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Mr John von Doussa QC
President
Human Rights and Equal Opportunity
Commission
GPO Box 5218
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Dear Mr von Doussa

Thank you for your correspondence regarding the National Inquiry into discrimination against people in same-sex relationships: Financial and work-related benefits and entitlements.

I am pleased to advise that in March 2004, the Northern Territory Government commenced the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* ("the Act"). The Act introduced extensive changes to existing Northern Territory laws to provide for equal treatment before the law for same-sex partners. The Act, amongst other things, gave same-sex partners and heterosexual de facto relationships the same rights and obligations as married persons.

While extensive legislative changes to provide equal treatment were made through the amending Act, it must be noted that it also repealed and replaced a section of the *Anti-Discrimination Act* to allow for discrimination in the workplace on the basis of religious belief/activity or sexuality. The Northern Territory Government considered it necessary that legislative reform struck an appropriate balance between the right of a religious institution to practice their faith without restriction and according to their beliefs, versus the right to protect Territorians against discrimination based on their sexuality.

Section 37A of the *Anti-Discrimination Act* therefore allows for a religious educational institution to discriminate against a person in the work place on the grounds of religious belief or sexuality. However, the discrimination must be in good faith and to avoid offending the religious sensitivities of the people of the religion.

Apart from this specific and carefully considered exemption, I am confident that the Northern Territory Government has put in place appropriate legislation to remove discrimination against same-sex relationships in relation to financial and work related benefits.

For the purposes of the National Inquiry, the Explanatory Memorandum to the Act provides a summary of the reforms undertaken by this Government. The Explanatory Memorandum and the Second Reading Speech are enclosed (*) for your information. The Act can be found at: http://www.nt.gov.au/dcm/legislation/current.shtml.

If you wish to discuss these matters further, the contact officer is [Name withheld] [Name withheld] number is [Details removed] and her contact email address is [Details removed]

Yours sincerely

PETER TOYNE

Encl (*)

18 JUL 2006

MINISTER FOR JUSTICE
AND ATTORNEY-GENERAL
SERIAL

LAW REFORM (GENDER, SEXUALITY AND DE FACTO RELATIONSHIPS) BILL 2003

EXPLANATORY MEMORANDUM

This Bill amends many Acts and subordinate legislation of the Territory.

The purpose of the Bill is to reform the law of the Territory to remove or modify legal distinctions based on a person's gender, sexuality or de facto relationship with another person. The Bill is divided into these three main areas.

The first part relating to gender, mostly amends the Criminal Code:

(a) by equalising the age of consent to 16 years for all sexual activity, regardless of the sex or gender of the participants;
(b) creating a new offence of sexual intercourse or gross indecency involving a child under the age of 16 years, that is of general application and applies equally to all victims and offenders, regardless of sex or gender;
(c) by creating a new offence of sexual intercourse or gross indecency with a child who is over the age of 16 years and under the special care of the offender;
(d) by increasing penalties for sexual offences committed against children;
(e) by removing inappropriate and offensive gender assumptions in child sexual offences and the incest offences under the Criminal Code; and

(f) but also amends the *Sentencing Act* to accommodate the changes to the child sex offences under the Criminal Code.

The second part removes or improves laws in the Territory that discriminate against Territorians on the basis of their sexuality, including by:

(a) amending the *Anti-Discrimination Act* to allow a person to discriminate against another person on the grounds of irrelevant criminal record in the area of work, if the work principally involves working with "vulnerable people" and it is necessary to protect the well-being of the vulnerable persons;
(b) repealing and replacing section 37 of the *Anti-Discrimination Act* to provide an exemption to religious schools that will enable them to discriminate against a person in the area of work on the grounds of either sexuality or religious belief or activity, if the discrimination is in good faith to avoid offending the religious sensitivities the people of the religion;
(c) inserting section 37A into the *Anti-Discrimination Act* to restrict the religious bodies general exemption under the Act to only acts done as part of any religious observance or practice; and
(d) amending the *Criminal Records (Spent Convictions) Act* to allow for the release and use of a person's irrelevant criminal record for the purposes of section 37 of the *Anti-Discrimination Act*.

The third part, provides a range of amendments to ensure people in same-sex relationships and heterosexual de facto relationships have the same rights and obligations under Territory law as married persons. These reforms include:

(a) inserting a new, more flexible definition of "de facto relationship" into the *De Facto Relationships Act*, which is inclusive of same-sex de facto relationships;

(b) amending the *Interpretation Act* to apply the new definition of "de facto relationship" to all Territory legislation, unless a contrary intention is shown;

(c) amending the *Status of Children Act* to provide for a limited presumption of parentage in relation to IVF children in lesbian families, so that the consenting non-biological parent can be recognised as a parent;

(d) amending all identified legislation dealing with property rights, financial entitlements and access to benefits to ensure equality for same sex couples (and, where necessary, different sex couples);

(e) amendments to all relevant laws to ensure children in same-sex families are not discriminated against in legislation that confers various entitlements and responsibilities arising out of a parental relationship; and

(f) amending all identified legislation imposing obligations and liabilities on people in married or de facto relationships, to apply the obligations and liabilities in the same manner to people in same-sex de facto relationships.

