSW), s 4; *Property Law Act 1958* (Vic), s 275 (see also *Relationships Act 2008* (Vic), s 35); *Acts Interpretation Act 1954* (Qld), s 32DA; *Interpretation Act 1984* (WA), s 13A; *De Facto Relationships Act 1991* (NT), s 3A; *Legislation Act 2001* (ACT), s 169; *Relationships Act 2003* (Tas), s 4. Note: Tasmania and Northern Territory do not require the couple to be 'living together', although cohabitation can be considered as a factor.

[4] Jenni Millbank (2006) 'The Changing Meaning of "De Facto" Relationships', 12 *Current Family Law* 82.

accords with how same-sex couples view and understand their relationships, and is generally consistent with state and territory approaches to same-sex de facto recognition.

- **The definition ensures the definition of 'de facto relationship' is largely consistent across federal law.** The GLRL believes that the consistency of recognition will help same-sex de facto couples better navigate and understand their rights and responsibilities under federal law.[5] Although certain specific couple definitions are retained in areas such as migration and social security, we see greater consistency in federal de facto recognition as being an extremely sensible way to make partner entitlements more accessible.

- **The definition ensures the individual circumstances of each relationship can be flexibly considered within the overall framework.** The GLRL notes that the proposed section 22C(3) makes it clear that no particular factor (listed in section 22(2)) must exist for the couple to be deemed 'de facto partners'. This ensures that the definition looks to the intention of the parties, how the parties view their relationship and takes into account the variety of ways parties may structure the financial and non-financial aspects of their relationship. We welcome this approach which respects relationship diversity and accords with the different approaches taken by de facto couples in arranging their financial and personal affairs.[6] In particular, we strongly favour this approach over the former prescriptive definition of 'interdependency' which often required proving each individual formal factor (for example, financial support *and* domestic support *and* personal care)[7] rather than looking to the substance of the relationship and whether it was genuine and enduring.

- **We welcome the definition's clarification of the issue of temporary separation, as highlighted in our submission to the Super Bill.[8]** The proposed s 22C(4) clarifies that a de facto relationship may exist even if the partners have a temporary absence from each other or the partners are separated by reason of illness or infirmity. This will ensure, for example, that a partner who is absent for work reasons or who is admitted to an aged care facility will not lose the protection of de facto coverage.

Recommendation 2:

The proposed definition of a 'de facto relationship' for the *Acts Interpretation Act* should be supported without amendment.

[5] This is a concern we raise further in part 3 of this submission.

[6] See Helen Glezer (1997) 'Cohabitation and Marriage Relationships in the 1990s', (47) *Family Matters* 5, at 7-8; Jenni Millbank (2005) 'Cutting a Different Cake: Trends and Developments in Same-Sex Couple Property Disputes', 43(10) *Law Society Journal* 57, at 59.

[7] For example, see *Superannuation Industry (Supervision) Act 1993,* s 10A(1). See also Human Rights and Equal Opportunity Commission (HREOC) (2007) *Same-Sex Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, Sydney: HREOC, at 296.

[8] GLRL, *Super Bill submission*, part 1.2.

1.1.2 MIGRATION ACT DEFINITION

The Same-Sex Relationships Bill proposes amendments to introduce a new definition of 'de facto relationship' for the purposes of the *Migration Act 1958* (proposed s 5CB).[9] We would like to highlight one area of potential concern with respect to the **cohabitation requirement** in this definition, particularly for same-sex applicants applying for a protection visa.

Under the proposed definition, to satisfy the definition of a de facto partner, a visa applicant must show:

- They are not married to someone else (proposed s 5CB(2)), and
- They have a mutual commitment to a shared life with their partner to the exclusion of all others (proposed s 5CB(2)(a)), and
- The relationship with their partner is genuine and continuing (proposed s 5CB(2)(b)), and
- They **live together with their partner** (the '**cohabitation requirement**') or do not live separately and apart on a permanent basis with their partner (proposed s 5CB(2)(c)), and
- They are not related by family to their partner (proposed s 5CB(2)(d); see also proposed s 5CB(4)).

The proposed definition authorises the migration regulations to outline how an applicant would satisfy each of the criteria above (proposed s 5CB(3)).

The GLRL is concerned that the requirement for same-sex couples to show that they **live together** may not be adequate to recognise the situation of same-sex couples in persecutory environments, particularly those who are applying for humanitarian visas.[10]

Homosexuality is criminalised in no less than 85 countries.[11] That means, merely having a same-sex partner, let alone living with one, may pose a serious risk of harm to gay, lesbian, bisexual and transgender people hoping to apply for a visa with their partner in Australia.

In 2008, the GLRL completed a comprehensive review of Australian refugee decisions on the basis of sexual orientation.[12] We reviewed 133 tribunal and appeal decisions on this issue, and interviewed 5 lawyers and welfare workers who worked in the field. Our review highlighted that

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[9] Same-Sex Relationships Bill, Schedule 10, Part 2, Division 1, Clause 20.

[10] Since the 1990s, Australia has accepted people who have a well founded-fear of persecution on the basis of their (actual or imputed) membership of a 'social group'. 'Social group' has been defined to include gay, lesbian, bisexual and transgender people.

[11] Ottoson, D (2007) *State-Sponsored Homophobia: A World Survey of Laws Prohibiting Same Sex Activity Between Consenting Adults*, Brussels: International Lesbian and Gay Association, <http://www.ilga.org/statehomophobia/State_sponsored_homophobia_ILGA_07.pdf> [Accessed 3 October 2007].

[12] Ghassan Kassisieh (2008) *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation*, Sydney: Gay & Lesbian Rights Lobby.

several same-sex couples who were applying for protection visas would not satisfy the proposed definition of 'de facto partner' as it currently requires cohabitation.

For example, one interview with a welfare worker highlighted the situation facing a gay couple, who had been together for more than ten years, but who faced separation after one partner was successful before the Refugee Review Tribunal (on a second hearing) whilst the other was not. If the couple had been heterosexual, the primary visa applicant (who was successful in securing refugee status) may have been able to sponsor his partner. However, due to discriminatory definitions of 'spouse' under the Migration Regulations, this successful refugee claimant was precluded from doing so on the basis that his partner was of the same sex. Although the proposed inclusive definition of 'de facto partner' aims to address discrimination in migration against same-sex couples such as this one; by imposing a cohabitation requirement in **all** circumstances, the GLRL is concerned that the discriminatory effect will remain.

For example, the couple mentioned above were not able to live together for the majority of their ten year relationship because it would have brought attention to their homosexuality and heightened the risk of persecution (they lived in a country which criminalised homosexual acts with up to 2 years imprisonment). Several other cases reviewed in our study showed that significant same-sex relationships have endured over several years in secrecy[13], but these relationships would also not satisfy the proposed definition of 'de facto relationship' as the partners in these cases were not living together for fear of persecution.

The GLRL believes it is appropriate to consider removing cohabitation as a prerequisite for de facto recognition, at least, in compelling circumstances. One possible solution may be to give a broader discretion for the cohabitation requirement to be waived where justice demands, such as in 'compassionate or compelling circumstances'. We note this is the current approach to waiving the 12-month temporal requirement for the existing interdependency visa (which is presently almost exclusively used by same-sex couples).[14]

Achieving this recommendation would simply require a minor amendment to the proposed section 5CB of the *Migration Act*, to include:

> **5CB De facto partner**
>
> [...]
>
> (5) For the purposes of paragraph (2)(c), the requirement that de facto partners live together may be waived in compassionate and compelling circumstances, taking account all the circumstances of the case.

[13] For example, see *RRT Reference 060820542* [2006] RRTA 189 (Unreported, Zelinka, 19 May).

[14] Migration Regulations 1994, reg 1.09A(2A).

Recommendation 3:

For the purposes of eligibility in applying for visas, prior cohabitation should not be a prerequisite for a de facto couple in all circumstances. Discretion should be given to waive the cohabitation requirement where justice demands, such as in compassionate or compelling circumstances.

