



Australian
Human Rights
Commission
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Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008

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Australian Human Rights Commission
Submission to the Senate Legal and
Constitutional Affairs Committee

15 September 2008

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Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Senate Legal and Constitutional Affairs Committee in its Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008.
2. The Commission welcomes the introduction of this Bill.
3. In June 2007, *Same-Sex: Same Entitlements*, the report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (the Same-Sex: Same Entitlements Inquiry) was tabled in the federal Parliament.
4. The Same-Sex: Same Entitlements Inquiry found that at least 58 federal laws relating to financial and work-related entitlements discriminated against same-sex couples and in many cases, their children. As a result, these laws breach the *International Covenant on Civil and Political Rights*. Many of these laws also breach the *Convention on the Rights of the Child* (CRC), by discriminating against the children of same-sex couples and failing to protect the best interests of the child in the area of financial and work-related entitlements.
5. The Same-Sex: Same Entitlements Inquiry recommended:
 - The federal government should amend the discriminatory laws identified by the Inquiry to ensure that same-sex couples and opposite-sex couples enjoy the same financial and work-related entitlements.
 - The federal government should amend the discriminatory laws identified by the Inquiry to ensure that the best interests of children in same-sex and opposite-sex families are equally protected in the area of financial and work-related entitlements.¹

Summary

6. The Commission supports the amendments to Commonwealth legislation introducing new definitions of 'de facto partner' and 'de facto relationship'. These amendments remove discrimination against same-sex couples contained in Commonwealth laws.
7. The Commission supports the amendments to Commonwealth legislation introducing new definitions of 'child' and 'parent'. These amendments remove discrimination against children of same-sex families contained in Commonwealth laws.
8. The Commission welcomes the amendment of the definitions of 'stepchild' and 'step-parent' so that they recognise these relationships in de facto families, including same-sex families.

¹ Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements*, Report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (Same-Sex: Same Entitlements), April 2007.

9. The Commission is disappointed that the amendments to the *Sex Discrimination Act 1984* (Cth) (SDA) only remove discrimination against same-sex couples in relation to family responsibilities discrimination and not marital status discrimination.
10. The Commission supports the removal of the interdependency definition in the *Migration Act 1958* (Cth) (Migration Act). This definition is no longer necessary as the new definition of 'de facto partner' applies to people in both opposite sex and same-sex de facto relationships.

Recommendations

11. The Australian Human Rights Commission recommends that:

Recommendation 1: The amendments contained in the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 inserting the new definitions of 'de facto partner' and 'de facto relationship' into Commonwealth legislation should proceed.

Recommendation 2: The amendments contained in the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 inserting the new definitions of 'child' and 'parent' into Commonwealth legislation should proceed.

Recommendation 3: The amendments contained in the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 expanding the definitions of 'stepchild' and 'step-parent' in Commonwealth legislation should proceed.

Recommendation 4: The *Sex Discrimination Act 1984* (Cth) should be amended to replace the protected ground of 'marital status' with 'couple status'. The definition of 'de facto spouse' should be replaced with the new definition of 'de facto partner', which this Bill inserts into the *Acts Interpretation Act 1901* (Cth).

Recommendation 5: Section 9(10) of the *Sex Discrimination Act 1984* (Cth) should be amended to ensure equal coverage under the SDA for men and women, along the lines of s 12(8) of the *Disability Discrimination Act 1992* (Cth).

Recommendation 6: The amendments contained in the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 removing the definition of 'interdependency relationship' from the *Migration Act 1958* (Cth) should proceed.

Recommendation 7: The amendments contained in ss 5CA(2) and 5CA(3) of the *Migration Act 1958* (Cth) should not proceed.

The new definition of 'de facto partner'

12. The Commission welcomes the new definitions of 'de facto partner' and 'de facto relationship' adopted by this Bill.
13. These new definitions ensure that same-sex and opposite-sex couples are treated equally under the Commonwealth laws that adopt the new definition.