LEGISLATION

Principal Act: Law Reform (Gender Sexuality and Defacto Relationships) Act
Assembly: Ninth
BILL:

Text of Bill:

Text of Explanatory Statement

Text of Second Reading Speech:

(This an uncorrected proof of the daily report. It is made available under the condition that it is recognised as such.)

Bill presented and read a first time.

Dr TOYNE (Justice and Attorney-General): Mr Acting Speaker, I move that the bill be now read a second time.

The purpose of the Law Reform (Gender, Sexuality and De facto Relationships) Bill is to reform the law of the Territory to remove or modify illegal distinctions based on a person's gender, sexuality or *de facto* relationship with another person. By doing this, the bill will provide greater protection and equality for all Territorians. The bill also includes a package of reforms developed to strengthen laws protecting children from sexual abuse.

I have said before in this parliament that the government is committed to equality for all Territorians. Last year, the Darwin Community Legal Centre released a paper which contained a number of proposals for law reform, but with a common goal, equality for all Territorians, regardless of gender, sexuality or marital status. Their proposals included establishing a common age of consent, extending domestic violence laws to homosexual couples, reforms to the *Anti-Discrimination Act* and access to *de facto* property settlements and other general property rights and benefits like superannuation.

The package of law reform I am now introducing has been developed after careful consideration of those proposals and the wider law. The aim in developing this package has been to ensure equality of treatment under the law. Many of the amendments are in areas of the law that affect only the individual, for example, access to superannuation, pensions and other financial benefits. Reform to those areas will ensure that same sex *de facto* couples and their children are no longer entitled to less benefits than others in our society.

Before going into the detail of the legislation I am introducing, I would like to make a comment about the reforms to the age of consent. It has been argued that equalising the age of consent for both males and females reduces the protections available to young men. The government does not accept this argument. Strong protections for children and young people from the predatory behaviour of adults of either gender is provided by our sexual assault and related laws, and we have taken this opportunity to significantly strengthen the Northern Territory criminal law in that area.

The government is also persuaded that a higher age of consent for young men in fact led to higher health and suicide risks, with young men reluctant to seek help for fear of being

reported for a breach of the law. The reforms we are introducing today achieves an appropriate balance. They address those serious concerns about the impacts of the current law and strengthen the laws that protect children and young people against predatory adults of any persuasion.

These reforms will ensure equality before the law for all Territorians, no matter what their sexuality, and will bring the Territory into line with the rest of Australia.

There are three main parts to this bill. The first part reforms the *Criminal Code* to provide equal outcomes for sexual offences, regardless of whether the victim is male or female, and to increase protection of young people against predatory adults. The second part removes and improves laws in the Territory that discriminate against Territorians on the basis of their sexuality. The third part, a range of amendments, will ensure people of same-sex relationships have the same rights and obligations under Territory law as married persons, providing equality to all people in *de facto* relationships, particularly Territorians in gay and lesbian relationships. For too long, gay and lesbian people have been denied access to the same legal rights and protections provided to heterosexual Territorians, and gay and lesbian people in other states and territories.

I will now move onto the specific amendments contained in the bill - first those related to sexuality. These reforms principally involve amendments to the *Anti-Discrimination Act*, that will create more appropriate exemptions than operate effectively to protect children from paedophiles and sexual predators.

Section 37 of the *Anti-Discrimination Act* currently provides that a person may discriminate on the basis of sexuality in areas of work, if the work involves the care and education of children, and the discrimination in necessary to protect the wellbeing of the children. This type of provision supports the erroneous myth that homosexual people have a predatory attitude to young people and are more likely to commit paedophilia. In addition, it fails to address the possibility of abuse by heterosexual people and, in this way, does not provide sufficient protection for children. Nobody can suggest that all paedophiles are homosexual. That is not only a discriminatory assumption, but it is also a dangerous one. A more equitable and effective way of vetting employees and ensuring protection of vulnerable people is to replace the current section with one that will allow an employer to discriminate against a potential employee on the basis of his or her criminal record. Employers can already require a criminal history check of any potential employee, but this only includes records of any actual findings of guilt against the person that have not been spent. The proposed extension will cover what is known as irrelevant criminal record and includes the criminal record of a person that would otherwise be spent, findings of not guilty, and circumstances where criminal charges were laid but not proceeded with.

It is not just children who must be protected from potential abuse from workers. There are other vulnerable people who should be protected in this way. New section 37 defines a vulnerable person as including children, aged persons, and persons with physical and intellectual disability. This new section will provide more effectively for the protection of a wider range of vulnerable people.