1.2 THE QUESTION OF INTERDEPENDENCY

Whilst respecting the value and importance of relationships between non-couples, in our previous submissions the GLRL rejected the 'interdependency' model as an inadequate model for the recognition of same-sex de facto couples (see *Super Bill submission*, part 1.3). However, the concept of 'interdependency' has continued to have currency in the debate on same-sex relationship recognition, despite no submissions from people in caring relationships or carer groups being made in the context of these reforms. Therefore, the GLRL will address the question of interdependency briefly in this submission.

The GLRL strongly believes that the recognition of caring relationships and potential reforms in this area should properly be left to a specific inquiry that investigates both the potential positive and negative implications for people in caring relationships.

In particular, we note that the incidence of people in caring relationships is difficult to measure. Interestingly, where there has been recognition of people in caring relationships for **couple-like** rights and entitlements, these rights have seldom been exercised. For example, since the introduction of a relationship register in Tasmania on 1 January 2004[15], only **one** caring relationship has been registered (as at 6 December 2007).[16] Similarly, despite recognition of close personal and caring relationships in property division regimes under state and territory law[17], there have been very few claims made with respect to these entitlements.[18] Similarly, despite the recognition of 'interdependent relationships' under federal migration law, same-sex couples have almost exclusively been the utilisers of the 'interdependency' visa category.

The low numbers of people in caring relationships who have registered their relationship or have accessed couple-like rights and entitlements may suggest:

- There may be few people in caring relationships overall, and/or
- Few people understand their legal rights, the purpose of relationship registers or are aware of the existence of legal recognition, and/or

[15] Under the *Relationships Act 2003* (Tas).

[16] Rodney Croome Blog, <http://www.rodneycroome.id.au/other_comments?id=2580_0_2_0_C13> [Accessed 13 September 2007].

[17] Property regimes in the Australian Capital Territory, New South Wales, Tasmania, South Australia and (soon) Victoria recognise close personal and caring relationships: *Domestic Relationships Act 1994* (ACT), s 3; *Property (Relationships) Act 1984* (NSW), s 5; *Relationships Act 2003* (Tas), s 5; *Domestic Partners Property Act 1996* (SA), s 3; *Relationships Act 2008* (Vic) [not yet commenced].

[18] Jenni Millbank (2006) 'Recognition of Lesbian and Gay Families in Australian Law – Part One: Couples', 34(1) *Federal Law Review* 1.

- People in caring relationships may already be **legally** recognised in relevant areas, for example, sibling carers may already be recognised as *siblings*, and parent/child caring relationships may already be recognised as *parent-child* relationships, and/or

- There may be little interest, desire or need among people in caring relationships to have their relationships recognised in a similar fashion to romantic couples, and/or

- The rights that are attached to couple relationships (such as property rights and family assistance) may not be relevant or required for people in caring relationships who are less likely to have children, and/or

- People in caring relationships may have needs (such as social, welfare or financial needs) which are **different** to heterosexual de facto and same-sex couples.

Furthermore, the comprehensive recognition of caring relationships without proper consultation may serve to disadvantage people in these relationships, and in particular, vulnerable people who are being cared for. This issue has been recognised in Tasmania, where independent legal advice about the implications of registration is required **before** caring relationships can be registered.[19] And unless registered, caring relationships are generally not recognised in many areas at all.[20] This recognises that the implications for recognition bring **responsibilities and obligations** which may be detrimental to the people in the relationship, in addition to rights and entitlements which may be advantageous.

Whilst the gay, lesbian, bisexual and transgender community has been consulted about the disadvantages of recognition (and generally agree that the advantages of equality outweigh the disadvantages[21]), people in caring relationships have not been consulted to any real degree about these issues. Automatically recognising caring relationships at the federal level, even those who have registered their relationships under state and territory schemes, means that the existing legal advice sought by people in caring relationships about their obligations and responsibilities **prior** to registration will be deficient. As a result, people in caring relationships who have registered their relationship may find themselves imposed upon by obligations under federal law that they never intended nor desired to apply to them.

There is simply no evidence available of a widespread demonstrable need for a **couple-like, comprehensive legal status** to be afforded to people in caring relationships for the purpose of federal rights and responsibilities. Rather, the specific needs and desires of people in caring relationships deserves separate and genuine investigation. We would particularly welcome this investigation, as people in our own community, such as those who are living with HIV/AIDS and may therefore be living in caring arrangements, should have the opportunity to address much wider issues in relation to their needs than simply issues related to legal definitions.

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[19] *Relationships Act 2003* (Tas), s 11(3).

[20] Millbank, n18 above, at 28.

[21] Laurie Berg, Vicki Harding, David Scamell & Ben Bavinton (2007) *All Love is Equal... Isn't It? The Recognition of Same-Sex Relationships under Federal Law*, Consultation Report, Sydney: Gay & Lesbian Rights Lobby, at 8. See also, HREOC, n7 above, at 215-7.

Recommendation 4:

The recognition of people in interdependent or caring relationships is beyond the scope of the current Bill and deserves a separate and genuine investigation in consultation with affected stakeholders.

1.3 DEFINITIONS OF 'CHILD' IN THE SAME-SEX RELATIONSHIPS BILL

The GLRL has already made extensive submissions in relation to the definition of parent-child relationships under federal law (see *Super Bill submission*, part 2; *De Facto Bill submission*, part 2).

We previously expressed concern about the exclusion of co-mothers from parentage presumptions in section 60H of the *Family Law Act 1975* (Cth). We welcome the Committee's first recommendation from the Inquiry into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 which accepted our submission in this regard. We hope to see this recommendation enacted as an amendment to the De Facto Bill.

We have also expressed our concern about the proposed concept of the 'product of a relationship'. We note that the 'product of a relationship' concept has now been incorporated throughout the Same-Sex Relationships Bill for almost all areas of federal law.

In this section we outline our position with respect to:

- The definition of 'step child' throughout the Same-Sex Relationships Bill,
- The non-discriminatory parentage presumption proposed for the *Australian Citizenship Act 2007*,
- The limitations of the 'product of a relationship' definition.

We also respond to some of the criticisms made towards our model definition of 'child', which we previously outlined in our *Super Bill submission*.

1.3.1 STEP CHILDREN

The GLRL welcomes the inclusive definition of stepchild/stepparent introduced by the Same-Sex Relationships Bill. This definition will ensure that no child in Australia will be disadvantaged as a result of the marital status of the relationship between their parent and *de facto* stepparent.

Used throughout various amendments, the definition of stepchild is expressed in this way:

> ***stepchild****: without limiting who is a stepchild of a person for the purposes of this Act, someone who is a child of a de facto partner of the person is the* ***stepchild*** *of the person if he or she would be the person's stepchild except that the person is not legally married to the partner.*[22]

With respect to this definition, we note that the Explanatory Memorandum says:

[22] For example, see Same-Sex Relationships Bill, Schedule 5, Clause 17 (amends section 4(1) of the *Safety, Rehabilitation and Compensation Act 1988*).

It is not necessary to establish that the person and the parent are capable of being legally married.[23]

This statement is extremely important as it rebuts the reasoning in cases like *Commonwealth of Australia v HREOC and Muller* ('*Muller's Case*') [1998] 138 FCA (27 February 1998) which found that the term, 'as a spouse', meant that a partner, although not married, must show they were *capable* of becoming legally married in order to satisfy the definition of 'as a spouse'. This reasoning (although since doubted[24]) has meant that terms such as 'spouse' have excluded same-sex partners because same-sex couples are not capable of marrying under Australian law.

The reasoning in *Muller's Case* could be influential for interpreting the term, '*except that the person is* ***not legally married*** *to the partner*', in the stepchild definition. This is because, following *Muller's Case*, this term may imply that a person must be *eligible* to marry their partner (but not, in fact, be married to their partner) in order to satisfy the definition of a stepchild. If *Muller's* reasoning is applied, this could exclude a same-sex partner because same-sex couples are not capable of legally marrying under Australian law.

The GLRL would invite the Committee to consider whether the statement in the Explanatory Memorandum will be enough to rebut the reasoning in *Muller's Case* for the purpose of interpreting the stepchild definition in a way which does not discriminate against same-sex stepparents.

