

19 September 2008

Dear Senators,

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

Thank you for your invitation to Liberty Victoria to make a submission to this inquiry.

Liberty Victoria (as the Victorian Council for Civil Liberties Inc is usually known) is an independent non-government organization that traces its history back to 1936. As Victoria's oldest and leading defender of civil liberties and human rights, Liberty Victoria is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia's compliance with the major human rights instruments set out in international law.

The right to equality set out in many of those instruments, and in particular the *International Covenant on Civil and Political Rights*, articles 26 and 2, is fundamental, and the long-standing discrimination in Australian laws against lesbians and gay men, and particularly against same-sex relationships and against the children of those relationships, is a matter for national shame. It is 23 years since a federal government, through then Immigration Minister Chris Hurford in September 1985, first formally recognised the human reality of same-sex couples, accepting that same-sex couples were just as real—as “marriage-like”—as mixed sex couples, and hence equally entitled to recognition as couples when it came to allowing an Australian's overseas partner to be in Australia.

This breakthrough should not have waited so long to be followed with general recognition in federal law.

**Liberty therefore wholeheartedly commends the Government for introducing this and the related bills to remedy important aspects of this discrimination, and urges the Committee to recommend that it, and they, be passed without further delay.**

- 1 This bill is a very lengthy and complex one, amending as it does some 68 Acts, and even with the Committee's generous grant of an extension of time, it has not been possible to assess it in detail. This submission is necessarily general.
- 2 Notwithstanding Liberty Victoria's firm support for the immediate passage of this “Equal Treatment Bill”, there are two issues we wish to raise for the record, and to indicate the need for further work in the future.

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- 3 The first is to warn against the suggestions some have made that the bill should be expanded to include so-called “interdependent relationships.” Liberty strongly opposes such amendments for the reasons set out in the HREOC *Same-Sex Same Entitlements* report. The second is, though for similar reasons of respect and symbolism, to express regret at the anxiety the Bill shows to avoid giving “marriage-like” status to same-sex couples, even while properly granting equality in practical matters.
- 4 The need for equality for same-sex couples, and ending discrimination against the children of same-sex couples, has been the subject of many inquiries, such as the HREOC *Same-Sex Same Entitlements* inquiry which reported in 2007, and the EOCV *Same Sex Relationships and the Law* report of 1998. These inquiries established beyond doubt, following extensive community consultations and large numbers of written submissions, that there was a real social problem of discrimination against same-sex couples and their children, and that action needed to be taken to remedy this wrong.
- 5 No such inquiry or needs analysis has been conducted into the supposed problem of the status of “interdependent couples.” Whether such a problem exists, and what measures might need to be taken to alleviate it if it does, would need to be established by properly conducted research and public inquiries. These have not been done, and until they are, and report appropriately, it is entirely inappropriate to delay the well-crafted solution to the well-attested problem of discrimination against same-sex couples that this Equal Treatment Bill provides.
- 6 As the HREOC report observed, “The ‘interdependency’ term suggests that same-sex couples are different to, and lesser than, similarly situated opposite-sex couples. Put another way, it is an almost de facto relationship, or a *de facto* de facto relationship. This is not only insulting to the couple; it imposes an unspoken hurdle in front of a same-sex couple trying to prove the genuineness of the partnership.”
- 7 Liberty strongly endorses this view, and HREOC’s conclusion that “interdependency” is not an appropriate way to characterize same-sex couples, and is incapable of delivering anything approaching real equality to them. It is instead a term expressly calculated to put same-sex couples at arm’s length, as not “real” couples, even more emphatically than the present bill’s careful avoidance of terms such as “marriage-like.” **Liberty urges the Committee to reject any proposal to insert “interdependency” into this bill.**
- 8 Central to the bill’s architecture is the introduction of the term “de facto couple”. Such couples will be made up of “de facto partners”. Speaking broadly, “de facto couple” is to replace the term “*de facto* spouse” as currently used in legislation. We say “speaking broadly” because the Equal Treatment Bill deals with a raft of legislation with many variations on how unmarried couples are identified.
- 9 The test for being a *de facto* spouse (in the laws to be amended) varies between Acts. It generally requires the couple to live “as a married couple” or “as a husband and wife” or in a “marriage-like relationship”, to adopt language of sub-paragraph 4(2)(b)(iii) of the *Social Security Act* 1991. Some Acts (such as the *Social Security Act*) explicitly require such relationships to be between parties of the opposite sex. There have been dissenting judgments in Court cases that say that two women or men can live “as a married couple”, but this

has not been the law. It is fairly clear that until now only mixed sex relationships can be “*de facto* spouses”, or have “marriage-like” relationships.

