



AUSTRALIAN  
COALITION FOR  
EQUALITY

Equality For Australia's Lesbian, Gay, Bisexual, Transgender & Intersex People

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**Submission to**  
**Senate Legal & Constitutional Affairs**  
**Committee**

***Inquiry into the Same-Sex Relationship (Equal Treatment in Commonwealth Laws-General Law Reform) Bill 2008***

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## **Background**

In June 2007 the Human Rights & Equal Opportunity Commission (HREOC) commissioned the report *Same Sex: Same Entitlements*. This report identified fifty-eight pieces of legislation discriminating against same-sex couples and their families. Following the 2007 election, the Attorney-General's department identified approximately forty-seven additional pieces of legislation, bringing the total to approximately 100.

The government has committed to amending these 100 pieces of legislation to remove discrimination against same-sex couples through five pieces of amending legislation. It is understood these bills will be the:

- Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008;
- Evidence Amendment Bill 2008;
- Family law Amendment (De Facto Financial Matters and Other Measures) Bill 2008;
- Same-Sex Relationship (Equal Treatment in Commonwealth Laws-General Law Reform) Bill 2008; and
- National Employment Standards (Announced, legislation yet to be introduced).

### **Inquiry into the Same-Sex Relationship (Equal Treatment in Commonwealth Laws-General Law Reform) Bill 2008**

The Senate Legal and Constitutional Affairs Committee is inquiring into the provisions of the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008. The purpose of this Bill is to eliminate discrimination against same-sex couples and the children of same-sex relationships in a wide range of Commonwealth laws. The Bill will amend 68 Commonwealth laws, a list of which is included in the Explanatory Memorandum for the Bill.

According to the Explanatory Memorandum, the amendments contained in this Bill are required because same-sex de facto relationships and registered relationships are not accorded recognition in a wide range of Commonwealth laws which already provide recognition to opposite-sex de facto relationships. This differential treatment prevents same-sex couples from accessing many benefits which are available to opposite-sex

couples, and also relieves them of some obligations commonly imposed on opposite sex couples. The amendments are also intended to ensure that children of same-sex couples are not disadvantaged solely because of their family structure.

The Bill is intended to remove discrimination by amending a number of different definitions across Commonwealth legislation. These amendments will include:

- a new model definition of 'de facto partner' which will apply equally to same and opposite-sex de facto couples;
- the definitions of 'child' and 'parent' will be expanded where appropriate to include the children of same-sex couples; and
- amendments will also be made to ensure that de facto partners, children of same-sex couples, and persons whose relationship is traced through them will be considered to be members of a person's family, and relatives for the purposes of relevant Commonwealth legislation. The general approach taken by the Bill is to extend the existing meaning of these terms to include same-sex relationships.

The **reporting date for this inquiry is 30 September 2008.**

**NOTE:** Due to the length of the Bill and the short period for written submissions, the Australian Coalition for Equality has been unable to complete a comprehensive review of the Bill. The below is a highlight of key issues that have been identified in the time available.

### **About the Australian Coalition for Equality**

The Australian Coalition for Equality (ACE) is dedicated to achieving equality for lesbian, gay, bisexual, transgender and intersex (LGBTI) people in Australian national law and policy. ACE is an LGBTI advocacy and lobbying network with a focus on outcomes. Its mandate is drawn from international human rights law and it is made up of LGBTI advocates with a proven track record in achieving equality in their respective fields.

Currently ACE is the only LGBTI human rights organisation dedicated to a wide range of national issues - including equality for same-sex couples in areas like superannuation, workplace benefits and marriage, national sexuality and gender identity anti-discrimination laws and equality for families headed by same-sex couples.

## General Comments

### Same-Sex Couples in Australia

**24,683 same-sex defacto couples in Australia** were recorded from the 2006 Census. This is made up of some 26, 000 individuals in male same-sex relationships and over 23,300 in female same-sex relationships<sup>1</sup>.

**4,386 children live in same-sex families** in Australia (ABS, 2007). This figure does not include children of non-resident or single lesbian or gay parents, or adult children living out of home. It is estimated 20% of lesbians, and up to 10% of gay men, are parents.<sup>2</sup>

The Australian Bureau of Statistics acknowledges these figures are an underestimate, as some couples may be reluctant to publicly disclose their same-sex relationship status.