14. As noted above, the primary recommendation of the Same-Sex: Same Entitlements Inquiry was that discriminatory legislation should be amended so that same-sex and opposite-sex couples enjoy the same financial and work-related entitlements. The amendments contained within this Bill achieve this aim.

What did the Same-Sex: Same Entitlements Inquiry recommend to remove discrimination against same-sex couples?

15. The Same-Sex: Same Entitlements Inquiry report argued that the preferred drafting approach for bringing equality to same-sex couples is to:
- retain the current terminology used in federal legislation (for example 'spouse')
 - redefine the terms in the legislation to include same-sex couples
 - insert new definitions of 'de facto relationship' and 'de facto partner' which include same-sex couples.²

The new definition of 'de facto partner' removes discrimination against same-sex couples

16. This Bill reflects the Commission's recommendations in that it retains current terminology such as 'spouse'. Discrimination against same-sex couples is removed through the new definition of 'de facto partner' inserted into the *Acts Interpretation Act 1901* (Cth).
17. The Commission supports the approach taken in the Bill to people in registered relationships. A person will automatically be considered to be the de facto partner of another person if they are in a 'registered relationship'.³
18. The Same-Sex: Same Entitlements Inquiry heard from many same-sex couples about the importance of formal relationship recognition. The Commission recommended that relationship registration should be proof of the relationship from the date of registration.⁴ The Bill implements this recommendation.
19. The Commission fully supports the new definition of 'de facto relationship' contained in the Bill. The list of circumstances to be taken into account when determining whether two persons have a couple relationship almost exactly mirror the definition recommended by the Same-Sex: Same Entitlements Inquiry.⁵
20. The Commission supports the requirement that the new definitions of 'de facto partner' and 'de facto relationship' will only apply if specified by a particular

² Same-Sex: Same Entitlements, section 18.5.1, p383.

³ Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008, inserting new section 22A into the *Acts Interpretation Act 1901* (Cth).

⁴ Same-Sex: Same Entitlements, section 18.5.2, p384.

⁵ Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008, inserting new section 22C into the *Acts Interpretation Act 1901* (Cth); Same-Sex: Same Entitlements, section 18.5.2, p384.

Act. There are instances where an alternative definition of a 'couple relationship' has been developed for specific policy reasons, such as in the *Social Security Act 1990* (Cth) or the *Migration Act 1958* (Cth). The Commission supports the retention of these established definitions, as long as they do not discriminate against same-sex couples.

21. **Recommendation 1:** The amendments contained in the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 inserting the new definitions of 'de facto partner' and 'de facto relationship' into Commonwealth legislation should proceed.

The new definitions of 'child' and 'parent'

22. The Commission supports the new definitions of 'child' and 'parent' contained in the Bill.
23. Protecting the best interests of a child is one of the most important principles of international law and a guiding principle in the CRC. Ensuring that children in same-sex families have the same entitlements as children in opposite-sex families is fundamental to protecting the best interests of these children.
24. The clear purpose of this Bill is to ensure that the children of a same-sex relationship are treated equally as the children of an opposite-sex relationship. The Commission supports the removal of discrimination against the children of same-sex families.

What did the Same-Sex: Same Entitlements Inquiry recommend regarding the legal recognition of children?

25. The Same-Sex: Same Entitlements Inquiry made the following recommendations regarding the legal recognition of children:
- Federal laws without a definition of 'child' should include a definition which recognises the children of a birth mother, birth father, lesbian co-mother or gay co-father.
 - Federal laws should ensure that a lesbian co-mother of an Assisted Reproductive Technology child can access the same financial and work-related entitlements available to a birth mother and a birth father (a legal parent).
 - Federal financial and work-related laws should include a definition of 'step-child' which recognises a child under the care of a 'de facto partner' of a birth mother or birth father.
 - 'Step-parent adoption' laws should more readily consider adoption by a lesbian co-mother or gay co-father.
 - Gay and lesbian couples should have equal rights to apply for adoption of an unrelated child.
 - Where access to financial or work-related benefits is intended to extend beyond the legal parents, federal laws should explicitly recognise the eligibility of a person who has a parenting order from the Family Court of Australia.

