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An independent statutory body
accountable to the Victorian Parliament

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Dear Mr von Doussa

SAME-SEX: SAME ENTITLEMENTS / DISCUSSION PAPER II

Thank you for providing the Equal Opportunity Commission Victoria ('EOCV') with the opportunity to comment on *Same-Sex: Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships: Finanacial and Work-Related Entitlements and Benefits, Discussion Paper II* ('the Discussion Paper').

The Discussion Paper covers a range of situations under Federal law which involve discrimination against people in same-sex relationships. As noted by the EOCV in its submission of 23 June 2006 to the Human Rights and Equal Opportunity Commission ['HREOC'] in respect of its original discussion paper, it is extremely disturbing that same-sex couples are excluded for no apparent reason from accessing financial benefits and entitlements in public sector areas such as social security, taxation and healthcare; and also in the Federal Government's regulation of private industries such as superannuation and health insurance. The Discussion Paper further demonstrates the harsh and unjustifiable impact of these discriminatory laws insofar as it reveals their broader, more arbitrary impact, on the children of same-sex couples.

The EOCV therefore urges HREOC to recommend that the Federal Government amends the laws referred to in the Discussion Paper, such that they are in keeping with steps taken in Victoria, and other states and territories, to eliminate discrimination in the law against gay, lesbian, bisexual, transgender and intersex persons – both as individuals and in their relationships.

Similarly, the EOCV urges HREOC to recommend that the Federal Government gives effect to its obligations under the *International Covenant on Civil and Political Rights* [1980] ATS 23 ('the ICCPR'), to ensure that all citizens enjoy the right to equality before the law without distinction of any kind (Article 2); to ensure against arbitrary or unlawful interference with people's privacy, family and home (Article 17) and the right of every family to protection by society and the State (Article 23) – rights which are infringed by the legislation referred to in the Discussion Paper.

The impacts of discrimination against same-sex couples on their children, as set out in the Discussion Paper, are also not consistent with Article 24 of the ICCPR, which relevantly provides that every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a

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minor, on the part of his family, society and the State. Furthermore, the discrimination referred to in the Discussion Paper suggests that Australia has also not met its obligations under the *Convention on the Rights of the Child* [1991] ATS 4 ('CROC'). Article 2, for instance, provides that:

> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

As this indicates, it is incumbent upon both State and Federal Governments to ensure that any rights accruing to the children of heterosexual couples also extend to the children of same-sex couples; and by corollary, to protect all children from any discrimination that might arise because of their parents' status. Article 3 of CROC also relevantly provides that:

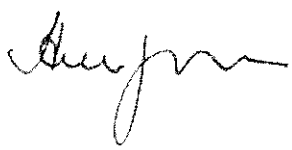
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

As this Article indicates, it is incumbent on Governments to enact legislation that protects children against discrimination. It is beyond doubt that the legislation cited in the Discussion Paper clearly has an adverse discriminatory impact on children and it is therefore vital that the Federal Government directs its attention to amending this legislation as a matter of urgency.

Rather than provide further analysis or feedback on the discriminatory legislation referred to in the Discussion Paper, I would like to provide you with the EOCV's views on two particular questions, which are suggested at page 2 of the Discussion Paper. These questions relate to 1) the suggested definition of 'de facto relationship' in Federal law (see **Attachment 1**) and 2) the suggested options for recognising a 'child' in Federal law (see **Attachment 2**).

If you have any queries regarding our submission please do not hesitate to contact Mr Benjamin Rice, Acting Manager - Legal, Policy and Systemic Initiatives, on [details removed]

Yours sincerely



Dr Helen Szoke
Chief Executive Officer / Chief Conciliator

ATTACHMENT 1

Definition of de facto relationship

The EOCV supports the proposition that uniformity could be introduced into federal law through the use of a common definition that provides that 'spouse' includes a 'de facto relationship' or 'domestic relationship'.

As noted in the EOCV's submission of 23 June 2006, in 2001 the Victorian Parliament amended some 57 Acts through the *Statute Law Amendment (Relationships) Act 2001* and the *Statute Law Further Amendment (Relationships) Act 2001* ('the Relationships Acts').

These Acts introduced the term 'domestic partner' into various Victorian statutes to recognise the rights and liabilities of partners in domestic relationships irrespective of the gender of each partner. Save from some remaining issues as set out in Part 2 of the EOCV's submission, the Relationships Acts were tremendously useful in ensuring that all Victorians, irrespective of sexual orientation or gender identity, equally enjoy rights and entitlements under all Victorian laws. By introducing a similar definition to Federal legislation, it is anticipated that much of the inequities described in the Discussion Paper could be alleviated.

It is noted that the Discussion Paper proposes a new definition of de facto relationship that is similar to the principal definition of 'domestic partner' adopted in Victorian legislative schemes dealing with property-related benefits, compensation schemes, Victorian public service superannuation schemes, and general legislation such as the *Equal Opportunity Act 1995* and the *Guardianship and Administration Act 1986* – save for a few minor differences.

Broadly speaking, the EOCV endorses the suggested definition of 'de facto relationship', but makes the following comments and suggestions:

1. It is important that the definition of 'de facto relationship' be conceptually distinct from any considerations around proving it. It is therefore suggested that the primary definition be able to stand alone, and that it represents as accurate as possible a depiction of what is meant by 'de facto relationship'.

2. The principal definition of 'de facto relationship' should be as follows:

   De facto relationship means the relationship between 2 people (irrespective of gender) who have a mutual commitment to a shared life.