### Support for reform within the Australian community

There has been increasing support within the Australian community for recognising same-sex couples as equals to defacto opposite-sex couples, as demonstrated by numerous state reforms over the past 10-15 years. It is perhaps best encapsulated in the June 2008 Galaxy Poll, commissioned by GetUp! , which found **71% of Australians** agreed that “same-sex partners should have the same legal rights as those in heterosexual defacto relationships”.<sup>3</sup>

Further, within the LGBTI community there has been an overwhelming support for legal recognition of same-sex relationships. In 2005 the Victorian Gay & Lesbian Rights Lobby report, “Not yet Equal”, identified **98% of respondents supported some form of legal recognition**.<sup>4</sup>

ACE remains disappointed by the continued failure of both major parties to provide equal marriage rights to all Australians who share a mutual commitment for life. We recognise, however, that the reforms before the Senate Inquiry relate to defacto and registered relationships and do not address the issue of equal marriage. We would welcome the opportunity to discuss this matter in the future.

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<sup>1</sup> <http://www.coalitionforequality.org.au/2006census.pdf>

<sup>2</sup> HREOC , p 16 – 17; see also *Meet the Parents: A Review of the Research on Lesbian and Gay Families*, p 20 – 21. ([http://www.girl.org.au/publications/major\\_reports/meet\\_the\\_parents.pdf](http://www.girl.org.au/publications/major_reports/meet_the_parents.pdf))

<sup>3</sup> Galaxy Poll June 16-17 2007 <http://beta.getup.org.au/files/media/equalityforsamesexcouples.pdf>

<sup>4</sup> <http://www.vgirl.org.au/files/VGLRL%202005%20-%20SSRS%20Report.pdf>

## Analysis of Reforms to date

### 100 laws vs. 85 laws

In April 2008, the Government announced it would amend approximately 100 laws discriminating against same-sex couples<sup>5</sup>. On 4 September 2008, the Attorney-General's media release, in relation to the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008, indicated the Government had fulfilled its election promise<sup>6</sup>.

Bill Title	No of Acts Amended
Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008	14
Evidence Amendment Bill 2008	1
Family law Amendment (De Facto Financial Matters and Other Measures) Bill 2008	1
Same-Sex Relationship (Equal Treatment in Commonwealth Laws-General Law Reform) Bill 2008	68
National Employment Standards <i>(Announced, legislation yet to be introduced)</i>	1
<b>TOTAL</b>	<b>85</b>

ACE conducted an audit of the five bills listed below against the Human Rights Commission's list of legal instruments to be amended. ACE found a number of instruments not yet included in these Acts. We have listed them below for the Committee's benefit.

### List of HREOC identified Acts not included for amendment

The following list is taken from the Human Rights Commission's Same Sex: Same Entitlements Report, Appendix 1. These Act have been identified by ACE as not being amended in any of the above Bills.

<sup>5</sup> See Transcript of Attorney-General's Press Conference, 9:45am, 30 April 2008.  
([http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Transcripts\\_2008\\_30April2008-PressconferenceParliamentHouse](http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Transcripts_2008_30April2008-PressconferenceParliamentHouse))

<sup>6</sup> See Attorney-Generals Media Release, 4 September 2008.  
([http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases\\_2008\\_ThirdQuarter\\_4September2008-RuddGovernmentDeliversonElectionCommitmenttoEndSame-sexDiscrimination](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_ThirdQuarter_4September2008-RuddGovernmentDeliversonElectionCommitmenttoEndSame-sexDiscrimination))

During the Attorney-General's second reading speech to the House on Wednesday 28<sup>th</sup> May 2008, the Attorney-General stated, "*On coming to office, we commissioned a whole-of-government audit of Commonwealth legislation building on HREOC's excellent work. The audit confirmed HREOC's findings.*"<sup>7</sup>". This statement implies the Government will amend all recommendations of the HREOC report, yet a number of Acts identified by HREOC have not been included in the above Bills.

A list of the identified Acts not included in the reform is provided below. Footnote comments have been included where it has been identified an Act may have been amended through changes to definitions in an Act of a different title.