Consequential to this, amendments to the *Criminal Records (Spent Convictions) Act* are required so as to allow for the release of those irrelevant criminal records by police. Section 15 (a) is to be inserted and is carefully drafted to ensure that the records can only be released specifically for the purposes of section 37 of the *Anti-Discrimination Act*; that is, in order to work principally with the care, instruction and supervision of vulnerable people. I would also like to stress that these records can only be released at the request of the person who is the subject of the record. A potential employer cannot access these records without the consent of the potential employee.

The other aspect of the sexuality amendments to the *Anti-Discrimination Act* relates to the unnecessarily wide exemptions currently given to religious bodies. The amendments we are proposing are not intended to impact on any churches' freedom of religion; they are about balancing this freedom against the right of Territorians to protection from discrimination. This government recognises and strongly supports the right of religious institutions to practise their faith without restriction and according to their beliefs and tenets. However, the current exemption for religious bodies under section 51 of *Anti-Discrimination Act* is unnecessarily wide. It exempts all religious bodies from the operation of the act in every respect, from sexuality, to race, to pregnancy, to age and more, in relation to ordination, training and so on of priests, ministers of religion and other people appointed to perform church functions. It also exempts religious bodies in relation to any act done in accordance with the doctrine of religion, necessary to avoid offending the religious sensitivities of members. The concern is that the scope of the current exemption is inappropriate and unnecessary given that many religious bodies receive government funding to perform activities that are not strictly religious such as providing crisis accommodation.

There is no reason why religious organisations should be exempt from what would otherwise be unlawful discrimination in areas in which non-religious organisations providing the same non-religious services are liable for unlawful discrimination. As I stated earlier, there is no intention to affect the right of freedom of religion, therefore, the proposed amendment to section 51 will make no changes in relation to appointment, training or ordination of persons to perform religious functions, it only modifies the exemption slightly to restrict it in relation to other acts by religious bodies to matters of religious observance only.

There was some fear expressed to me that these changes would affect the rights of religious schools to discriminate on the basis of sexuality or religious belief when employing teachers in religious schools. It is understood that in our community of religious schools there is concern that teachers who have different religious beliefs or attitudes to sexuality to those taught by the religious school may impact negatively on the ability of the school to impart the teachings of the religion to its students. New section 37(a) will provide exemptions to religious schools to enable them to discriminate on the basis of sexuality or religious belief where employing persons to work in the institution. The discrimination must be in good faith and for the purposes of avoiding offence to the religious sensitivities of the people of that particular religion. Before leaving this area, I would like to stress that these exemptions do not stop any religious school from employing teachers of a different religion, or homosexual teachers. Schools have the freedom to set their own policies in that regard.

I now turn to the amendments relating to *de facto* relationships. These are by far the majority of the reforms contained in the bill as they have required consequential amendments to all Territory laws that make provisions in relation to married or *de facto* persons. For the first time these changes make the law consistent in its application to relationships across the Territory. For the main part the biggest impact of the changes will be felt by the gay and lesbian community, however, there are various Territory laws which currently discriminate against all *de facto* relationships, both heterosexual and homosexual which will also be addressed. This includes Aboriginal traditional marriages which are currently catered for in some legislation but are conspicuously absent in others.

I am very proud to be introducing these reforms today to recognise gay and lesbian relationships. As a government our job is to ensure equality for all Territorians and for too long gay and lesbian people have been ignored in our statute books. Equality before the law is a fundamental right but until now gay and lesbian Territorians have not enjoyed the same rights as their fellow Territorians or as gay and lesbian men and women in other parts of the country. These amendments will allow gay and lesbian people to be full and equal participants in our society. But by giving gay and lesbian relationships recognition under Territory law it is

not just people in same sex relationships who will benefit from these reforms, it is society as a whole.

Children in same sex families will benefit from greater protection as their non-biological parents' rights and responsibilities towards their children would be recognised and enforceable. The same financial obligations and liabilities of married people will be imposed on people in *de facto* relationships in the same way as married people and society will benefit from greater participation and greater tolerance. It is a step towards reducing the stigmatisation felt by young gay people which research shows can lead to mental illness and suicide. Mr Acting Speaker, the main vehicle for effecting this change across the Territory is through changes to the *De facto Relationships Act*, particularly the definition of what constitutes a *de facto* relationship. The *De facto Relationships Act* currently provides for a legal mechanism for the recognition of the property rights of *de facto* partners and the division of property after the breakdown of a *de facto* relationship.

It also provides for *de facto* partners to make certain legal agreements relating to financial matters between the partners and ex-partners. Unlike the case of a marriage breakdown, *de facto* couples cannot seek legal redress through the Family Court in relation to division of joint property. At the moment the definition of a *de facto* relationship under that act is quite narrow and applies only to relationships of two people living together as husband and wife on a *bona fide* domestic basis. The definition therefore excludes same-sex relationships and Aboriginal traditional marriages, where the parties to the marriage do not live in the same household.