   This definition incorporates one of the suggested indicia (f) for determining whether two people are in a de facto relationship. In the EOCV's view, the expression 'living together as a couple' does not necessarily indicate a genuine de facto relationship; while the expression 'on a genuine domestic basis' lacks any clear meaning in a 21st century context, whereby there is no normative way of assessing household arrangements. Instead, the use of the word 'domestic' is closely linked with house and home, which may not fairly reflect the way many de facto couples run their lives. On the other hand, the EOCV considers that a 'mutual commitment to a shared life' describes the essence of a genuine de facto relationship and covers a range of lifestyles.

3. The EOCV considers that indicium (h) in sub-section (2) ('the performance of household duties) is anachronistic and has sexist connotations that are not relevant to the question of whether a de facto relationship exists. After some consideration, the Victorian Government omitted a similar indicium in the Relationships Acts, for similar reasons.

   If this indicium were to remain, it would be improved by substituting the word 'performance' with '*sharing*' *and the word* '*duties*' *with* '*activities*', *such that the sentence reads* '*the sharing of* household activities'. These substitutions would avoid any connotations of 19th century domestic or marital servitude and also the suggestion that they might be activities provided on a commercial basis.

4. The EOCV makes the further point that proving the existence of a de facto relationship should not be overly burdensome on parties. In comparison, heterosexual couples who are able to marry under Federal law immediately accrue rights under the law in the areas mentioned in the Discussion Paper, such as taxation, superannuation, property, family law, social security, health benefits, etc. The element of 'proof' for de facto couples who are unable to marry should therefore be no more onerous than signing a marriage certificate.

5. Rather than stating that a statutory declaration is a mere factor in proving a de facto relationship, the existence of a statutory declaration signed by both couples stating that they are, or were, in a de facto relationship, should be stand-alone proof of that relationship existing, subject to the ordinary rules of evidence around perjury. In other words, registration of a relationship (through a civil union or other registration process) and the existence of such a statutory declaration should be afforded the same evidentiary status. This is particularly important, given that not all States and Territories have civil union or relationship recognition schemes such that proof can be obtained in satisfaction of the proposed sub-section (5). Giving a similar status to statutory declarations would avoid any injustice that may flow to persons living in these States and Territories.

ATTACHMENT 2

Definition of 'child' in Federal law

As noted in the Research Paper ('Areas of Federal Law that Exclude Same-Sex Couples and their Children'), children are increasingly born into same-sex families and when this occurs, Federal law provides no recognition of the relationship between the child and the non-biological parent. The research paper further states that the issue for same-sex families with children is that unlike most heterosexual families, there is always one parent who does not have a biological relationship with the child. Further difficulties arise also for sperm donors, who are not legal fathers under state law or the *Family Law Act 1975* (Cth) – and yet may play an important parenting role in the child's life.

A form of parenting recognition that can encompass a wide range of family situations, as opposed to the notion that children can have only two opposite sex parents, is necessary in order to not only support the rights of parents, but also the rights of the child, which the Australian Government has pledged to enshrine by becoming a party to the *Convention on the Rights of the Child* [1991] ATS 4 ('CROC').

In a recent position paper on Assisted Reproductive Technology & Adoption, the Victorian Law Reform Commission ('VLRC') considered whether the law that governs the legal parentage of children born to single women or women in same-sex relationships is in need of reform (see Position Paper 2: Parentage, July 2005). The VLRC was guided in its deliberations by a number of principles, which the EOCV would also refer you to in making any recommendations to the Federal Government around a new definition of 'child'. Those principles are:

- In considering the law that determines who is to be recognised as a legal parent of a child, the best interests of the child should be the paramount consideration. This is consistent with the Convention on the Rights of the Child.

- 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.

- It is important for people to appreciate the responsibilities that accompany parenthood, in particular the needs of donor-conceived children, and to plan their arrangements before the child is born.

- 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.

In considering the options suggested in the discussion paper, these principles posit the conclusion that any Federal definition of 'child' should be careful to cover all possible 'family' situations. As noted in the table on page 122 of the Research Paper, a number of the options suggested do not cover a range of family situations; for example, Option 2 would not cover some children born through ART, children born overseas, children where donor fathers are involved in parenting, or children adopted in same-sex

families where only one partner is the legal adoptive parent. In the EOCV's view, the preferable definition is therefore Option 3 – a 'functional family' definition of child. In particular, two examples of such a definition are suggested:

a) 'child' includes a child living with a person as a member of their family' or
b) 'a child to whom the person acts in the place of a parent'.

Out of these two examples, b) posits uncertainty over how to determine the parental status of donor fathers who may occupy a wide variety of roles from occasional contact to more involved contact. It would also require a court order and so limits coverage to children whose parents have the knowledge, commitment and funds to pursue such orders.

On the other hand a) may be problematic insofar as it would not cover children who do not live with the adult, and so it would exclude, for example, the non-biological parent-child relationship in separated same-sex families, if the child ceases to live with the person. Nonetheless, on balance, the EOCV considers that option a) is preferable.

In some instances where a non-biological parent ceases to live with a child, and yet does in fact have a parenting role, then a court order may be obtained, which determines that parent's rights and responsibilities (as is the case with separated heterosexual couples, when a parent ceases to live with the child). In some cases, it is possible that this order may be relied upon for the purposes of invoking any statutory rights or benefits to be conferred on the child or parent. Similarly, where there is any other uncertainty as to the application of statutory definitions of 'child' or 'parent', court orders may help clarify the status of the individual in question.