Recommendation 5:

We invite the Committee to consider whether the discriminatory outcome reached, as a result of the reasoning in *Commonwealth of Australia v HREOC and Muller* ('*Muller's Case*') [1998] 138 FCA, will be sufficiently remedied by the Explanatory Memorandum statement which says, that the definition of stepchild must be interpreted without regard to whether a partner is capable of marrying their partner under Australian law.

1.3.2 Parentage presumption in the Australian Citizenship Act 2007

The GLRL notes that **section 8** of the *Australian Citizenship Act 2007* will be amended by the Same-Sex Relationships Bill to replace a discriminatory parentage presumption.[25]

The previous section 8 deemed the consenting husband or **male** de facto partner of a woman (who has a child through an 'artificial conception procedure') as a parent of that child for the purposes of the *Australian Citizenship Act*. The new section 8 will deem the consenting husband or **male or female** de facto partner of the birth mother as a parent for the purposes of the *Australian Citizenship Act*. This means that a lesbian co-mother will automatically be recognised as a parent for citizenship purposes.

This is a significant amendment as it demonstrates our vision for inclusive parentage presumptions in federal law, including how we would like to see section 60H of the *Family Law*

[23] Explanatory Memorandum to the Same-Sex Relationships Bill, at 11.

[24] HREOC, n7 above, at 65.

[25] Same-Sex Relationships Bill, Schedule 10, Part 1, Clause 7.

Act 1975 expressed. This is the 'best practice' drafting model for affording co-mothers parental status, and is used in the majority of Australian states and territories (including, the Australian Capital Territory, New South Wales, Northern Territory, Western Australia and expected for Victoria in 2008) (for more information, please see part 2 of our *De Facto Bill submission*).

The GLRL strongly supports this parentage presumption in the *Australian Citizenship Act* and believes it is the starting point for replacing the problematic 'product of a relationship' definition.

1.3.3 'PRODUCT OF A RELATIONSHIP'

The GLRL supports the **objective** of the new 'product of a relationship' definition, which attempts to ensure that those children who are parented by same-sex couples will enjoy similar entitlements and benefits to children with opposite-sex parents.

Despite our support for the removal of discrimination against children parented by same-sex couples, the GLRL has already expressed its concerns about the proposed 'product of a relationship' concept.

In our *Super Bill submission*, we outlined our model definition of 'child' to replace the proposed concept (see *Super Bill submission,* part 2.3). We resubmit our arguments in part 2 of *Super Bill submission* and provide a short summary of those arguments here.

1.3.3.1 Problems with the 'product of a relationship' definition

In our *Super Bill submission*, the GLRL expressed concerns that the concept of a 'product of a relationship' was not sufficiently clear and may be overly inclusive or too restrictive for some families (see *Super Bill submission*, part 2.2). We note that the Explanatory Memorandum to the Same-Sex Relationships Bill provides more detail as to which families the concept is attempting to cover.

Unfortunately, the examples precisely highlight the problems we have already expressed about the concept. In particular:

- **The 'product of a relationship' concept overly complicates the definition of 'child' for the purposes of children born through regular assisted reproductive technology (ART).** Example 2 of the Explanatory Memorandum outlines a situation where a woman undergoes ART (e.g. donor insemination, IVF etc.) using donor gametes. The child who is born to the woman would be her 'product' and the 'product' of her partner if – as the Explanatory Memorandum suggests – the procedure was a 'joint endeavour'.[26] The GLRL believes that the recognition of children born through ART can be achieved in a much simpler way. Simply, why not recognise the consenting partner of the birth mother of a child born through ART through an inclusive **federal** parentage presumption (such as the presumption inserted into section 8 of the *Australian Citizenship Act* above)? Then, simply reflect that recognition throughout federal law?

  Parentage presumptions exist in various forms in state, territory and federal law. They have received judicial attention – which has resulted in clarity around their

[26] Explanatory Memorandum to the Same-Sex Relationships Bill, at 9.

interpretation. Why introduce a wholly new concept – the 'product of a relationship' – to define a parent-child relationship that can be easily recognised through existing legislative tools?

- **The 'product of a relationship' concept invites inconsistency about who is a 'parent' under common law versus statutory law.** Example 3 of the Explanatory Memorandum outlines a situation where one partner in a relationship (whether heterosexual or homosexual) agrees to have *sexual intercourse* with another person outside the relationship, in order to conceive a child to be parented by that couple. That child will be a 'product of the relationship', and the couple will be parents for the purposes of all federal laws which include the 'product of a relationship' concept. The problem with this proposition is that, under the common law, the conception of a child through *sexual intercourse* would deem the biological mother and the biological father as the parents of that child. Therefore you will have a child who is the child of a couple for the purpose of some federal laws, but not for the purposes of family law, child support or any state/territory law which leaves terms such as 'child' or 'parent' undefined. The biological father of that child will still be the parent in these cases, alongside the birth mother. The only way he can completely cede his parental rights would be through an adoption process. Therefore, the GLRL believes that the concept only creates uncertainty for children and their parents – and is therefore not in the best interests of a child.

- **The 'product of a relationship' concept does not adequately address surrogacy outcomes, particularly where there is conflict between the surrogate mother and the commissioning couple.** Example 4 of the Explanatory Memorandum outlines a situation where a couple 'commission' a surrogate mother to carry a child for them, with the intention of being parents to that child. If all goes to plan, the child will be the 'product' of their relationship for the purposes of many areas of federal law (with the notable exception of the *Family Law Act* and child support). But in this example, what happens to the surrogate mother's rights as the birth mother? At present, in the *Family Law Act* (section 60H) and under every state/territory parentage presumption, the surrogate mother is the parent of that child, and her consenting partner[27] (if any) is the second parent. In this situation, there has been no process of **transferral of rights**, from the surrogate mother and her partner (if any), to the intended parent/s – and importantly, no process of transferral of rights **with the surrogate mother's express consent**. This means the child could conceivably have three or four parents for the purposes of some federal law. Furthermore, what happens if the surrogate mother changes her mind after the birth of the child and decides she does not want to give up the child? Will the child still be recognised as the intended parents' 'product' against the wishes of the surrogate mother? These complexities are not adequately addressed by the concept.

- **The 'product of a relationship' concept does not adequately address surrogacy outcomes where the child is intended to have a sole parent or where neither intended parent is biologically related to the child.** As the 'product' definition

[27] In NSW, WA, ACT and NT the partner may be male or female. In SA, Qld or Tas, only a male partner would be recognised under the law.

> requires a 'relationship' for parental status to be recognised, the definition will not include children born through surrogacy arrangements to intended *sole* parents. The GLRL is aware of at least one family where this has been the case (i.e. a *single* person commissioned a surrogate mother to carry the child). It is also conceivable that the intended couple do not donate any gametes to the birth of their child, meaning they have no biological relationship with the child carried by a surrogate mother. This couple would also not be recognised by the concept of 'product of a relationship' which requires at least one parent to be biologically related to the child.

In conclusion, the 'product of a child' definition overly complicates the legal recognition of family forms created through ART, which are more readily and less problematically recognised through inclusive parentage presumptions. The definition is manifestly inadequate to address the particular complexities of surrogacy arrangements, including the issue of consensual relinquishment, biological heritage and sole parent recognition.

1.3.3.2 Responding to the criticisms of our model definition of 'child'

The GLRL notes that Senator Hanson-Young asked the Commonwealth Attorney-General's Department to evaluate our model definition of 'child'. We thank the Senator for her question to the AG's Department, and would like to raise some issues with the Department's response.

The Department described our submission as 'thoughtful' but stated it would lead to 'several inappropriate results'.[28]

1.3.3.2.1 Children born through intercourse and adopted children

In relation to our submission, which outlined the need for a federal model definition of 'child' to include children born through sexual intercourse and adopted children (see *Super Bill submission*, part 2.3.1), the AG's Department responded:

> *In relation to their first two recommendations, biological children of both parents and adopted children are already recognised for superannuation purposes.*[29]

This is indeed true, but the essence of our recommendation was to introduce a federal model definition of 'child' that went beyond superannuation purposes. The idea was to provide a more consistent approach across the board to defining parent/child relationships under federal law. Clearly, if legislation already includes biological children born through intercourse and adopted children, there is no need to amend the legislation for these two tiers. However, we left these two tiers for completeness, in order to highlight all the classes of children that should be included.