Arguably, it may also exclude people who still consider themselves to be in a committed monogamous relationship, but who, due to financial reasons or job opportunities, maintain separate households, for example where one of the partners works at a mine or in a remote community and the other lives in town.

We propose to insert a more flexible definition to section 3(a) of the *De Facto Relationships Act* that can be applied across the board to a wide range of personal relationships that exist in the Territory. The proposed definition is gender non-specific and provides that *de facto* relationship is a marriage-like relationship between two persons. Section 3(a)(2) then goes on to specify, when determining if a *de facto* relationship exists, all the circumstances of the relationship must be taken into account, including relevant matters that are specifically listed in the legislation. These include matters such as the duration of the relationship, whether a sexual relationship exists, the degree of financial dependence or inter-dependence and the public aspects of the relationship. Is not an automatic bar if one of the matters on the list is not present, but the presence of any matter will go towards establishing the existence of a *de facto* relationship. In case there is any doubt, it is also proposed to include 3(a)(3), which expressly states that it is not relevant when determining the existence of a relationship whether the persons are of the same or opposite sex, they are married to another person, or they are in another *de facto* relationship.

This definition to be applied in to the *De Facto Relationships Act* will for the first time in the Territory give gay and lesbian people a mechanism in the courts to resolve property disputes with their ex-partners. Until now, the non-financial contributions of a same-sex partner to a relationship cannot be recognised in the same way as marriage or heterosexual *de facto* relationships. This could lead in some cases to a non-working partner not being able to obtain an appropriate property settlement. Their contributions to the relationship, such as home improvements or domestic support to the other party while they work in a highly paid demanding job, is under-recognised and can not be practically enforced in a property settlement.

Whilst there are other ways to settle disputes over property division, these are more complex and costly than the *De Facto Relationships Act.* Property reform for same-sex relationships is

long overdue, but the reforms do not stop here. The new definition of *de facto* will apply across the board to all Northern Territory legislation. The *Interpretation Act* is being amended to provide that unless there is an expressed contrary intention, where the term '*de facto*' or '*de facto* relationship' is used in any act, or legislation under any act enacted by this parliament, the definition under the *De Facto Relationships Act* will apply. Wherever '*de facto*' appears, it will include same-sex as well as heterosexual relationships.

To clarify the position in relationship to Aboriginal traditional marriages, the *Interpretation Act* will also provide that wherever there is a reference to terms such as marriage, spouse, husband and wife, they are to be read as including Aboriginal traditional marriages.

The *De Facto Relationships Act* was enacted in 1991. The act purported to give equal treatment under Territory law to heterosexual *de facto* relationships, as were given to married relationships. The method of providing for that reform was that at the same time to include references to *de facto* where necessary throughout each relevant item of legislation. Consequently, a definition of *de facto* was also inserted into each relevant item of the legislation.

For these new reforms, that approach has been rejected. A separate definition in each act is cumbersome and unnecessary. It is much simpler to provide for one definition in the *De Facto Relationships Act,* and applied across the board. Moreover, it will apply the term automatically to any future acts of the Territory. If another interpretation is intended, it will have to be very clearly expressed and specifically justified.

You will note the vast array of amendments to acts, regulations, rules and even community government schemes. These are essentially amendments needed to remove the old definition of *de facto* throughout the statute books and replace them with the new terminology.

As mentioned earlier, there are some existing laws which have failed to recognise any form of *de facto* relationship. In those cases, these reforms will ensure that the *de facto* partners and relationships are dealt with under Territory law in the same way as marriage. These reforms are not as wide-ranging as those related to same sex *de facto* relationships, but are necessary if we are going to successfully implement our policy of providing equality of treatment for all personal relationships in the Territory.

For example, some of the amendments needed in this regard were to acts related to statutory pensions provided to judges and administrators on retirement. In addition, the spouses of judges and administrators are entitled to a part of the pension if they are widowed. At the moment, *Administrators Pensions Act* and the *Judges (Supreme Court Judges Pensions) Act* restrict the payment of part pension only to spouses and widows of judges. As these terms are interpretive consistently with the legal definition of marriage, *de facto* spouses and same sex partners would arguably not be entitled in the same way as legally married spouses to access the part pension on the death of their partner. As with other Territorians, judges and administrators are entitled to make the same choices as to the types of personal relationships they enter. Territory legislation needs to recognise and provide for this. The reforms therefore include amendments to these acts to allow for the part pension to be paid to the surviving *de facto* partner in the same way as it is paid to a widow.

An additional amendment has been included in these cases for the situations where there is both a surviving *de facto* partner and a wife and husband to whom the judge or administrator is still legally married. In these cases, the *de facto* who has been in an exclusive relationship with the judge or administrator for two years, will be entitled to the part pension. In any other case, the wife or husband will be eligible.