	Legal Instrument	Proposed Changes by HREOC
1	<i>Aboriginal Councils and Associations Act 1976</i> (Cth)	'de facto partner' (insert new definition) 'de facto relationship' (insert new definition) 'spouse' (s 3 – amend to include 'de facto partner')
2	<i>Child Support (Assessment) Act 1989</i> (Cth) <sup>8</sup>	'eligible carer' (s 7B – no need to amend if 'parent' recognises a gay co-father or lesbian co-mother through reformed parenting presumptions or adoption laws) 'parent' (s 5 – no need to amend if section 60H of the <i>Family Law Act 1975</i> (Cth) is amended and a gay co-father or lesbian co-mother may be recognised through reformed adoption laws)
3	<i>Defence Act 1903</i> (Cth)	'child' (no need to insert definition if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws) 'de facto partner' (insert new definition) 'de facto relationship' (insert new definition) 'dependant' (insert definition to include a 'de facto partner' and 'child'.) 'member of a family' (s 58A - no need to amend if new definition of 'dependant')

<sup>7</sup> See Hansard, House of Representatives, 28<sup>th</sup> May 2008.

([\)](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=:query=BillId_Phrase%3A3011%20Dataset%3Ahansardr.hansards%20Title%3A%22second%20reading%22%20Speaker_Phrase%3A%22mcclelland,%20robert,%20mp%22;queryType=:rec=1;resCount=)

<sup>8</sup> & <sup>9</sup> ACE notes the Committee's report into the Family Law Amendment Bill, which recommends amendment to s60H of the Family Law Act. If this recommendation were accepted then the Child Support Act would be updated.

4	<i>Diplomatic Privileges and Immunities Act 1967</i> (Cth)	'de facto partner' (insert new definition) 'de facto relationship' (insert new definition) 'member of the family' (insert new definition including a 'de facto partner'. No need to insert definition of 'child' if a lesbian co-mother or gay co-father and her or his children may be recognised through reformed parenting presumptions or adoption laws)
5	<i>Family Law Act 1975</i> (Cth) <sup>9</sup>	'parent' (s 4 – no need to amend if s 60H is amended and a gay co-father or lesbian co-mother may be recognised through reformed adoption laws)  Parenting presumptions for a child born through assisted reproductive technology (s 60H – amend to include a parenting presumption in favour of a lesbian co-mother)
6	Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 (seeking to amend the <i>Federal Magistrates Act 1999</i> (Cth)) <sup>10</sup>	'de facto partner' (insert new definition) 'de facto relationship' (insert new definition) 'eligible child' (sch 1, cl 13 inserting sch 1, cl 9F into the Federal Magistrates Act – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws) 'eligible spouse' (sch 1, cl 13 inserting sch 1, cl 9E into the Federal Magistrates Act – no need to amend if 'marital relationship' is amended) 'marital relationship' (sch 1, cl 13 inserting sch 1, cl 9E(5) into the Federal Magistrates Act – amend to include a 'de facto partner')
7	<i>Foreign States Immunities Act 1985</i> (Cth)	'de facto partner' (insert new definition) 'de facto relationship' (insert new definition) 'spouse' (insert new definition including a 'de facto partner')
8	<i>Higher Education Funding Act 1988</i> (Cth)	'de facto partner' (insert new definition) 'de facto relationship' (insert new definition) 'overseas student' (s 3 – no need to amend if new definition of 'spouse') 'relative' (no need to insert definition if a lesbian co-mother or gay co-father and her or his children may be recognised through reformed parenting presumptions or adoption laws) 'spouse' (insert new definition including a 'de facto partner')
9	<i>International Organisations (Privileges and</i>	'children' (no need to insert definition if the children of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions or adoption laws)

<sup>10</sup> ACE notes that the *Federal Magistrates Act 1999* (Cth) was amended instead.



	<i>Immunities) Act 1963</i> (Cth)	'de facto partner' (insert new definition) 'de facto relationship' (insert new definition) 'dependent relatives' (insert new definition including a 'spouse' and 'children') 'spouse' (insert new definition including a 'de facto partner')
<sup>10</sup>	<i>Medicare Levy Act 1986</i> (Cth) <sup>11</sup>	The <i>Medicare Levy Act 1986</i> (Cth) does not define the relevant terms, but relies on definitions in the <i>Income Tax Assessment Act 1936</i> (Cth) (s 3(1)). Changes to that Act will automatically change definitions in the Medicare Levy Act.