Another consideration that should be given is whether federal statutes should **exhaustively** define who is a parent for the purposes of federal law to ensure certainty for children and their parents. For example, we note that the there is some judicial difference on how to interpret who is a 'parent' under the *Family Law Act 1975*:

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[28] Attorney-General's Department, response to question on notice, <http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/add03.pdf > [Accessed 15 September 2008].

[29] Ibid.

- **On one view, parentage presumptions are exhaustive** (e.g. *B v J* (1996) FLC 92-716)**.** That is, a person can only be a 'parent' for the purposes of the *Family Law Act* if they are recognised under one of the parentage presumptions contained in the Act; or

- **On another view, parentage presumptions are not exhaustive** (e.g. Brown J in *King & Tamsin* [2008] FamCA 309). That is, a person (who would otherwise **not** be recognised as a 'parent' under one of the parentage presumptions – due to a limitation in the law) may be found to be a 'parent' under the *Family Law Act*, nonetheless. *King & Tamsin* suggests this may happen if a person *intended* to be a parent after a successful surrogacy arrangement.[30] It is not clear how far this view may extend to other parenting situations.

Therefore, it may be entirely appropriate for a consistent federal definition of 'child' to **exhaustively** define who is a parent for the purposes of federal law in **statute**. If this was the case, then children born through sexual intercourse would need to be in the definition of 'child' as these children are generally recognised by virtue of the common law.

1.3.3.2.2 Children born through assisted reproductive technology

In relation to children born through ART (e.g. donor insemination, IVF etc.), the GLRL recommended an inclusive parentage presumption to be inserted in one central Act (such as the *Family Law Act* or *Acts Interpretation Act*) and then reflected across all federal law (see *Super Bill submission*, part 2.3.2).

In response to this aspect of our model definition of 'child', the Department said:

> *As recognised in the New South Wales Gay and Lesbian Rights Lobby's submission, State and Territory parenting presumptions relating to same-sex couples are inconsistent. The effect of relying on these presumptions at the national level is that it would lead to different treatment of children in similar circumstances depending on which State or Territory they were born. In terms of superannuation entitlements under Commonwealth defined benefit schemes this would be undesirable and inappropriate.*[31]

Whilst it is true that state and territory parenting presumptions are inconsistent (although becoming more consistent in recent years), the GLRL did not suggest that the federal definition of 'child' should solely rely on these state/territory presumptions. We recommended that a **federal** parentage presumption, which included lesbian co-mothers, should be centrally introduced into a *federal* statute and reflected across federal law. This would ensure the consistent recognition of children born through ART (who are not the result of a surrogacy arrangement) for all purposes under federal law, regardless of where they lived in Australia.

Indeed, we note that a **federal** parentage presumption will actually be inserted into the *Australian Citizenship Act 2007* as a result of the Same-Sex Relationships Bill. This parentage presumption makes the 'product of a relationship' definition entirely redundant for almost all children born through ART, as these children will be adequately recognised by the presumption. Of course, the only exception to this will be children born through ART as a result of a surrogacy arrangement. (This will be discussed below).

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[30] It is arguable that the person may also need a biological link with the child as the *King* decision emphasises that Mr King was the biological father.

[31] Attorney-General's Department, n28 above.

We therefore recommend that a similar parentage presumption to the one proposed for section 8 of the *Australian Citizenship Act* should be centrally inserted into a federal status and reflected across federal law. The 'product of a relationship' concept should be removed, at least, in respect to children born through assisted reproductive technology who are not the result of a surrogacy arrangement.

1.3.3.2.3 Children born via surrogacy

Without a doubt, children born through surrogacy arrangements present the biggest challenge for federal law in trying to recognise their familial situation. This is because these children have not been adequately recognised by state/territory law, which generally determine questions relating to legal parentage.

In part 2.3.3 of our *Super Bill submission,* the GLRL's response to this issue was, firstly, for federal law to automatically recognise children born through surrogacy arrangements, which have had a surrogacy order issued with respect to their legal parentage. We noted that only the Australian Capital Territory has an established surrogacy scheme at present[32], although Western Australia, South Australia, Queensland, New South Wales, Victoria and Tasmania have considered or are considering the issue through various inquiries and draft bills.

In the interim, the GLRL also recommended the automatic recognition of children born through surrogacy arrangements which have had a parenting order issued by the Family Court with respect to their parental responsibility.

The AG's Department's response to this suggestion was:

> *The limitations of relying on parenting orders was discussed in HREOC's Same-Sex: Same Entitlements report at pp102 and ff. The Commission received evidence that the process can be costly and onerous.*[33]

The GLRL acknowledges that there are limitations with recognising children born through surrogacy arrangements via parenting orders. And certainly, our preference is that where states and territories have a surrogacy scheme already in operation, federal law should automatically recognise those who are recognised under state/territory schemes (i.e. there should be no need for further federal parenting orders). For example, the term 'adoption' can be defined in the *Acts Interpretation Act* to include a child recognised under a prescribed surrogacy order.

However, the problem is legal parentage is very much a state-based issue which federal law cannot easily sidestep. State and territories issue birth certificates, keep birth registers and generally prescribe who is a parent for the whole of a child's life (even when the child becomes an adult). Federal law cannot sever who is a parent under state law, leaving the risk of inconsistency and uncertainty for children born through surrogacy who are recognised as the 'product of a relationship'.

Parenting orders would provide an interim solution whilst states and territories reform their parentage laws with respect to surrogacy. Importantly, parenting orders allow for an inquiry into the best interests of the child to ascertain how parental responsibility should be ordered.

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[32] Under the *Parentage Act 2004* (ACT).

[33] Attorney-General's Department, n28 above.

Parenting orders will also ensure the problems with the 'product of a relationship' concept (outlined in **section 1.3.3.1** above), such as the issue of consensual relinquishment, are adequately dealt with by the Family Court. This will ensure that the child's best interests are paramount, whilst also taking in account the need for a surrogate mother to **consent** to the relinquishment of her parental responsibilities to the intended parents of the child.

Recommendation 6:

Remove all references to 'product of a relationship' in the various definitions of 'child' under the Same-Sex Relationships Bill;

Whilst the GLRL believes the concept should be removed entirely, we particularly believe it should be removed for children born through assisted reproductive technology (and who are not the result of a surrogacy arrangement);

Instead, insert a new federal definition of 'child' which recognises:

• Children born through intercourse

• Adopted children

• Children born through regular assisted reproductive technology (recognised via a *federal* parentage presumption which includes lesbian co-mothers)

• Children recognised under prescribed state or territory surrogacy parentage transferral schemes

• *In the interim*, children born through surrogacy arrangements recognised under parenting orders

• Where appropriate *and for specific relevant purposes*, children under the care of a person who is acting in the position of a parent ('in loco parentis') or children normally resident in the household.

PART TWO: SCOPE OF THE BILL

The GLRL supports the Same-Sex Relationship Bill's implementation of the same-sex reforms in an omnibus form (as recommended by the Human Rights and Equal Opportunity Commission (HREOC) Inquiry[34]). Case-by-case reform in this area would simply cause confusion and inconsistency, and present a barrier for same-sex couples knowing which laws recognised their relationship, and how to assert their rights under these laws.

In this section, we conduct a brief analysis of the scope of the Bill in the context of the *Same-Sex: Same Entitlements* Inquiry.

2.1 THE 58 LAWS HIGHLIGHTED BY THE *SAME-SEX: SAME ENTITLEMENTS* INQUIRY

Owing to the very limited time available for making a submission to this Inquiry, the GLRL has not been able to completely ascertain whether there are gaps in the proposed reforms. We note that, taken together, the Same-Sex Relationships Bill, Super Bill, Evidence Bill, De Facto Bill and proposed National Employment Standards appear to faithfully implement most of the recommendations of the *Same-Sex: Same Entitlements* Inquiry.