The *de facto* reforms will also function to remove discriminatory effects on some children

under the Territory law. At the moment, the lack of recognition of gay and lesbian relationships in the Northern Territory law not only discriminates against men and women in homosexual relationships, but it also discriminates on many levels against the interests of children raised by same sex parents. A significant aspect of the reforms relates to the recognition of parentage of a lesbian partner in very limited circumstances. The proposed amendments to the *Status of Children Act* create a presumption of parentage in relation to IVF children in lesbian families. The consenting non-biological female parent in a lesbian family will be presumed to be the parent. However, I would like to stress that this will not affect the parental obligations or rights of a biological father in situations where the mother enters in a later lesbian relationship. If there is a father with an interest in the child, this will not be affected. The aim of this amendment is purely to give IVF children in lesbian families the benefits and protections of two parents, which would otherwise not be available. These children then will not be disadvantaged or discriminated against as a result of the person they perceive as their parent being denied legal recognition under the Northern Territory law. It will provide such children with the same level of security, both financial and personal, as other children, should either of their parents die.

Looking at the Northern Territory legislation generally, it does not recognise the relationships between children raised in same sex families and their non-biological parents. As a result, both the children of same sex couples and same sex parents are discriminated against in a number of other statutes, such as the *Law Reform (Miscellaneous Provisions) Act,* which regulates compensation for injury arising from mental or nervous shock; the *Motor Accidents (Compensation) Act*; the *Police Administration Act*; the *Work Health Act*; the *Family Provision Act*; and the *Taxation Administration Act.*

A child would normally have an expectation that they would be entitled to ongoing support from the parent that the child is dependent upon. As the law is currently drafted, a child raised in same sex parents is not always entitled to rely on this support. While children in heterosexual families can look to their step-parents for support, children in same sex families do not have the same level of protection. Under the current law there are certain benefits and rights that children of heterosexual couples are entitled to access that are not fully accessible by children of the same sex parents. For example, a child being supported by same sex parents will not be eligible to access compensation under the *Motor Accidents (Compensation) Act* or the *Crimes (Victims Assistance) Act* in relation to an accident or offence suffered by their non-biological or non-adoptive parent.

Another area that currently discriminates against such children is in the area of succession and intestacy. The *Family Provisions Act* provides for family members of a deceased person to apply for adequate provisions under the deceased person's estate if they feel that they have been inadequately provided for. A stepchild of a person is entitled to apply to a court if they were maintained immediately prior to the person's death. Without clarification of this term to include the same-sex step-parents, this would be interpreted to mean a child from a married or heterosexual *de facto* relationship. In addition, neither the same-sex partner or the child of a same-sex partner is entitled to a portion of the estate of their stepchild or step-parent under the *Administration and Probate Act* where they die intestate. This is the case, even if the partner or child was being fully supported by the intestate person. This could result in an incongruous situation that a remote relative is entitled to the estate over the deceased person's dependant child.

To address these situations, a new definition of 'stepchild' has been inserted into the *Interpretation Act* which defines the term to include a child of the person's *de facto* partner. Now that the term *'de facto'* includes same-sex partners, stepchild will include the child of a person's same-sex *de facto* partner. This definition will now apply across all Territory legislation; the effect of which is to provide that the non-biological parent in a same-sex relationship is, essentially, treated under the law in the same manner as any other step-parent.

As you can see, the reforms are addressing a wide range of discriminatory treatment under Territory law. Other areas also being addressed in relation to the same-sex relationships include the provision of equal access to financial benefits. These reforms relate to schemes that entitle the person to compensation as a result of accident or criminal offence. Under these schemes, such as the *Compensation Fatal Injuries Act*, a married spouse or heterosexual partner can be eligible to apply as a dependant of the injured or deceased person. However, same-sex partners are excluded. The *Stamp Duty Act* will also be reformed so that exemptions will also apply in relation to property settlements between separated same-sex *de facto* partners.

Reforms in the area of intestacy and inheritance are also being addressed. These relate the management of the estate of the deceased person and the distribution of property when the person dies intestate. These will have the effect of ensuring that the same-sex partners are recognised and have the same entitlements under the estate as the widow or widower.

Similarly, reforms are proposed in relation to the management of personal affairs such as under the *Adult Guardianship Act* and the *Aged and Infirmed Person's Property Act*, providing mechanism for the care of people who become unable to manage their own affairs and protect the property of the person suffering from a disability. Currently, same-sex partners are not expressly recognised as relatives, are not entitled to apply for a protection order, and are not entitled to apply for assistance as dependants.

The Territory legislation relating to issues of human dignity and medical treatment were also identified as requiring reform. The relevant acts deal with issues such as consent to medical treatment, organ donation, post mortems and autopsies, and applications for exhumations. Currently, same-sex partners do not have an automatic right to consent to their partner's emergency operation or organ donation in the same way as other spouses.