- There should be a public information and education campaign to ensure that gay and lesbian families are aware of their rights and entitlements under federal financial and work-related laws.

The new definitions of ‘child’ and ‘parent’ remove discrimination

26. The definitions of ‘child’ and ‘parent’ in the Bill remove discrimination by including the children of most same-sex relationships. This is achieved by broadening the definition of child to include a person who is the ‘product of a relationship’ with a partner: ‘someone who is the product of a relationship the person has or had as a couple with another person (whether of the same sex or a different sex)’.⁶
27. The Commission notes that this new definition does not replace the definition of ‘child’ as it is currently understood, but rather expands the classes of children that may be taken to be a child of a couple for the purposes of the Acts to be amended.
28. As outlined in the Commission’s submission to the Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, the Commission believes that this new definition of ‘child’ will include children born into all same-sex relationships, including:
 - where one member of a lesbian couple gives birth using donated sperm
 - where one member of a lesbian couple gives birth using donated sperm and donated eggs
 - where one member of a lesbian couple gives birth following intercourse with a man
 - where a surrogate mother gives birth to a child for a gay couple using the donated sperm of one member of a gay couple.

Is there an alternative approach to the definition of ‘child’?

29. The Commission is aware that there are alternative views as to the most appropriate way to remove discrimination against children in same-sex families.
30. The Commission agrees that there is an alternative approach which would ensure greater consistency in the legal recognition of the parent-child relationship both in federal laws and between federal and state laws.
31. This approach would involve:
 - amendment of the parenting presumption in s 60H of the *Family Law Act 1975* (Cth) (Family Law Act) to include lesbian co-mothers

⁶ For example, see the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008, amending section 5(1) of the *Bankruptcy Act 1966* (Cth).

- introduction of uniform state surrogacy laws that recognise gay co-fathers and provide a mechanism for the transfer of legal parentage from the birth mother
- amendment of the Family Law Act to recognise parental status as conferred by state laws
- amendment of the definition of 'child' in the Family Law Act to include children born through intercourse, children lawfully adopted, children of parents recognised under s 60H and children of parents recognised by state laws
- extension of the Family Law Act definition of 'child' to apply to all federal laws that grant rights or obligations based on a parent-child relationship.

32. The above approach would require amendment of the parenting presumptions contained in s 60H of the Family Law Act. This was recommended in the Senate Legal and Constitutional Affairs Committee Report on the Inquiry into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Cth).
33. However, even if s 60H of the Family Law Act was amended, equality for fathers who formed a family through a surrogacy would not be achieved if state and territory surrogacy laws were not reformed. There is no guarantee of uniform amendment of surrogacy laws or that these amendments would include same-sex couples.
34. Consequently, the Commission prefers the approach of the new definition of 'child' contained in this Bill, as it achieves equality for all same-sex families.

Does the new definition of 'child' recognise anyone as a parent other than those in the couple relationship?

35. As noted above, the new definition of 'child' maintains a parent-child relationship where there is a biological connection. This means a person may be the 'child' of a sperm donor to a lesbian couple and the 'child' of a birth mother to a gay couple. Importantly, no surrogacy laws in Australia automatically oust the parental status of a birth mother.
36. Consequently, the new definition of child will mean that a child may be considered to be the 'child' of both partners in a same-sex couple and the 'child' of the sperm donor or birth mother. It may also include the partner of the sperm donor or birth mother, if that couple are intended parents.
37. It is important to understand that gay and lesbian parenting arrangements often involve more than two people. Where a male sperm donor is an active parent along with a lesbian couple, recognition that a person can be a child of both the lesbian couple and the donor father may be appropriate. Similarly, it may be important to recognise the status of a birth mother to a gay couple.
38. Consequently, it is appropriate that some of the legislation amended by this Bill reflect the reality of gay and lesbian parenting arrangements by providing access to benefits wherever a parent-child relationship is found to exist under the new definition.