We note that some of the laws and legal instruments listed in Appendix 1 of the HREOC *Same-Sex: Same Entitlements* Inquiry report have not been included in the Same-Sex Relationships Bill.[35] We list these laws and instruments in **Table 1.**

In some cases, the reason for these omissions appears clear and entirely legitimate. For example, some discriminatory legal instruments have been marked for reform in other Bills.

However, the GLRL would be keen for the Committee to review whether:

- All the recommendations of the HREOC *Same-Sex: Same Entitlements* Inquiry have been incorporated (to the extent possible) by this Bill, other Bills or proposed reforms,
- Whether any further action is required to ensure equality for same-sex couples in the areas highlighted by HREOC (for example, whether subsequent changes to further regulations are still required), and
- Whether there may be any possible future discrimination by not reforming Acts, which although have been superseded by new Acts, have nonetheless not been entirely repealed (for example, the *Aboriginal Councils and Associations Act 1976* and *Higher Education Funding Act 1988*).

[34] HREOC, n7 above, at 77.

[35] HREOC, n7 above, 'Appendix 1: A List of Federal Laws to be Amended' at 389-405.

Table 1: Legal instruments listed in the *Same-Sex: Same Entitlements Inquiry* not included in the Same-Sex Relationships Bill	
Legal instruments not included in the Same-Sex Relationships Bill	**Notes**
Aboriginal Councils and Associations Act 1976	This Act has been replaced by the *Corporations (Aboriginal and Torres Strait Corporations) Act 2006* which has been included in the Bill.
Defence Act 1903	
Diplomatic Privileges and Immunities Act 1967 *	
Family Law Act 1975 / (*Child Support (Assessment) Act 1989*)	We note the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 covers many issues highlighted by HREOC, however section 60H of the *Family Law Act* – which also impacts on child support – remains outstanding. We welcome the recommendation made by the Senate Legal and Constitutional Affairs Committee with respect to section 60H.[36]
Foreign Acquisitions and Takeovers Regulations 1989	
*Foreign States Immunities Act 1985**	
Higher Education Funding Act 1988	This Act has been replaced by the *Higher Education Support Act 2003* which is included in the Bill.
*International Organisations (Privileges and Immunities) Act 1963**	

[36] Senate Standing Committee on Legal and Constitutional Affairs (2008) *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 [Provisions]*, Canberra: Senate Printing Unit, Parliament House.

Military Superannuation and Benefits Trust Deed (made under s 5(1) of *Military Superannuation and Benefits Act 1991*)	
Remuneration Tribunal Determination 2006/14: Members of Parliament – Travelling Allowance	
Remuneration Tribunal Determination 2006/18: Members of Parliament – Entitlements	
Retirement Savings Accounts Act 1997	
Superannuation Act 1990	
Superannuation (Public Sector Superannuation Accumulation Plan) Trust Deed (made under s 10 of the *Superannuation Act 2005*)	
Workplace Relations Act 1996	Incorporated into the proposed National Employment Standards.

Recommendation 7:

We recommend the Committee reviews whether all the recommendations of *Same-Sex: Same Entitlements* have been incorporated (to the extent possible) by this Bill or proposed reforms and whether any further action is required to ensure equality for same-sex couples and their children in federal law.

Recommendation 8:

We recommend the Committee reviews whether there may be any possible future discrimination against same-sex couples by not reforming Acts, which although have been replaced by new Acts, have nonetheless not been entirely repealed.

2.1.1 DIPLOMATIC, CONSULAR AND INTERNATIONAL IMMUNITIES

From the list of legal instruments above, of particular concern to us are the omissions of the:

- *Diplomatic Privileges and Immunities Act 1967*,
- *Foreign States Immunities Act 1985*, and
- *International Organisations (Privileges and Immunities) Act 1963*.

These Acts articulate important immunities for diplomatic and consular staff, Heads of State and family members, and therefore have significant potential consequences for those concerned. The *Diplomatic Privileges and Immunities Act* annexes the Vienna Convention on Diplomatic Relations which uses the term 'family'.[37] The *Foreign States Immunities Act* extends diplomatic immunity to a Head of State and his or her 'spouse'.[38] The *International Organisations (Privileges and Immunities) Act* annexes international law in five schedules which use the terms 'spouse', 'dependent relatives' and 'children'.[39] These terms are undefined. The GLRL is concerned that reliance upon a common law interpretation of these terms may render them discriminatory.

We suggest considering whether the Same-Sex Relationships Bill requires an amendment to the interpretations section of the *Diplomatic Privileges and Immunities Act, Foreign State Immunities Act* and *International Organisations (Privileges and Immunities) Act* to expressly articulate that familial terms used in these Acts should be read (without limiting their scope) to include same-sex couples and their children.

We note that other terms in the annexed international agreements have been given localised meanings in the interpretations section of some of these Acts. For example, the term 'indirect tax' – which appears in Article 34(a) of the annexed Vienna Convention – is defined in section 4 of the *Diplomatic Privileges and Immunities Act*:

> ***indirect tax*** means:
>
> (a) GST within the meaning of section 195-1 of the GST Act; or
>
> (b) luxury car tax within the meaning of section 27-1 of the Luxury Car Tax Act; or
>
> (c) wine equalisation tax within the meaning of section 33-1 of the Wine Equalisation Tax Act.

The terms in this 'indirect tax' definition are further defined in reference to specific domestic legislation:

> ***GST Act*** means the *A New Tax System (Goods and Services Tax) Act 1999*.
> ...
> ***Luxury Car Tax Act*** means the *A New Tax System (Luxury Car Tax) Act 1999*.
> ...
> ***Wine Equalisation Tax Act*** means the *A New Tax System (Wine Equalisation Tax) Act 1999*.[40]

[37] The Vienna Convention on Diplomatic Relations is annexed as a Schedule to the *Diplomatic Privileges and Immunities Act 1967*. Articles 10 and 36- 40 in the schedule use the term 'family'.

[38] *Foreign States Immunities Act 1985*, s 36(1)(b).

[39] *International Organisations (Privileges and Immunities) Act 1963*, Second, Third and Fourth Schedules.

[40] *Diplomatic Privileges and Immunities Act*, s 4.

Recommendation 9:

The interpretations section of the *Diplomatic Privileges and Immunities Act 1967* should be amended to define the term 'family' as including, but not limited to, same-sex couples and their children.

Recommendation 10:

The interpretations section of the *Foreign States Immunities Act 1985* should be amended to define the term 'spouse' as including, but not limited to, a de facto partner within the meaning of the *Acts Interpretation Act 1901.*

Recommendation 11:

The interpretations section of the *International Organisations (Privileges and Immunities) Act 1963* should be amended to define the terms 'dependent relatives' and 'children' to include, but not be limited to, same-sex couples and their children.

2.2 THE ADDITIONAL AMENDMENTS

The Same-Sex Relationships Bill also amends some pieces of legislation outside the terms of the *Same-Sex: Same Entitlements* Inquiry. We thank the Government for auditing and reforming these further areas of federal law which discriminate against same-sex couples and their children.

The impacts of the discrimination in the 58 laws highlighted by HREOC were given some attention and consideration in the *Same-Sex Same Entitlements* Inquiry. The GLRL was concerned to provide some commentary on the likely impacts of the remaining reforms which have been included in the Same-Sex Relationships Bill. This is to show the incredible breadth of these reforms, and emphasise our later discussions about the importance of public education (see **part 3** of this submission). **Table 2** lists the laws **not** included in the HREOC *Same-Sex: Same Entitlements* Inquiry, and highlights their likely effect and impact on same-sex couples and their children. Please note, in light of the very limited time available for reviewing the Same-Sex Relationships Bill for this submission, this table is merely a guide and brief overview.

We note that some of the additional amendments have the potential for very positive and significant human rights protection. For example, same-sex partners of High Court and federal judges will be entitled to any remaining long service leave payments upon the death of their partner. However, some of the amendments also impose equal responsibilities and obligations – rather than new rights – on same-sex de facto partners. For example, some changes place restrictions on foreign ownership or empower the Australian Federal Police to recover certain superannuation benefits which are in the 'effective control' of a same-sex partner etc. where certain corruption offences have being committed. The GLRL has no concern with respect to the likely impact of these amendments, which are in line with our community's desire for *equal* treatment not *special* treatment. However, we do recommend the need for comprehensive public education with respect to all these reforms (see **part three** of this submission).