### **List of HREOC identified Regulations not included for amendment**

Separate to the list of Acts amended via the bills is a list of regulations identified by HREOC. These regulations were identified by the Attorney-General in his second reading speech of the Same-Sex Relationships (Equal Treatment in Commonwealth Law – Superannuation) Bill 2008. In his speech the Attorney stated "*The (HREOC) audit also identified a number of statutory regulations and instruments which include possibly discriminatory terms. The government will review, and where necessary, amend these instruments to remove any differential treatment of same-sex couples.*"<sup>12</sup>

To ensure all items identified by the Human Rights Commission are enacted, it is appropriate that the responsible person to amend these regulations and instruments is identified, together with a timeframe for completion.

A list of the HREOC identified regulations and other legal instruments is attached in Appndix 1 for the committee's benefit.

### **Departmental Audit**

The results of the departmental audit have not been made public to date. As such, the findings of this audit cannot be reviewed by interested parties to be commented on in this submission. Given that some of the HREOC recommendations appear not to have been amended, it seems possible that some items identified by the department may also have not been addressed.

<sup>11</sup> ACE notes that the *Income Tax Assessment Act 1936* (Cth) was amended instead.

<sup>12</sup> See Hansard, House of Representatives, 28<sup>th</sup> May 2008.

([\)](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=:query=BillId_Phrase%3Ar3011%20Dataset%3Ahansardr.hansards%20Title%3A%22second%20reading%22%20Speaker_Phrase%3A%22mcclelland,%20robert,%20mp%22:queryType=:rec=1:resCount=)

In the interests of transparency, the results of this audit should be made publicly available.

***Recommendation: Departmental Audit publicly available***

That the committee request a copy of the Attorney-General's department's audit into all forms of legal instruments that discriminate against same-sex couples be made publicly available to the Inquiry.

***Recommendation: Identify why some items not amended***

That the committee requests the Attorney-General's department identify those legal instruments, listed in the HREOC report and/or departmental audit, not included for amendment.

- a) Where it is the Department's intent not to amend the legal instrument identified, ACE suggests the committee requests a detailed explanation be made available on why this legal instrument is not being amended.
- b) Where the Department intends to amend the legal instrument in the future, a responsible individual, process for amendment and timeframe be identified.

## **Couples Relationship**

### **Defacto and Registered relationships are distinct**

The Australian Coalition for Equality strongly supports the introduction of a separate category of "registered relationship" for the kind of relationships similar to, but distinct from, "defacto relationships".

The social and legal reality is that State and Territory registered relationships are not de facto relationships with certificates; but a different type of relationship in their own right, akin to civil unions. Partners entering into State and Territory registered relationships make a specific decision not to be considered de facto partners and should have this choice respected.

Sometimes partners in registered relationships acquire a range of rights and responsibilities not available to de facto partners. For example, in Tasmania conjugal partners acquire parenting rights and their previous wills are automatically voided.

Sometimes partners in registered relationships do not fulfil the criteria traditionally associated with de facto relationships – for example, in Tasmania registered partners are not required to cohabit. On this basis, Australian State and Territory-registered relationships are recognised overseas as civil unions.

### **Need for an Umbrella Term**

Given the extensive drafting completed to date, ACE recognises it would be challenging for extensive redrafting of the legislation to occur. In light of this, we would propose an umbrella term be introduced into the Acts Interpretation Act. This will signpost the fact that the model definition has been used, as distinct from the definition contained in any particular Act.

We propose the previous term introduced into the superannuation Bill, “couple relationship” continue to be used for “defacto relationships”, as well as “registered relationships”. This would be separate them from “marital relationships”.

In doing this, the term “defacto partner” - used to refer to the Acts Interpretation Act model definition - would be changed to “partner of a couple relationship”.

### ***Recommendation: “partner of a couple relationship”***

That Schedule 2 part 1 be amended to alter the term “defacto partner” to the term “partner of a couple relationship”. That a definition of couple relationship, including both a defacto relationship and a registered relationship, be introduced.