39. For example, in respect of the *Safety, Rehabilitation and Compensation Act 1998* (Cth), which governs Commonwealth worker's compensation payments, the effect of the amendments is that it will be that it is easier for the child of a person in a same-sex relationship to prove a right to an entitlement if that person dies. Further, the operation of the tracing rule introduced into this legislation means members of same-sex families will be now considered 'prescribed persons' for the purposes of some entitlements. It is appropriate that this legislation applies in every case where a person is considered another person's child.
40. In other cases, the amendment of the definition of child will, quite appropriately, not impact on the entitlements available to a child or parent.
41. For example, the *A New Tax System (Family Assistance) Act 1999* (Cth) specifies that a child can only ever be the 'FTB child' (family tax benefit child) of one person. The impact of the new definition of child is not to expand the benefits available under the legislation. It merely expands the classes of persons who are eligible to be the parent of an FTB child.
42. Similarly, the Child Care Benefit and the Child Care Tax Rebate are only available if a child is the 'FTB child' of a taxpayer or their partner. No other person can claim this benefit.⁷
43. The Commission understands that the possibility that more than two people could be recognised as parents of a single child has caused concern amongst some sections of the community. However, in the Commission's view, this is an appropriate outcome given the realities of some gay and lesbian parenting arrangements. Furthermore, it makes no difference in the application of some legislation if a person is the child of more than two people as child-related entitlements are only available to one person (and possibly their partner).
44. **Recommendation 2:** The amendments contained in the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 inserting the new definitions of 'child' and 'parent' into Commonwealth legislation should proceed.

The new definitions of 'stepchild' and 'step-parent'

45. The Commission welcomes the amendment of the definitions of 'stepchild' and 'step-parent' so that they recognise these relationships in de facto families, including same-sex families.
46. As outlined in the Same-Sex: Same Entitlements Inquiry, under current legislation a person can generally only be a 'step-parent' of a child if the person is married to the child's biological parent. As same-sex couples cannot marry, neither a lesbian co-mother nor a gay co-father can become a 'step-parent'.
47. The Commission recommended that federal financial and work-related laws should include a definition of 'stepchild' which recognises a child under the care of a 'de facto' partner of a birth mother or a birth father. The amendments contained in this Bill implement this recommendation.

⁷ *A New Tax System (Family Assistance) Act 1999* (Cth), s 22(2) – (4).

48. **Recommendation 3:** The amendments contained in the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 expanding the definitions of ‘stepchild’ and ‘step-parent’ in Commonwealth legislation should proceed.

Amendments to the *Sex Discrimination Act 1984 (Cth)*

49. The Commission has some concerns about the approach taken to amending the *Sex Discrimination Act 1984 (Cth)* (SDA).
50. The Commission welcomes the amendments of the provisions of the SDA relating to discrimination on the basis of family responsibilities to remove discrimination against same-sex couples and their families.
51. However, the Commission is disappointed that the provisions of the SDA relating to discrimination on the basis of marital status have not been amended.
52. Section 6 of the SDA provides for a prohibition on discrimination on the grounds of marital status. Section 4 defines ‘marital status’ as 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.** (emphasis added)
53. The term ‘de facto spouse’ is then also separately defined, as follows
- 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.
54. Under this definition, only persons in an opposite-sex de facto relationship are protected from discrimination on the grounds of being in a de facto relationship. Same-sex de facto couples are not. The Commission considers that the SDA should be amended to provide equal protection to same-sex and opposite-sex de facto couples from discrimination on the basis of being in a de facto relationship.
55. The Commission does not believe that this amendment would provide protection from discrimination on the basis of sexuality or being in a same-sex relationship *per se*. A person in a same-sex relationship would only be able to rely on the prohibition against discrimination on the basis of marital status if the discrimination is due to their status of being in a de facto couple, rather than due to their sexuality or being in a same-sex couple.
56. For example, the proposed amendment would not apply to a hotel which refused service to a same-sex couple, as the basis of the refusal of service would be the sexuality of the couple and/or the sexuality of the persons in the couple. However, if the hotel refused service to all de facto couples, then this

amendment would ensure that same-sex de facto couples would have equal rights as opposite-sex de facto couples in challenging that refusal of service. This is because the refusal of service on this occasion is based on being in a de facto relationship, rather than sexuality or being in a same-sex relationship.