With the granting of the new benefits and rights also come new liabilities and obligations that are imposed on married and *de facto* heterosexual couples. The granting of rights to homosexual persons in other areas should be dependent on the imposition of other liabilities and obligations that already fall on heterosexual persons. The exclusion of homosexual relationships from some legislation may allow members of same-sex partnerships to access preferential loans, grants and licences from which they would be otherwise not eligible; for example, where their partner has already accessed the first home owners grant. This position has, in the past, prevented relevant authorities from properly assessing the assets and suitability of applicants. There are also many acts that impose an obligation on applications for certain licences to disclose any relevant interest of their spouse and *de facto* partner, which does not currently include same-sex partners.

There are also provisions for members of certain boards or organisations, such as the board of the Territory Insurance Office, to disclose the financial and other interests held by them or their associates, which include married spouses and *de facto* partners but does not include same sex partners. This real and potentially damaging lack of accountability in relation to same sex couples will be addressed in the reforms.

Other rights that are currently denied to same sex couples, and which are now being granted, include the right under the *Police Administration Act* to be informed if their partner is being held in custody. It is currently only applicable to married and heterosexual partners. The *Mining Act* and the *Aboriginal Land Act* automatically give limited rights to married spouses and *de facto* heterosexual partners of licence and permit holders. These rights are not given to same sex partners.

You will note in Division 7 of Part 4 of the bill a list of application provisions. These are

required to apply the new definitions of *de facto*, spouse and stepchild. Generally, under section 31 of the bill the new definitions will apply to *de facto* relationships in existence at the time of the commencement of the reforms and to relationships that come into existence after that date. However, this general application provision is not appropriate for every act and so specific application provisions were required in some cases. For example, where the acts were dependent on the death of the person, such as the *Administration and Probate Act* or the *Compensation (Fatal Injuries) Act*, an application provision was required to clarify that the reforms only applied to the death that occurred after the commencement of the reforms.

This is just an overview of the legislation being amended in relation to *de facto* relationships. The bulk of the amendments dealing with the relationship reforms are contained in schedules 1 and 2. These amendments are quite straightforward and repetitive. I will not go through each amendment individually as they are just too numerous to mention in a second reading speech.

I now turn to part 2 of the Law Reform (Gender, Sexuality and De Facto Relationships) Bill 2003, which makes amendments to Territory law relating to gender. The bulk of the changes are to the *Criminal Code*. These include equalising the age of consent for males and females and toughening up the offences relating to sexual intercourse and activity with children, otherwise known as carnal knowledge offences. By increasing the penalties, creating some new offences and tightening up inappropriate defences. There were gaps that needed to be addressed as they failed to adequately protect boys from unlawful sexual intercourse. Currently for some offences the code applies different penalties, depending on the gender of the victim and/or offender. This is inappropriate and inequitable. Every child, regardless of their gender or the gender of the person committing an offence against them, is entitled to the same level of protection from the law.

Equalising the age of consent for both sexes will ensure equity between the sexes under the law for consensual sex and toughening our sexual assault laws will protect all young people from predatory adults and close the loopholes which fail to adequately protect boys from unlawful sexual intercourse. The age of consent and child sexual offences, or carnal knowledge offences, are contained in division 2 of part 5 of the *Criminal Code*.

Subdivision 2 of this division entitled 'Other Offences Against Morality' has been completely overhauled. Although there is currently no specific provision in the Northern Territory legislation expressly creating a respective age of consent for males and females, the cumulative effect of the *Criminal Code* offences created by sections 127, 128 and 129, which deal with sexual intercourse with children, is that, while either gender can legally consent to engage in heterosexual sex and for female lesbian sex at 16 years, a male must be 18 years of age before they can consent to engage in male homosexual sex. Currently the effect of these provisions is not only to create a different age of consent but also fails to protect our male children. For example, section 128 assumes that a male child who has homosexual sex will do so consensually and is not a victim while the female under 16 years who has sexual intercourse is a victim. This could see young boys who are the victim of sexual assault by another male also being criminally liable, an obvious unacceptable situation.

There is an offence of sexual intercourse or gross indecency involving females under 16, but no similar offence to protect males. The changes we are making will remove these anomalies. The bill therefore proposes to repeal sections 127, 128 and 129 and replace them with one general offence of having sexual intercourse with a child under the age of 16, regardless of the gender of the child or the perpetrator.

At the same time, the penalties have been increased, sending the message to potential offenders that the community will not tolerate sexual interference with our children. Currently, the maximum penalty for a general offence of sexual intercourse or gross indecency with a child is seven years imprisonment where the child is over 14, and 14 years imprisonment

where the child is under the age of 14. The maximum penalty for the general offence is being increased to 16 years imprisonment.