10 Thus consequent to this bill heterosexual unmarried couples who qualify now under the current law as *de facto* spouses are to be recharacterised as *de facto* couples. In this bill the test for whether two people are a *de facto* couple refers to a range of matters; generally speaking it is likely that those who are *de facto* spouses will form *de facto* couples without difficulty. In this new test, however, there is no reference to or implication of the couple needing to live as husband or wife or in a marriage-like relationship. It is fair to say a lot of intellectual energy has been applied to removing the common requirement currently in legislation that to be “*de factos*” a couple must “look like” they are married.

11 From a practical viewpoint it is possible there will be men and women who live together but, while not living in a “spousal” relationship, do have a way of living that will mean they are “*de facto* partners” in this new definition. This will be so even though they are not *de facto* spouses. Less likely but still possible is that some people who have a marriage-like relationship will lack the necessary way of living to qualify as “*de facto* partners”. A very wide-reaching change is being made to many existing legal arrangements. It is to be expected that these changes will have some effect on the position of people currently caught by these arrangements. In terms of the people to whom the law currently applies, that is mixed sex couples, this change is being made for no apparent reason, nor it would seem with any consideration as to its effect.

12 Speaking more broadly, however, this re-characterisation removes the need for and relevance of living like or as a married couple. Thus what is required of, or putting it another way expected, in order to be “a *de facto*” is to be culturally and socially reduced. For homosexual people, being brought into this new and lesser category involves the equalisation of legal rights. Yet it leaves unchanged the enormous cultural and social significance of the lack of any recognition of the fact of being in a relationship.

13 The bill does recognise that the states and territories may have relationship registration schemes, and does give these schemes force by causing a couple who have registered their relationship to be *de facto* partners automatically. This also is exemplary, as it creates a regime where couples unable to get married can achieve certainty that their relationship will be legally recognised. There are two comments to make about this, however:

(a) *de facto* is Latin for “as a fact” or “in practice”. Historically, the whole concept of *de facto* couples arose to deal with couples who live in practice as married couples in fact without being married “*de jure*”, ie at law. It is odd that by registering a relationship a couple is to be dealt with as “*de facto*” when they are, by registering, a couple at law: *de jure*. This can be seen to be odd for two reasons in particular:

- (i) the couple have gone through a legal process, but unlike marriage this is given no explicit recognition. It merely confirms one’s *de facto* status; and
- (ii) the registered couple are deemed to be a couple “in fact”, no matter what their circumstances in fact are. A person living with a new person in a domestic relationship but still registered to someone else could have two *de facto* partners. This is something of a distortion of language; and

(b) paragraph 13 of the Explanatory Memorandum for the Bill reads:

"The types of relationships that will be prescribed under section 22B of the *Acts Interpretation Act* are relationships that can be registered under some State and Territory laws that provide for registration of certain relationships. Only State and Territory laws or provisions of laws that provide for registration of relationships—same-sex or opposite-sex—will be prescribed."

The fairly strangely worded second sentence set out above seems almost to imply as concluding words: *and if it does any more (such as provide for a ceremony) it will not be.*

- 14 The Equal Treatment Bill is an enormous bill. A lot of this bill is concerned with the removal of marriage-like characteristics being relevant to couples being identified as de facto couples. Some real effort and intellectual rigor has been gone to to prevent same sex relationships obtaining, or merely being acknowledged as having, any "marriage-like" quality through this bill, and indeed any cultural or social significance at all.
- 15 To put this into context it is helpful to read the Opinion of the Chief Justice of the Supreme Court of California in *re Marriage Cases* (15 May 2008, S147999). This opinion sets out why it was there found to be appropriate for same sex couples to enjoy access to the same customs available to opposite sex couples, that is to marriage, and that to deny this is discriminatory, even if all the rights that married couples obtain (other than to be married) are available to same sex couples who cannot marry.
- 16 Following the activities of the previous Federal Government the Commonwealth of Australia now has provisions in the *Marriage Act* 1961 that mimic the "Defence of Marriage" Acts or constitutional provisions popular in parts of the United States of America. This discriminatory legislation was supported by the Labor Party. The avoidance of any marriage-like quality being given to same sex relationships is apparently Government policy. The effort made in the Equal Treatment Bill draws a line that states that no symbolic character can be attached or attach to a same sex union and goes far beyond the terms of even the *Marriage Act*. Also, it leaves for the future the task of dismantling the very tightly fenced "equality" the Equal Treatment Bill provides. This will be a cumbersome task, and could be avoided now by having taken a less driven approach in the Equal Treatment Bill to preventing homosexual relationships being recognised as having or being attributed with any marriage-like characteristics.
- 17 Admirable though the Government's purpose is in seeking to eliminate discrimination, and effectively though the Equal Treatment Bill does that in practical matters, there remains an inevitable lacuna. Liberty hopes that it will not be another 23 years before Australia joins South Africa, Canada, Belgium, the Netherlands, Norway, California and Massachusetts in ending the discrimination against couples who wish to marry but are of the same sex.

Yours faithfully




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