

Inquiry into Same Sex
Relationships (Equal Treatment
in Commonwealth Laws –
General Law Reform) Bill 2008

To Senate Legal and Constitutional Affairs Committee

16 September 2008

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Introduction

The Law Council notes that the Same-Sex Relationships (Equal Treatment in Commonwealth Laws- General Law Reform) Bill 2008 (the Bill) seeks to implement the Government's commitment to removing discrimination against same sex couples and their children. This commitment arises in part from a 2007 Report of the Human Rights and Equal Opportunity Commission (HREOC), which is now known as the Australian Human Rights Commission.¹

The Law Council made a submission to the relevant HREOC review, which led to the Report. The submission stated that the review of laws which discriminate against same sex couples was an important step in addressing the exclusion of same sex couples from rights enjoyed by heterosexual couples and in providing for consistency in policy across different pieces of legislation. The submission also stated that the Law Council would welcome future law reform initiated by the review.

The Law Council maintains this position and commends the intention of the Bill. The removal of discrimination against same sex couples and their children is long overdue and will assist Australia to achieve greater compliance with its international obligations under instruments such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

The Law Council notes that the HREOC Report recommended that relevant definitions in Federal laws should be changed in order to remove discrimination against same sex couples and their children.

In relation to removing discrimination against same sex couples, the preferred option of HREOC was to redefine current terminology to include such couples and to insert new definitions of 'de facto relationship' and 'de facto partner'. HREOC rejected the inclusion of same sex couples in an 'interdependency' definition. HREOC proposed a model definition of 'de facto relationship' and 'de facto partner'.

In relation to removing discrimination against children of same sex relationships, HREOC recommended that:

- If there was no definition in the relevant legislation, a child should be defined to include a child of a birth mother, birth father, lesbian co-mother and gay co-father
- A lesbian co-mother of a child born using Assisted Reproductive Technology should have the same entitlements as a birth mother or father
- The definition of 'step-child' should include a child under the care of a de facto partner of a birth mother or father
- Same sex couples should be able to adopt related or unrelated children
- A lesbian co-mother or gay co-father with a parenting order under the *Family Law Act 1975* should have the same entitlements as a birth mother or birth father

¹ Same Sex: Same Entitlements Report See http://www.hreoc.gov.au/human_rights/samesex/report/index.html

The proposed definitions in the Bill do not precisely follow these recommendations and the Law Council suggests that the Committee consider whether it would be preferable that the Bill do so. In the time available to make this submission, the Law Council has itself not been able to consider this issue fully.

The Law Council also notes that concerns have been raised by commentators including Professor Patrick Parkinson and Professor Jenni Millbank on similar definitions used in the Same Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 (the Superannuation Bill).² In the time available to make this submission, the Law Council has been unable to consider these concerns fully but suggests that the Committee should do so.

The Law Council maintains the position put in its submission on the Superannuation Bill that the definitions proposed in that Bill will result in the removal of discrimination against same sex couples and their children. However, the Law Council also noted that those definitions result in inconsistencies with definitions in other legislation. The Law Council in giving evidence on the Superannuation Bill suggested that the proposed definitions should aim to have a consistent effect with definitions in other legislation without necessarily being consistent in form.³

The Law Council also notes that this Committee has recently reported on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (the Family Law Bill) and in doing so, considered the definition of 'de facto relationship' in that Bill and amending the definition of 'child' in the *Family Law Act 1975*. Further, the Law Council notes that one of the Committee's recommendations was that the Government review all federal legislation containing definitions of 'de facto relationship', 'couple relationship', 'child' and 'parent' to ensure that consistent concepts and terminology are used where appropriate⁴.

The Law Council notes that the Bill deals with a range of taxation issues and the Law Council urges the Committee to give detailed consideration to these provisions to ensure that same sex couples are treated in the same manner as heterosexual couples for tax purposes.

Issues to be considered by the Committee

The Law Council therefore suggests that this Committee consider the definitions in the Bill in the light of:

- The recommendations in the 2007 HREOC Report
- Comments made on similar definitions in the Superannuation Bill
- The Committee's recommendations in relation to the Family Law Bill

² See <http://www.aph.gov.au/hansard/senate/commtee/S11108.pdf>

³ *ibid*

⁴ http://www.aph.gov.au/Senate/committee/legcon_ctte/family_law/report/index.htm

Concluding remarks

The Law Council regrets that due to the short time frame for making submissions on the Bill, it has been unable to provide more detailed comments.

The Law Council is currently considering the definitional issues raised by the Bill and may be able to provide detailed comments in a more reasonable time frame.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.