We are introducing new aggravated offences, which will attract an even higher level of penalty. In circumstances where the child is particularly vulnerable, the penalty will increase to 20 years imprisonment. These circumstances include where the offender is in the company of others, the child is under the authority of the offender, the child has a serious disability, or the child is affected by drugs or alcohol.

Where the child is under the age of 10, the maximum penalty is 25 years. The lower age of the victim is regarded as a factor of aggravation in itself.

These penalties are amongst the toughest in the nation. This government is committed to protecting our children from abuse. This approach to increasing penalties generally has been applied consistently across all child sexual intercourse offences in subdivision two of Division 2, Part V. The penalties related to the section 130 offence of sexual intercourse or gross indecency by the provider of disability support services to the mentally ill or handicapped person have been revised to specifically provide for offences involving children.

Currently, if a carer had sexual relationships in his or her care, he or she could be prosecuted under section 130 and would have been liable to receive a maximum penalty of only seven years, the same penalty as applies to an offence against an adult. There was no recognition of the greater level of seriousness if the offence was committed against a child. The bill addresses this deficiency by inserting higher penalties where the victim is a child and where the victim is under the age of 10 years. The penalties of 20 years and 25 years respectively reflect the penalties of aggravated carnal knowledge.

Section 131(a) creates the offence of maintaining a relationship of a sexual nature with a child. The penalties for this offence are graduated in the sense that if the relationship an actual sexual offence, will attract a higher penalty, currently 14 years or life imprisonment depending on the nature of the offence. These maximum penalties are being increased to 20 years and life.

The types of offences that will attract life imprisonment if committed as part of an ongoing sexual relationship with a child include coerced sexual self-manipulation and attempted rape causing grievous bodily harm.

The penalties in the section 132 offence of indecent dealing with a child under the age of 16 years are also being increased as they are considered to be inadequate and not reflective of the seriousness of the offences that section covers. Currently, the general maximum penalty is five years imprisonment, increasing to 10 years if the victim is under 12 years, a lineal descendant or under the offender's care.

Section 132 is aimed at indecent dealings which are less than gross indecency but still of a sexual nature. Such activities could include touching a child inappropriately, showing pornography to a child, taking indecent photographs of a child or talking in a sexual manner to a child. These are obviously very serious offences, but not as serious as sexual intercourse or gross indecency. The penalties are being increased to 10 years imprisonment for a general offence and 14 years imprisonment if the child is under 10 years of age.

This government is concerned that child sexual intercourse offences in the *Criminal Code* are not enough to completely protect our young people from predatory behaviour in some adults. Therefore, a new offence is being inserted in section 128 of the Code, which will apply to sexual intercourse or gross indecency involving a child over the age of 16 but who is under the offender's special care. This offence is in addition to the carnal knowledge offences as it applies to child victims who are of the age of consent but are still perceived a vulnerable

because of their age and relationship to the offender.

Despite being legally able to engage in sexual relationships, young persons aged 16 and 17 can still be emotionally vulnerable and easily influenced. They still need to be protected from predatory behaviour by adults who could take advantage of their youth and inexperience, particularly from persons in authority, who can easily exploit their position in order to take advantage of children.

The new offence will apply to offenders who are step-parents or guardians, school teachers, custodial officers, health professionals and other personal instructors, such as sporting coaches. By creating an offence in respect of these relationships, the proposed offence appropriately recognises the power and balances that can exist in these types of relationships and how adults can exploit them.

However, in recognition of the fact that these young persons are otherwise of the age of consent, the penalties are lower than for carnal knowledge. If the young person is 16 years of age, the maximum penalty is eight years imprisonment, and four years imprisonment if the young person is 17 years of age. As a young person who is 16 or 17 can legally marry with the consent of the court, a defence is provided where the victim and the offender are in a married or in a *de facto* relationship.

You will also note that other defences have been either amended or inserted throughout the subdivision. For example, the defence in section 127(4) that the child was actually of or above the age of 14 years, and the accused believed, on reasonable ground, that the child was of or above the age of 16 years, currently there is a much wider defence available to perpetrators of child sex offences. The current defence is that the accused believed on reasonable grounds that the child was of or above the age of 16 in the case of a girl, or was an adult in the case of the boy. The current defence is too wide, because it will be pleaded by a perpetrator, regardless of the actual age of the child, and therefore it discourages potential offenders from making the proper inquiries. Where there is a doubt, the onus should be on the adult to make sure that the person is not under the age of consent. The tighter defences are being inserted into sections 127, 130, 131, 131A and 132, and will provide a higher level of protection for children.

It is also proposed to entirely remove another existing defence. This is the defence that the parties to the act are married. This defence currently operates through the requirement that child sex offences involve unlawful sexual activity. For the purposes of subsection 2 only, unlawful means that the parties are not husband and wife. However, the *Commonwealth Marriage Act* does not permit marriage of a child under the age of 16. The defence appears to have been included in 1983, where it was still possible to get a court approval to marry under the age of 16 years. This has not been the case since 1991.

