



# VICTORIAN GAY & LESBIAN RIGHTS LOBBY

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Same-Sex Inquiry  
Human Rights Unit  
Human Rights and Equal Opportunity Commission  
GPO Box 5218  
SYDNEY NSW 2001

Dear Mr Innes

## **National Inquiry into Discrimination against People in Same-Sex Relationships Discussion Paper II: Same-sex Couples and their Children in Federal Law**

The Victorian Gay and Lesbian Rights Lobby (**VGLRL**) welcomes the opportunity to make this second submission to the Human Rights and Equal Opportunity Commission (the **Commission**) in relation to the National Inquiry into Discrimination against People in Same-Sex Relationships (the **Inquiry**). The VGLRL would like to congratulate the Commission on its comprehensive research and consultation undertaken to date as part of the Inquiry.

This submission responds to the Inquiry's Discussion Paper II: Same-Sex Couples and their Children in Federal Law (the **Discussion Paper**). We note this Discussion Paper was informed by research commissioned by the Commission and undertaken by Associate Professor Jenni Millbank. Our submission responds to three questions raised by the Discussion Paper.

### **Do you have any comments about the suggested definition of "de facto relationship" in federal law (discussed in section 6.2 of the discussion paper)?**

We broadly support the proposed definition of "de facto relationship" in the Discussion Paper. However, in our view, criterion (f) should be moved to the first sub-section as it more clearly encompasses the necessary type of relationship to be covered by the definition.

As such, an appropriate definition of "de facto relationship" would be:

- (1) "De facto relationship" means the relationship between two people mutually committed to a shared life as a couple on a genuine domestic basis.
- (2) In determining whether two people are in a de facto relationship, all the circumstances of the relationship must be taken into account, including any of the following:
  - (a) the length of the relationship;
  - (b) how long and under what circumstances they have lived together;
  - (c) whether there is a sexual relationship between them;
  - (d) their degree of financial dependence or interdependence, and any arrangements for financial support, between or by them;
  - (e) the ownership, use and acquisition of their property, including any property that they own individually;

- (f) whether they mutually care and support children;
  - (g) the sharing of household duties;
  - (h) the reputation, and public aspects of the relationship between them.
- (3) No one factor, or any combination of factors, under (2) is necessary to establish a de facto relationship.
- (4) A de facto relationship may be between a couple of the same sex or different sex.

We also welcome the additional factor proposed by the Discussion Paper to be included in sub-section (2):

- (i) the existence of a statutory declaration signed by either or both of the couple stating they are, or were, in a de facto relationship.

In our view, especially in the absence of formal relationship recognition, a statutory declaration can assist couples make out that they satisfy the definition of de facto relationship. Such a declaration can minimise the chance of future disputes over the history the facts of the relationship, especially when one partner is no longer around to tell their side of the story. Being a statutory declaration there is a third party, the witness, whose signature confirms the date it was made, and the fact that two people signed it, and that the partners knew they were signing a solemn declaration. The VGLRL have an example statutory declaration on its website.

We also support the proposed sub-sections that relate to registration schemes in the Discussion Paper. Any relationship registration scheme must ensure that the fact of registration acts as proof that a couple fits the definition of being in a de facto relationship.

The above definition largely reflects the definition of ‘domestic partnership’ in Victorian law.<sup>1</sup> We note that the Victorian law, for the purposes of intestacy and property division, requires domestic partners to have been living together for at least 2 years.<sup>2</sup> In our view, there should not be such qualification period in the federal definition. If a qualification period does subsist (as does currently exist in parts of the *Migration Regulations*), then we believe that the existence of a statutory definition (as described above), should override any requirement for partners to have been living together.

**Do you have any comments about the suggested options for recognising a “child” in federal law (discussed in section 6.4 of the discussion paper)?**

The VGLRL believes that the law in relation to the recognition of children must accord with the following principles, taken from the Victorian Law Reform Commission Position Paper 2: Parentage (May 2005):

- The best interests of children require certainty about the status of their parents.
- Certainty about parental status at the earliest possible time minimises the potential for disputes and litigation about a person’s obligations and status in respect of the child, and promotes stability in the child’s life.
- It is in the best interests of children for their parents to be subject to all of the usual parental obligations and responsibilities.
- It is in the public interest for people who become parents to be subject to all of the laws that flow from the parent–child relationship.
- The law should aim to eliminate discrimination against children and parents based on their family type and relationship status. Legal recognition of diverse family types is an important way of countering discrimination.

As such, the VGLRL most strongly supports option 3 in the Discussion Paper. Utilising a broad purposive definition of child allows the above principles to be effected. Further, it most simply recognises that the law should apply to and protect those who live in child-parent relationships.

<sup>1</sup> *Property Law Act 1958* (Vic), s 275(2).

<sup>2</sup> *Administration and Probate Act 1958* (Vic), s 3.

**Do you have any recommendations about how to address the discrimination described in this paper?**

As outlined in our initial submission, the VGLRL believes that non-discrimination means that people in same-sex relationships be treated on a like basis as those in mixed-sex relationships. While the VGLRL acknowledges there are various ways of achieving this outcome, we suggest that in order to achieve full equality in all federal legislation, terms such as 'spouse', 'partner', 'dependent', 'family' and 'couple' should be redefined to include same sex partners and, where relevant, their children.

We have significant concerns with extending the concept of 'interdependency' to address discrimination. This is because interdependency does not treat same-sex relationships on a like basis as those in mixed-sex relationships. To satisfy the definition of 'interdependency relationship' in superannuation law, the following criteria must be satisfied:

- that the couple had a close personal relationship;
- that the couple lived together;
- that one or both members of the couple provided the other with financial support; and
- that one or both members of the couple provided the other with domestic support and personal care.

The fact that these (and potentially other) criteria need to be satisfied to prove that a person's relationship constitutes an "interdependency relationship" creates inequality in comparison with what is required for a person in a mixed sex-couple to prove their relationship.

The only factual requirement contained in the relevant legislative definition of "spouse" is that the person "lives with the person on a genuine domestic basis as the husband or wife of the person". This is obviously a different and simpler test to meet than that which is required to make out an interdependency relationship. The impact of this evidentiary disparity may result in a scenario in which a same sex partner may be unable to receive particular rights flowing from the definition that would have been payable if the partner had been of the opposite sex.

Finally, we note that perhaps the most simple and effective ways of addressing discrimination in the Discussion Paper is to give same-sex couples access to formal relationship recognition, through marriage or a civil union scheme, or both. Formal relationship recognition has been granted on a non-discriminatory basis in a number of foreign jurisdictions. Similar recognition in Australia can enable same-sex couples, like mixed-sex couples, access to the range of benefits outlined in the Discussion Paper.

Should you have any comments in relation to this submission, please contact us on 0417 484 438.

Yours sincerely

Gerard Brody  
Policy Working Group convenor