Table 2: The additional laws amended by the Same-Sex Relationships Bill (not listed in the HREOC *Same-Sex: Same Entitlements* Inquiry) and the likely effects and impacts of these additional amendments	
Proposed amendment	**Likely effect/impact**
Schedule 1 – Agriculture, Fisheries and Forestry	
Farm Household Support Act 1992	Regulates the provision of income support to certain farmers without a long term future in the farming sector. Certain 'armed services widows/ers' (now including a same-sex de facto partner) that receive a pension under Part II or IV of the *Veteran's Entitlements Act* are excluded from receiving some specific entitlements under this Act.
Schedule 2 – Attorney General	
Administrative Decisions (Judicial Review) Act 1977	Some migration-related decisions concerning international consular or diplomatic representatives and/or staff, or their de facto partners (which now includes same-sex partners), do not require written statement of reasons.
Age Discrimination Act 2004	Extends the exemption allowing discrimination on the basis of age in accommodation to a person whose near relatives (now including same-sex partners, children etc.) is a resident of that accommodation: s 29(3).
Australian Federal Police Act 1979	Gives the Australian Federal Police powers in relation to the forfeiture and recovery of employer-funded superannuation benefits paid to AFP employees convicted of certain corruption offences, which are in the effective control of an offender's family member (which now includes same-sex partners, children, etc.).
Crimes Act 1914	Various effects, including: strip searches of child aged 10 to 18 must be conducted in the presence of a parent (now includes same-sex parents) or guardian: s 3ZI; when making a sentence in relation to an offender, the court must consider the impacts of the sentence on the offender's family (including same-sex partner, child etc.): s 16A.

Crimes (Superannuation Benefits) Act 1989	Gives powers in relation to the forfeiture and recovery of employer-funded superannuation benefits paid to Commonwealth employees convicted of certain corruption offences, which are in the effective control of an offender's family member (which now includes same-sex partner, children, etc.).
Customs Act 1901	Various effects, including; people detained for serious customs offences have the right to contact a family member (including same-sex partner, children etc.); family relationships can be taken into account for the purpose of valuing goods, establishing effective control of goods etc.
High Court Justices (Long Leave Payments) Act 1979	Where a High Court Justice would be entitled to a long service leave payment upon their retirement or death, their partner (including same-sex partner) is entitled to receive, upon the Justice's death, any unpaid entitlements.
Judges (Long Leave Payments) Act 1979	Where a Federal Court or Family Court Judge would be entitled to a long service leave payment upon their retirement or death, their partner (including same-sex partner) is entitled to receive, upon the judge's death, any unpaid entitlements.
Service and Execution of Process Act 1992	Various effects, including: gives co-mother or co-father ability to apply for a suppression order in proceedings relating to their child, in certain matters to protect the child's welfare by preventing the publication of their identity.
Sex Discrimination Act 1984	Affords employees limited discrimination protection from dismissal on the basis of their family responsibilities (which now includes responsibilities to same-sex partners, children etc.).
Witness Protection Act 1994	Includes children of same-sex families for the purposes of the Witness Protection Program.

Schedule 3 – Broadband, Communications and the Digital Economy	
Australian Postal Corporation Act 1989	Australia Post employees will be empowered to disclose information to police etc. to help locate a next of kin (including a same-sex partner, child etc.) for someone who has died or been seriously injured.
Telstra Corporation Act 1991	Includes same-sex partner and child in definitions of 'relative' for the purposes of foreign ownership restrictions on Telstra.
Schedule 4 – Defence	
Defence (Parliamentary Candidates) Act 1969	Clarifies that a same-sex partner and children will be eligible for moving costs etc. for a defence force personnel who desires to become an election candidate.
Royal Australian Air Force Veterans' Residence Act 1953	A same-sex partner etc. of an Air Force member may be eligible for the provision of accommodation if in necessitous circumstances.
Schedule 5 – Education, Employment and Workplace Relations	
Student Assistance Act 1973	Includes children of same-sex couple for the purposes of waivers of student debts in specific circumstances.
Schedule 6 – Families, Housing, Community Services and Indigenous Affairs	
Aboriginal Land Grant (Jervis Bay Territory) Act 1986	For example, where a person from the Wreck Bay Aboriginal Community has an interest in Aboriginal land, that interest is transmittable by will or intestacy laws to their relative (including a same-sex partner, child etc.).
Corporations (Aboriginal and Torres Strait Islander) Act 2006	Includes same-sex partners, children etc. for the purposes of corporate governance of Indigenous corporations.

A New Tax System (Family Assistance) (Administration) Act 1999	Provides administrative, procedural and technical rules to the *A New Tax System (Family Assistance) Act 1999*, which regulates Family Tax Benefit, Baby Bonus, Child Care Benefit and Child Car Tax rebate. Same-sex parented families (and relatives in some circumstances) are equally included.
Schedule 7 – Finance and Deregulation	
Commonwealth Electoral Act 1918	Various effects, including: a person may request that their address is not shown on the electoral roll where it would be a risk to their safety or the safety of their 'family' (including same-sex partners, children etc.).
Medibank Private Sale Act 2006	Various effects, including: outlines maximum allowed share ownership for shareholders of Medibank and their 'associates' (includes relatives, defined to include same-sex partners, children, etc.).
Schedule 8 – Foreign Affairs and Trade	
Australian Passports Act 2005	A registration of relationship will be recognised as a document for proving identity for the purposes of an Australian travel document.
Export Market Development Grants Act 1997	Recognises allowable reimbursements for expenses incurred by relatives (including same-sex partners, child etc.) in relation to certain export business costs.
Trade Representatives Act 1933	The Minister may make determinations relating to the remuneration of Trade Representatives, and allowances/benefits to members of their families (including same-sex partner and children).
Schedule 9 – Health and Ageing	
Prohibition of Human Cloning for Reproduction Act 2002	Prohibits human cloning by regulating individuals who are able to consent to dealings with excess embryos created by a woman and her 'spouse' (including same-sex partner).

Research Involving Human Embryos Act 2002	Regulates embryonic research; defines individuals who are able to consent to dealings with excess embryos created by a woman and her 'spouse' (including same-sex partner).
Schedule 10 – Immigration and Citizenship	
Australian Citizenship Act 2007	Same-sex partner and children are included in eligibility entitlements for becoming an Australian citizen.
Immigration (Education) Act 1971	Relates to the provision of English and citizenship courses for certain children whose parents (including same-sex parents) hold a permanent entry permit or permanent visa.
Immigration (Guardian of Children) Act 1946	The Minister for Immigration and Citizenship is the legal guardian for unaccompanied non-citizen minors in Australia, to the exclusion of any 'parents' (including same-sex parents).
Schedule 11 – Infrastructure, Transport, Regional Development and Local Government	
Airports Act 1996	Various effects, including: same-sex partner, child etc. included in definitions of 'relative' for the purposes of foreign ownership restrictions etc.
Navigation Act 1912	Various effects, including; measures relating to compensation, wages and property entitlements for same-sex partners, children etc. following the death of a seafarer.
Schedule 12 – Innovation, Industry, Science and Research (no further amendments)	

Schedule 13 – Prime Minister and Cabinet	
Privacy Act 1988	Various effects, including: definitions of 'family' include same-sex partners, children etc. for exceptions from privacy laws relating to the collection, holding, use, disclosure or transfer of personal information by a person for, or in connection, with 'personal, *family* or household affairs'.
Schedule 14 – Treasury	
A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Act 1999	Regulates aspects of the Medicare levy surcharge for certain taxpayers who do not have private patient hospital insurance. Includes same-sex partners' income etc. in the calculation of liability.
Schedule 15 – Veterans' Affairs	
Defence Service Homes Act 1918	Provides housing benefits to eligible veterans and their dependents (including same-sex partners, children etc.), including subsidised loans and insurance.