## **Registered Relationship**

The Australian Coalition for Equality supports the comments in paragraph 12 of the explanatory memorandum stating that registered ‘interdependent’ relationships will not be a type of relationship prescribed for the purposes of the Act.

### **Registered Relationships should not be limited to State or Territory registers**

The Australian Coalition for Equality notes that Australian State or Territory-registered relationships are recognised overseas by some schemes as civil unions. ACE believes Australia should reciprocate this recognition where appropriate. This may be achieved by removing reference to the term “under a prescribed law of a State or Territory” in the proposed Section 22B of the Acts Interpretation Act of this Bill.

This will allow Parliament to prescribe appropriate international civil unions as recognised registered relationships for the purposes of Federal law.

### **Registered relationships are not “defacto partners”**

As discussed above, individuals who choose to enter into a formalised relationship by signing a register, are electing to no longer be perceived as “defacto”. Therefore, it is inappropriate to continue referring to them as such. A more appropriate term should be used to refer to these two distinct categories of relationships.

### **Tracing rule should apply to registered relationships also**

In Schedule 2, part 1 of the Bill, a tracing rule is introduced under the definition of “defacto relationships” to identify people who are “related by family”. This issue is discussed in further detail below, but it is important to note this tracing rule should apply equally to “registered relationships” as it does to “defacto relationships”.

***Recommendation : Recognition of international registry schemes***

That the words “under a prescribed law of a State or Territory” in Schedule 2 Part 1 (Section 22B of the Acts Interpretation Act) and all other references be removed from all Bills.

## **Defacto Relationships**

The bill introduces a definition of “defacto partner” and “defacto relationship” into the Acts Interpretation Act. However, unlike most items in the Acts Interpretation Act, the amended substantive Act must specifically refer to the Acts Interpretation Act in order for this model definition to apply.

### **Model definition should apply in all Acts**

In order to remove confusion and truly adopt a “model definition”, it is suggested that - following the implementation of these Acts - a review be undertaken to amend all acts to refer to the Acts Interpretation Act. Where there is a need to deviate from the model defacto definitions in the Acts Interpretation Act, this should be stipulated in the substantive Act. This should be completed regardless of whether the above proposal to introduce the term couple relationship is adopted by the committee.

The current definitions before the Senate in the Superannuation, Evidence and Family Law Amendment Bills should be updated in this manner to refer to the Acts Interpretation Act. This would allow for ease of understanding of the defacto definition and clarity about when the exact model definition is and is not used.

In the Bill before the Inquiry an example of where this principle (if adopted by the committee) may require an amendment, is the Social Security Act. In paragraph 414 of the explanatory memorandum, it states "*The criteria in subsection 4(3) of the Social Security Act are similar to the criteria in the key definition of 'de facto partner' within the meaning of the Acts Interpretation Act.*"

This is a clear example of where the new model definition should be referred to, rather than retaining different definitions in different Acts.

***Recommendation: Amend all current bills to refer to model definition***

That the committee recommend amendments to the Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008, Evidence Amendment Bill 2008 and Family law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 to refer to the model definition of in the Acts Interpretation Act.

***Recommendation: Project to cross reference all Acts with model definition***

That the committee recommend the Attorney-General commence a project to amend all Federal legislation to refer to the model definition in the Acts Interpretation Act. That this model definition then be applied across all Acts and no longer require the substantive Act to refer to the definition in order for it to be enacted.

## **Sex Discrimination Act**

### **Marital Status**

The Sex Discrimination Act (SDA) prohibits discrimination on the grounds of marital status. Currently marital status is defined in the Act as the condition of being single, married, married but not cohabiting, divorced, widowed or a de facto spouse.

The amendments replace the term “defacto spouse” with the inclusive term of “defacto partner”. However the protection of marital status is not updated to include defacto relationships or registered relationships.

This means that whilst people in a marriage are protected from discrimination, those in a defacto or registered relationship may continue to be discriminated against.

This is obviously not the intention of the Bill, as there are various references to removing discrimination on the grounds of marital status throughout the explanatory memorandum. For examples, see paragraph 418 regarding Social Security, paragraph 534 referring to Members of Parliament (Life Gold Pass) Act 2002, paragraph 749 relating to Australian Citizenship Act and paragraph 814 relating to Migration Act.