Further, because the definition of husband and wife in section 1 of the code includes an Aboriginal marriage according to tribal custom, it has become clear that the otherwise defunct carnal knowledge defence available to a husband of a girl under 16 could be invoked in the case of customary marriage. It is significant that indigenous women's organisations and child protection organisations have spoken out against traditional marriage being used to mitigate or excuse sexual offences committed against children.

The Aboriginal and Torres Strait Islander Commission Social and Physical Well-Being Committee supports the principle that, in a conflict between customary law and criminal law, the interests of the child must come first – and that was in a media release on 16 May 2003. The availability of such a defence is also inconsistent with international human rights standards. These include article 19 of the Convention on the Rights of the Child, which provides that states must take all appropriate legislative measures to protect a child from all forms of physical and mental abuse. Additionally, article 16 of the Convention on the

Elimination of all Discrimination Against Women states that the betrothal and marriage of a child shall have no legal effect.

The defence is also arguably inconsistent with the Northern Territory *Community Welfare Act,* which provides for the protection of children from sexual abuse or exploitation. For these reasons, we have removed the defence altogether by repealing the definition of 'unlawful' in section 126, and making amendments throughout subsection 2 to omit all references to 'unlawful' or 'unlawfully'. This government does not condone child sexual abuse in any circumstances.

The offences in section 201 and 202 also needed to be addressed. The offence created by section 201 is the offence of taking or enticing away, or detaining a child under the age of 16 with the intention that he or another shall have sexual intercourse with the child, or that that child shall be indecently dealt with or exposed to indecent behaviour. The offence contains the defence of being married to the child or having the consent of that child's mother, father or other persons having a lawful care or charge of the child. Like the defence to carnal knowledge offences, this defence is offensive and inconsistent with the basis of human rights of the children to be protected from all kinds of physical and sexual abuse. It will be removed. Similarly, the offence contained in section 202 of taking a child under 16 years without consent out of the custody or protection of that child's mother, father or other person having the lawful care or charge, contains a defence that the person was married to the child. This defence is also being removed.

The separate offences of incest contained in sections 134 and 135 are also being reformed. The current offences are both inequitable and inadequate. The maximum sentence 14 years imprisonment for incest committed by a male is far greater than the penalty for seven years committed by a female. The offences also contain offensive and inappropriate gender assumptions; that is, that a female offender is a submissive participant, while the male offender is the aggressor. Notably, there is also no specific provision for homosexual incest.

I will say it again: every child, regardless of the sex of the person who exploits them, is entitled to the same level of protection under the criminal law. The bill, therefore, repeals both incest offences and replaces them with one offence applying equally to male and female victims and perpetrators. The general penalty is 14 years imprisonment. This applies to related adults engaging in sexual intercourse. If the act involves a child under 16 years, the same penalties apply as to other aggravated carnal knowledge offences; that is, 20 years imprisonment if the child is 10 years or over, and 25 years if the child is under 10 years.

Section 377 of the Criminal Code, which is the evidentiary provision relating to the proof of the closed family relationship in an incest offence, is also replaced to be gender-inclusive

Mrs AAGAARD: Mr Acting Speaker, I move that so much of Standing Orders be suspended as would allow the Minister to conclude his remarks.

Motion agreed to.

Dr TOYNE: Mr Acting Speaker, there are a range of other minor consequential amendments to the Criminal Code and *Sentencing Act*, as a result of the changes we are making. These include changing cross-references through the code, where the offence numbers have been changed or omitted. There are also various amendments to the code which include the new definition of *'de facto'*, which will apply across the board to all Territory legislation which I have already discussed.

Equality of treatment of gay and lesbian Territorians under the law provides self–respect, reduces stigmatisation, and promotes full participation in our community. We want to send a

strong message that it is not acceptable to discriminate against anyone on the basis of their sexuality; our statute books will not legitimise such discrimination. Our aim in government is to create a more tolerant and understanding society, and our role as government is to take that lead. The reforms that I have presented today reflect this government's committed approach to promoting and ensuring a Territory that is free of discrimination and protects its citizens to the fullest extent. I am proud to be introducing two bills that give gay and lesbian people rights and protection denied to them for so long.

Before finishing, I would like to acknowledge the work of the Darwin Community Legal Service, in a submission entitled *Equality Before the Law*, that was released in May 2002. Many of the reforms here today are based on the recommendations contained in that submission. I would like to thank the service for the wide consultation and work put into that submission. It was very helpful to us in developing our reforms. I am also very proud of the reforms in this package of legislation that will toughen up laws protecting children from sexual abuse. Toughening-up our sexual assault laws will protect all young people from predatory adults and close the loopholes that fail to adequately protect children from unlawful sexual intercourse. Mr Acting Speaker, I commend the bill to honourable members.

Debate adjourned.

ACT:

Text of Act:

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