2.2.1 INCONSISTENCY IN THE SEX DISCRIMINATION ACT

One of the additional Acts listed for amendment by the Same-Sex Relationships Bill is the *Sex Discrimination Act 1984* (**'SDA'**). This amendment will extend the limited protection from discrimination on the basis of family responsibilities to employees with same-sex partners and families.

Whilst this amendment appears significant at first glance, it is in fact very narrow. This is because this ground of discrimination only protects an employee if they have been **dismissed** on the basis of their family responsibilities.[41] Unlike other grounds, like sex or marital status, discrimination on the basis of family responsibilities does not extend beyond this limited work context, and even then, does not address any other type of unfavourable treatment in the workplace other than dismissal. Also, unlike other grounds, there is no protection for indirect discrimination (i.e. where a facially neutral requirement or practice disproportionally impacts on people with family responsibilities). Therefore, the protection afforded by the Same-Sex Relationships Bill reform will only address direct discrimination on the grounds of family responsibilities which – following the High Court decision in *Purvis*[42] – is very narrow protection indeed.

[41] *Sex Discrimination Act 1984*, s 14(3A).

[42] *Purvis v New South Wales (Department of Education and Training)* (2003) 202 ALR 133.

2.2.1.1 Discrimination on the basis of marital status

The GLRL notes that whilst the definition of 'spouse' in the meaning of 'family responsibilities' will be changed by the Same-Sex Relationships Bill, the definition of spouse in the meaning of 'marital status' will not be changed. Under the SDA, 'marital status' and 'de facto spouse' is defined:

> ***marital status*** means the status or condition of being:
>
> (a) single;
>
> (b) married;
>
> (c) married but living separately and apart from one's spouse;
>
> (d) divorced;
>
> (e) widowed; or
>
> (f) the **de facto spouse** of another person.
>
> [...]
>
> ***de facto spouse*** , in relation to a person, means a person of the opposite sex to the first-mentioned person who lives with the first-mentioned person as the **husband or wife** of that person on a *bona fide* domestic basis although not legally married to that person.

Due to common law interpretation, the current definition of 'marital status' therefore only protects people who are single, married, separated, divorced or are in a *heterosexual* de facto relationship from discrimination on the basis of their marital status.

By contrast to the SDA, almost every state and territory includes same-sex couples in their 'marital status' protections:

- **Victoria.** The *Equal Opportunity Act 1995* (Vic) prohibits discrimination on the basis of 'marital status' which includes domestic partners (whether of the same or opposite sex).
- **Western Australia.** The *Equal Opportunity Act 1984* (WA) prohibits discrimination on the basis of 'marital status' which includes de facto partners (whether of the same or opposite sex).
- **Queensland.** The *Anti-Discrimination Act 1991* (Qld) prohibits discrimination on the basis of 'relationship status' which includes de facto partners (whether of the same or opposite sex).
- **Northern Territory.** The *Anti-Discrimination Act* (NT) prohibits discrimination on the basis of 'marital status' which includes de facto partners (whether of the same or opposite sex).

- **Tasmania.** The *Anti-Discrimination Act 1998* (Tas) prohibits discrimination on the basis of 'marital or relationship status' which includes people in personal relationships[43] (whether of the same or opposite sex).

- **New South Wales.** The *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on the basis of 'marital or domestic status' which includes de facto partners (whether of the same or opposite sex) [yet to commence].[44]

Including same-sex couples under a 'marital status' or 'marital and relationship status' ground, would be a minimal yet important change to the *Sex Discrimination Act* which ensures the greater harmonisation of federal, state and territory discrimination law.

2.2.1.2 How 'marital status' protection would impact on same-sex couples

There would be some situations where marital status protection would be very important to a same-sex partner. For example, consider this situation:

> *A company sacks an employee or treats them unfairly after learning that their partner has been gaoled for a criminal offence.*[45]

Under the current SDA, if the employee in this scenario was in a heterosexual married or de facto relationship, they would have a discrimination claim on the basis of marital status. However, if the employee was in a same-sex de facto relationship, they could not use the current marital status ground, as same-sex partners are excluded.

For another example, consider this case study:

> *ABC Airlines offers **married** employees the opportunity to coordinate work-shifts, to allow married spouses the opportunity to fly and spend break times between flights together.*[46]
>
> *Mary is an employee of ABC Airlines. Mary is in a **de facto relationship** (i.e. unmarried) with Sue. Mary requests to have her flights coordinated with Sue's flights, so that they can spend more time together between destinations.*
>
> *ABC Airlines refuses on the basis that Mary and Sue are not married.*

If the SDA included same-sex de facto relationships in the definition of marital status, then Mary may have a claim under the SDA. This because her employer has treated her (and similar colleagues in her position) less favourably on the basis that she is not married to her partner. Therefore, a change to the marital status ground would provide a partner in both the situations highlighted above with equal protection against discrimination, whether they were of the same or opposite sex.

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[43] Includes those in significant (i.e. de facto) or caring relationships.

[44] *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW) [yet to commence].

[45] Case study based on facts in *Waterhouse v Bell* (1991) EOC 92-376.

[46] Case study based on facts in *Wilson v Qantas Airways Limited* (1985) EOC 92-141.

2.2.1.3 Same-sex de facto relationship status would not protect from sexuality discrimination

It is important to note that **even if** discrimination on the basis of marital status included same-sex couples, this would not protect same-sex couples from discrimination on the basis of **sexual orientation** at the federal level.

For example, consider this fact scenario which is slightly different to the case study above:

> *XYZ Airlines offers **married** employees and employees with **de facto spouses** the opportunity to coordinate flight work-shifts with their partners.*
>
> *John is an employee of XYZ Airlines. John is in a **de facto relationship** with Barry. John requests to have his flights coordinated with Barry's flights.*
>
> *XYZ Airlines refuses on the basis that their partner entitlements are for opposite-sex married and de facto couples only.*

In this case, even if the SDA included same-sex de facto relationships in the definition of marital status, then John would be unlikely to succeed in a discrimination claim. This because his employer has treated him less favourably than other married or de facto employees on the basis that he is living in **same-sex** de facto relationship. In other words, John is treated less favourably because of his sexuality – not because of his marital status. Following the spirit of the Same-Sex Relationships Bill, the GLRL believes it is time to consider enacting a federal discrimination act that protects from discrimination on the basis of sexuality.

2.2.1.4 Conclusion

The GLRL believes there is no reason to leave two inconsistent definitions of 'spouse' in the SDA: an inclusive one for the meaning of 'family responsibilities' and a discriminatory one for the purposes of 'marital status'. The protection that would be added by marital status discrimination for same-sex couples may be small, but it is nonetheless significant.

However, it is important to note that discrimination on the basis of sexual orientation will not be addressed by changes to the grounds of 'family responsibilities' and 'marital status' under the SDA. It is time for Australia to consider a federal act to specifically protect from discrimination on the basis of sexual orientation and gender identity.

Recommendation 12:

The definition of 'marital status' in the Sex Discrimination Act should be amended to include same-sex de facto couples.

Recommendation 13:

We recommend the enactment of a federal discrimination legislation to protect from discrimination on the basis of sexual orientation and gender identity.

2.3 FUTURE DISCRIMINATION AGAINST SAME-SEX COUPLES

The GLRL welcomes this momentous time in Australia's human rights history. It is a moment which has been the result of years of advocacy and law reform. We certainly hope that the future for same-sex couples and their children in this country are more just than the days gone by; and

that the equality of our relationships and families are not again called into question by discriminatory legislation. The GLRL is keen to ensure that the lessons of history are not repeated in the future. We are keen to ensure that **future** legislation does not discriminate against same-sex couples and their children.

We invite the Committee to consider recommending the reform of government policies and procedures (such as the Office of the Parliamentary Counsel procedures, the Department of Prime Minister and Cabinet's *Legislation Handbook* and the terms of reference for the Senate Scrutiny of Bills Committee) to ensure that future legislation does not include discriminatory provisions based on sexual orientation or marital status.