### **Sexual Orientation and Gender Identity Discrimination**

There are currently no federal laws that providing comprehensive protection from discrimination on the grounds of sexual orientation or gender identity (SOGI).

There are provisions which provide some relief from discrimination on the grounds of SOGI in relation to employment, including powers available to the Human Rights and Equal Opportunity Commission to investigate and report on such discrimination. However, the scope and enforceability of these provisions are limited.

At the same time, State and Territory laws in relation to SOGI discrimination may be as old as 30 years, and many use definitions and include exemptions which are no longer acceptable. It may also be possible these State and Territory laws do not cover Commonwealth agencies or their employees.

If the objective of these reforms is to remove discrimination against same sex couples, it is vital the Commonwealth provide comprehensive SOGI anti-discrimination protection for all Australians.

This can be achieved by amendment to the SDA, or by the enactment of a new SOGI-specific anti-discrimination instrument.

#### **a) Amendment of the SDA**

In the case of *Toonen v Australia* the Human Rights Committee found the definition of sex in the anti-discrimination provision of the International Covenant on Civil and Political Rights can be construed to include sexual orientation.

This finding provides the Commonwealth with the power to amend the definition of "sex" within the SDA to include sexual orientation.

The drawback to this approach is that provisions of the SDA are dated and not designed to handle SOGI discrimination.

Further, an amendment to the SDA fails to send out a clear message to the Australian people that SOGI discrimination is, in-and-of itself, unacceptable behaviour.

### **b) A new SOGI-specific instrument**

The above-cited HRC finding, plus other international jurisprudence, provides the Commonwealth with the power to enact a stand-alone Sexual Orientation and Gender Identity Discrimination Act.

This would have the advantage of being up-to-date and tailored legislation, specifically addressing gaps in State and Territory law.

It would also send out a clear message about the importance of tackling SOGI discrimination.

**We endorse option b.**

### ***Recommendation: Amend "Marital Status" to include "Relationship Status"***

We propose the committee replace the existing definition of "marital status" with a new term "relationship status" defined as the condition of being single, married, married but not cohabiting, divorced, widowed or a de facto partner, or a registered partner.



***Recommendation: Introduce Sexual Orientation and Gender Identity Discrimination provisions***

That the committee recommend draft legislation, dealing with discrimination on the basis of sexual orientation and gender identity, be prepared as a matter of urgency before the commencement of these Acts in mid-July 2009.

## **Children and Parents**

### **All families deserve equal treatment**

The Australian Coalition for Equality believes the best interests of the child should be paramount in any matter relating to families. In the context of removing discrimination against same-sex couples and their children, ACE agrees with the Attorney-General that this reform should “ensure children are not disadvantaged because of the structure of their family.”<sup>13</sup>

Regardless of the structure of any family, (nuclear, blended, opposite-sex or same-sex) ACE believes it is in the best interests of all children to be treated equally. This does not mean some families should have an onerous burden of proof placed upon them to prove the dependency of the child upon the parent, when other parents in the same situation do not. Children who have two parents, where they are biologically related to one parent and not biologically related to the other, should be treated equally before the law - regardless of the gender of their parents.

It has been suggested these changes alter the traditional family model. Further, it has been suggested the best situation to raise a child is within a marriage between a male and female parent. ACE holds the view that **love makes a family**. Throughout Australia there are many different forms of family structure - some with one parent, some with two; some parents have broken up, other parents stay together. Through all these types of families,

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<sup>13</sup> See Attorney-General's press release ([http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases\\_2008\\_SecondQuarter\\_30April2008-RuddGovernmentmovesonsame-sexdiscrimination](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_SecondQuarter_30April2008-RuddGovernmentmovesonsame-sexdiscrimination))

two single themes are consistent – love within a family and that all parents look out for the best interest of their child.

The situation faced by children in families headed by a same-sex couple is the same situation faced by ex-nuptial children in the 1970s, before laws were changed to both legally and socially recognise ex-nuptial children as equal to children born in wedlock. At the time, some sections of the broader Australian community were uncomfortable with the notion treating ex-nuptial children equally in the eyes of the law. In much the same manner, these sections of the community may be uncomfortable with the changes before the Inquiry today in 2008. It is important to remember, however, that it is in the best interest of the child that they be treated equally before the law.