57. This approach reflects the proposal made by the Commission in its recent submission to the Inquiry of this Committee: *The effectiveness of the Commonwealth Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality* (the Commission's *Submission to the Senate Inquiry into the SDA*). See Recommendation 15.⁸
58. **Recommendation 4:** The *Sex Discrimination Act 1984 (Cth)* (SDA) should be amended to replace the protected ground of 'marital status' with 'couple status'. The definition of 'de facto spouse' should be replaced with the new definition of 'de facto partner', which this Bill inserts into the *Acts Interpretation Act 1901 (Cth)*.
59. The Commission notes that the Bill also proposes inserting a new s 9(10A) into the SDA. The proposed amendment would draw on a wider source of Australia's international obligations in giving effect to the SDA under the external affairs power, rather than just the *Convention on the Elimination of All Forms of Discrimination Against Women* as is currently the case. As a result, the amendment would provide equal coverage to men and women in situations where only the external affairs power applies, such as where the respondent is an unincorporated entity or a State government. However, the amendment is limited to discrimination on the grounds of family responsibilities. It therefore does not extend equal coverage for men and women in respect of other areas of operation covered by the SDA, such as discrimination on the basis of sex or marital status or sexual harassment.
60. In the Commission's *Submission to the Senate Inquiry into the SDA*, the Commission has recommended that the SDA be amended to ensure full coverage for both men and women in all respects, including in relation to discrimination on the basis of sex and marital (or 'couple') status and sexual harassment (as well as discrimination on the basis of family responsibilities). See Recommendation 20. This would involve amending s 9(10) in similar terms to s 12(8) of the *Disability Discrimination Act 1992 (Cth)*.
61. The Commission retains its view that the SDA should ensure full coverage to men and women in all aspects of the Act.
62. **Recommendation 5:** Section 9(10) of the *Sex Discrimination Act 1984 (Cth)* should be amended to ensure equal coverage under the SDA for men and women, along the lines of s 12(8) of the *Disability Discrimination Act 1992 (Cth)*.

⁸ Note that, in the Commission's *Submission to the Senate Inquiry into the SDA*, it proposes that protection from discrimination on the grounds of sexuality and sex and gender identity should be considered as part of a second stage of reform of federal discrimination law, preferably through an inquiry into an *Equality Act* for Australia. See Recommendation 1, and Option for Reform C: Protection from discrimination on the grounds of sexuality, sex identity and gender identity.

Amendments to the *Migration Act 1958* (Cth)

63. The Commission supports the amendments to the *Migration Act 1958* (Cth) (Migration Act) to remove the definition of an 'interdependency relationship'.⁹
64. As the Migration Act and regulations will now recognise same-sex partners as de facto partners, this definition is no longer necessary.
65. The Same-Sex: Same Entitlements Inquiry argued that the interdependency category is an inappropriate means by which to recognise same-sex relationships.
66. The Commission refers the Committee to its comments regarding interdependency relationships in the Commission's submission to this Committee's Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008.
67. **Recommendation 6:** The amendments contained in the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 removing the definition of 'interdependency relationship' from the *Migration Act 1958* (Cth) should proceed.
68. The Commission notes that the Migration Act adopts the new definition of 'child' including the element of 'product of a relationship'. However, proposed ss 5CA(2) and (3) contemplate the passing of regulations to ensure that a person may be the child of no more than two people.
69. The Commission opposes this aspect of the amendments to the Migration Act on the basis that it may exclude people in some same-sex parenting arrangements from being recognised as a child's parent.
70. **Recommendation 7:** The amendments contained in ss 5CA(2) and 5CA(3) of the *Migration Act 1958* (Cth) should not proceed.

⁹ See for example, Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008, amendments to sections 237 and 238 of the *Migration Act 1958* (Cth).