Recommendation 14:

We recommend the Committee consider appropriate measures to ensure future legislation does not include provisions which discriminate on the basis of sexual orientation or marital status.

PART THREE: IMPLEMENTATION OF THE BILL

3.1 PUBLIC EDUCATION CAMPAIGN

In **part 4.1** of our *Super Bill submission*, the GLRL provided a brief note relating to the need for a public education campaign on the new rights and responsibilities arising for same-sex couples from the reforms. We submit that the need for a public education campaign following this omnibus reform is even more acute. We conceive that any campaign should take a three-pronged approach to educate:

- Lesbian, gay, bisexual and transgender Australians
- Commonwealth service providers and decision-makers, and
- Professionals working in the areas of reform.

Education of the following people is crucial for the overall success of the reforms.

3.1.1 EDUCATION FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AUSTRALIANS

The GLRL is very concerned that same-sex couples are not presently aware of their status under the law or even how to claim rights to which they are already entitled. In our consultation with over 1,300 lesbian, gay, bisexual and transgender people in NSW, confusion and uncertainty about legal rights were highlighted as a significant impediment to taking advantage of equal rights – even those which were granted to same-sex couples in NSW as far back as 1999.[47]

3.1.1.1 Greater consistency presents a greater opportunity for education

In our consultation, the GLRL found that the **lack of consistency** in the recognition of same-sex couples under state and federal law was one of the key impediments for understanding and asserting legal rights. Many participants were confused about which laws applied to them and their partner, and which did not. This was particularly telling in areas of life where same-sex couples could find themselves both recognised under state/territory law *and* discriminated against under federal law.[48] In these areas of overlap, the distinction between federal law (which on the whole, **did not recognise** same-sex partners) and state/territory law (which on the whole, **did recognise** same-sex partners) was not always understood by participants. As a result, federal discrimination meant that many participants simply assumed they were *also* discriminated against in state areas of responsibility (e.g. for the purposes of medical consent, inheritance and state-based entitlements).

The lack of consistency was compounded by a lack of consistency in **terminology** between federal and state law. Terms like 'interdependency' under federal law held little resonance with how participants understood their relationships as 'de factos' or 'partners' (i.e. terms used under existing state/territory laws).

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[47] Berg et al, n21 above, at 10.

[48] For example, in **health**, same-sex partners may be recognised under state law for the purpose of making decisions should a partner become incapacitated *but* are not recognised for the purposes of Medicare under federal law. Similarly, in **inheritance**, same-sex partners may be recognised under state/territory intestacy laws *but* may not be for the purposes of superannuation entitlements under federal law.

The sum total effect of this inconsistency has been a high level of confusion about legal rights among same-sex couples and a lack of confidence in asserting *existing* rights when challenged. With this reform, federal and state law will increasingly merge towards a consistent, comprehensive recognition of same-sex partners as equal to opposite-sex de facto partners. For this reason, it is an opportune time to educate lesbian, gay, bisexual and transgender Australians about their new (and existing) rights under the law.

3.1.1.2 Potential negative impacts of the reforms

Although the vast majority of the reforms will benefit same-sex couples, some aspects of the reforms – particularly, those related to social security – will have a financially negative impact on some same-sex couples. Other reforms will also establish new obligations, for example those amendments in relation to criminal matters and foreign ownership restrictions.[49] People must be made aware of these changes to ensure they have time to readjust their finances and to bring about better compliance with the law.

3.1.2 EDUCATION FOR COMMONWEALTH SERVICE PROVIDERS

Lesbian, gay, bisexual and transgender Australians may hold a very real fear that the disclosure of their relationship status will result in negative, disapproving or homophobic responses from service providers and decision-makers. Many frontline staff of federal agencies, such as Centrelink, aged care services and health agencies, may find that they are dealing with openly lesbian, gay, bisexual and transgender clients for the very first time.

Training and education for Commonwealth service providers on how to sensitively deal with gay, lesbian, bisexual and transgender clients is needed to ensure same-sex couples have the confidence to assert their rights without fearing hostility. This is particularly so as there is no federal protection from discrimination on the basis of sexual orientation and gender identity (see **section 2.2.1.3** above).

3.1.3 PROFESSIONALS

Many day-to-day professionals will be grappling with the consequences of the reforms for their clients in same-sex relationships. For example, tax agents, accountants, lawyers, migration agents, superannuation trustees and employers will need to understand the changes themselves, in order to assist their clients in asserting their new rights under the law. In some cases, there may be liability for negligent advice as a result of poor comprehension of the law. Professionals will require easy-to-access information on the implication of the changes in their areas of responsibility.

[49] See Table 2 above.

Recommendation 15:

A public education campaign should educate:

• Lesbian, gay, bisexual and transgender Australians

• Commonwealth service providers and decision-makers, and

• Professionals working in the areas of the reforms

about the effect of the reforms and how same-sex couples can assert their rights under the law.

3.2 SOCIAL SECURITY REFORMS

The Same-Sex Relationships Bill amends the *Social Security Act 1991* to recognise same-sex couples and their children. Although some of the changes under social security law will be beneficial to same-sex couples and their children, some will also **remove** benefits currently enjoyed by same-sex partners. It is important to note that many further non-government benefits also rely on one's eligibility for Centrelink benefits and concessions.

We are particularly concerned about the financial impacts for those who may be receiving the disability support pension, sole parenting payments or concession card benefits. These people are among the most economically vulnerable people in our community, and may be in the care of children or living with poor health.

It is beyond question that, even on the issue of social security, HREOC's consultation[50] and our own consultation[51] has shown that lesbian, gay, bisexual and transgender Australians do aspire for *equal* rights, not *special* rights. Same-sex couples are generally willing to forgo the advantages in social security for comprehensive equality across all areas of federal law.

Nonetheless, the Explanatory Memorandum shows that the Department of Families, Housing, Community Services and Indigenous Affairs is likely to experience a reduction in expenses, ranging from $18.5 million to $30.5 million per year, over the period 2009 – 2012.[52] This saving represents the removal of resources and benefits from people's everyday lives. It is highly conceivable that some people will need to relocate to cheaper accommodation, or may need to restart employment or study in order to readjust their finances. Social security reforms will require a particularly sensitive policy and procedure for the implementation of the reforms.

The GLRL would like to see a departmental policy where affected same-sex couples are given time and support to readjust their finances, without automatically attracting harsh penalties for an inability to comply with the new laws. This is particularly important as some same-sex partners will not know of the changes to the law and may find themselves with little time to readjust their finances. Some couples may find themselves even having to pay back overpayments.

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[50] HREOC, 215-217.

[51] Berg et al, p 8.

[52] Explanatory Memorandum to the Same-Sex Relationships Bill, at 5.

We would like the Committee to investigate:

- Whether any further transitional measures should be inserted into the Same-Sex Relationships Bill to ensure affected same-sex couples have sufficient time readjust their finances,

- What Centrelink can do to provide support and time in sensitively assisting affected same-sex couples in the transition to equality.

Recommendation 16:

We invite the Committee to investigate:

• Whether any further transitional measures should be inserted into the Same-Sex Relationships Bill to ensure same-sex couples affected by social security changes have sufficient time readjust their finances,

• What Centrelink can do to provide support and time in sensitively assisting affected same-sex couples in the transition to equality.

CONCLUSION

In conclusion, the GLRL sincerely welcomes the Same-Sex Relationships Bill and hopes to see its speedy passage through both Houses of Parliament. Our recommendations fine-tune the objects of the Bill, which we support without qualification.

We sincerely thank the Prime Minister Kevin Rudd and his Government for the fulfilment of its election commitment of legal equality for same-sex couples and their children. We also welcome the Coalition's expression of support for the Bill in principle and smaller parties, such the Australian Greens, who have expressed support for the Bill. We hope this support translates into a speedy passage of the Bill without delay.

We thank the Senate Committee for its investigation of the Bill, which will make a very real difference in the lives of thousands of Australians.

Most of all, we express our thanks to the Australian Human Rights Commission for its sensitive, groundbreaking and detailed investigation of our lives and livelihoods, and the widespread legal discrimination facing us, our lovers and our families.