### **Family Law Act**

The Australian Coalition for Equality is uncomfortable with the principle applied in this Bill in regards to the selective manner of recognising the relationship between children and their same-sex parents, in only some situations. The Family Law Act is the appropriate place to recognise the relationship between parent and child.

Without amendment to the Family Law Act - along with those Acts identified in the Bill - children in families headed by same-sex couples will continue to be considered children only for the specific purposes of the Bills amended. This may lead to continued discrimination against children of same-sex couples, as their relationship will not be seen as equal to those of opposite sex couples.

Paragraph 664 of the Explanatory Memorandum says, "*New subsection 11(11) is intended to expand the ordinary meaning of 'family' to ensure there is no discrimination against same-sex couples and their children.*" Without amending the Family Law Act to recognise the parental status of same-sex couples and their children, this discrimination will continue.

In relation to the specific recommendation of amending s60H of the Family Law Act, the Australian Coalition for Equality refers the committee to the amendments made to s8 of the Australian Citizenship Act in this Bill. This amendment permits equal treatment of

children born as a result of artificial conception procedures, regardless of the gender of their parents.

### **Child Support Act**

The Australian Coalition for Equality notes, for the committee's benefit, that the Child Support Act has not been included in these reforms. This may be due to intertwined relationship between the Child Support Act definitions and the definitions contained in the Family Law Act. Without recognition of same-sex parents in the Family Law Act, access to the Child Support Scheme would be neither automatic, nor guaranteed.

The Australian Coalition for Equality urges the Government to accept the recommendation of this committee, to amend the Family Law Act to recognise the relationship between both parents in a same-sex relationship and their children. ACE notes paragraph 431 of the Explanatory Memorandum for the benefit of the committee: *"While the non-biological parent of a child of a same-sex couple may be able prove legal responsibility for a child in his or her care without a parenting order, they are generally not assumed to be legally responsible. This imposes a higher burden than that placed on a birth mother and birth father (or adoptive parents) who do not need a parenting order to prove legal responsibility."*

### **Social Security – "Relationship Parent" & "Relationship Child"**

The Australian Coalition for Equality is deeply concerned by the need to create a new class of parent and child in the Social Security Act. We accept this may be necessary in the absence of an inclusive definition of "child" and "parent" as determined by the Family Law Act, but remain concerned by the decision to introduce these new terms.

In separating the terminology used to recognise same-sex parents, it is possible - over time - these terms will create a perception that their status as "parent" is lessened through the need to be deemed a "relationship parent" in order to meet the criteria of this definition. A more appropriate solution may be to simply include the criteria beneath "relationship parent" directly as part of the definition of "parent".

## **Tracing Rule**

The tracing rule explained in the Explanatory Memorandum has been used in the Acts Interpretation Act for defacto relationships, but does not appear to be used for registered relationships. Nor are there amendments to the Family Law Act to apply this tracing rule across all references to family.

Due to the short period of time available to prepare this submission, legal expertise on this issue has not been obtained. Suffice to say, ACE wishes to draw attention to the selective way in which the tracing rule has been applied to the definition of defacto only, and has not been applied in all situations.

This may lead to a situation where an Act for a specific purpose may recognise the relationship between a grandparent and a child, but may not recognise them for simply being a grandparent. ACE highlights this issue to the committee for further consideration. An appropriate solution may be to include the tracing rule in the Family Law Act.

## **Veterans Affairs – Young vs Australia**

In 1999, Edward Young was disallowed a veterans pension - following the death of his partner - due to his sexual orientation. In 2003, the United Nation's Human Rights Committee finalised a decision<sup>14</sup> that found Australia had violated the Optional Protocol to the International Covenant on Civil and Political Rights. In remedying this violation, Australia was obliged to reconsider Edward Young's pension without discrimination based on his sex or sexual orientation.

Due to the short timeframe to prepare this submission, ACE has been unable to confirm if the amendments meet Australia's obligation in relation to eligibility timeframes, thus allowing Mr Young to make a renewed application for consideration.

## **Education Campaign**

The changes to federal law proposed in this Bill impose a raft of new rights and responsibilities on same-sex couples. To ensure same-sex couples and their families,

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<sup>14</sup> Mr. Edward Young v. Australia, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003).  
(<http://www1.umn.edu/humanrts/undocs/941-2000.html>)

NGOs, service providers, professionals, and government agencies are all adequately prepared for these changes, it is important that an extensive education campaign be prepared and implemented by the Federal Government.

The Australian Coalition for Equality notes those Acts that may have a financial impact on members of the lesbian, gay and bisexual community are being phased in by 1 July 2009. This is a positive step; ensuring individuals affected by these changes are able to restructure their finances before the commencement of these changes. However, without an effective education campaign targeting all affected parties, individuals may not be aware of the changes and the impact upon them.

Further, without educating service providers and professionals administering or advising individuals regarding these changes, discrimination may inadvertently continue through a lack of understanding.

## Conclusion

The Australian Coalition for Equality urges the Committee to bear in mind the following key points:

- 15% of social marriages are defacto couples. This is an increase of 5% in the past 10 years. These relationships deserve the same rights and responsibilities in Federal law as that afforded to married couples.
- Same-sex relationships are “defacto” or “registered” relationships. They are not “interdependent” relationships and to characterise them as such would be a gross misrepresentation of the love between two people. Same-sex couples deserve the same rights and responsibilities in Federal law as those afforded opposite-sex defacto couples.
- **24,683 same-sex defacto couples** in Australia were recorded from the 2006 Census. **4,386 children live in same-sex families** in Australia (ABS, 2007). It is estimated that 20% of lesbians and up to 10% of gay men are parents.
- **71% of Australians agree** that “same-sex partners should have the same legal rights as those in heterosexual defacto relationships”

## Appendix 1: HREOC Identified Regulations to be amended

The below list of regulations

	<b>Legal Instrument</b>	<b>Proposed Changes by HREOC</b>
1	Foreign Acquisitions and Takeovers Regulations 1989 (Cth)	'de facto partner' (insert new definition) 'de facto relationship' (insert new definition) 'spouse' (reg 2 – amend to include a 'de facto partner')
2	Income Tax Regulations 1936 (Cth)	'interdependency relationship' (reg 8A(1) – no need to amend if 'spouse' is amended in the Income Tax Assessment Act 1997)
3	Migration Regulations 1994 (Cth)	'member of the family unit' (reg 1.12 – no need to amend if 'spouse' is amended) 'member of the immediate family' (reg 1.12AA – no need to amend if 'spouse' is amended) 'spouse' (reg 1.15A(2) – amend criteria of 'de facto relationship' to include same-sex couples)
4	Military Superannuation and Benefits Trust Deed (made under s 5(1) of <i>Military Superannuation and Benefits Act 1991</i> (Cth))	'child' (sch 1, r 1 – no need to amend if 'spouse' is amended and the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of 'step-child') 'de facto relationship' (insert new definition) 'eligible child' (sch 1, r 1 – no need to amend if the child of a lesbian co-mother or gay co-father may be recognised through reformed parenting presumptions, adoption laws or a new definition of 'step-child') 'marital relationship' (sch 1, r 1A – amend to include 'de facto relationship') 'spouse' (sch 1, r 12 – delete) 'spouse' (sch 1, r 9 – no need to amend if 'marital relationship' is amended) 'step-child' (insert new definition)
5	<i>Remuneration Tribunal Determination 2006/14: Members of Parliament – Travelling Allowance</i>	'de facto partner' (insert new definition) 'de facto relationship' (insert new definition) 'spouse' (insert new definition including a 'de facto partner')

6	<i>Remuneration Tribunal Determination 2006/18: Members of Parliament – Entitlements</i>	'de facto partner' (insert new definition) 'de facto relationship' (insert new definition) 'spouse' (insert new definition including a 'de facto partner')
7	Superannuation (Public Sector Superannuation Accumulation Plan) Trust Deed (made under s 10 of the <i>Superannuation Act 2005</i> (Cth))	'dependant' (div 2, r 1.2.1 – no need to amend if 'spouse' is amended in the <i>Superannuation Industry (Supervision) Act 1993</i> (Cth) (Superannuation Industry Act))