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Campaign Co-ordinator
Tasmanian Gay and Lesbian Rights Group

Senator Lyn Allison
Senator for Victoria
62 Wellington Pde
East Melbourne VIC 3002
C/o Tim Wright

re: TGLRG submissions to same-sex entitlements inquiry

Dear Senator Allison,

Thank you for this opportunity to make known the views of the Tasmanian Gay and Lesbian Rights Group on your party's Same-sex: Same-entitlements Bill 2007.

The Tasmanian Gay and Lesbian Rights Group strongly supports the Bill. To provide greater detail on why, I have enclosed our submission to the Human Rights and Equal Opportunity Commission's (HREOC) inquiry into same-sex couple entitlements.

However, the TGLRG is concerned that the Bill makes no provisions for the recognition, in federal law, of state registered relationships.

We believe that relationships recognised by state-based registries, such as the one currently operating in Tasmania, should be accorded full and equal status in federal law. We do not support state registered relationships being proof for the existence of a de facto relationship. Rather, we believe relevant federal laws should be amended to ensure that couples entering into a registered relationship automatically have all federal relationship rights as registered partners. Our reasons for this position are given in greater detail in an attached letter on the matter we recently sent to HREOC.

Should you have any concerns about the constitutionality of full federal recognition of state registered relationships, we have also enclosed a legal opinion confirming that such recognition is constitutionally sound.

Thank you again for this opportunity, and best wishes with your important initiative.

Yours Sincerely,
Rodney Croome.

Commonwealth Government Recognition of Same-Sex Relationships

This advice summarizes the issue of Commonwealth power over same-sex relationships and, in particular, the constitutional issues that arise. It is made on the basis of certain assumptions concerning the substantive nature of the type of Commonwealth legal recognition. These assumptions are addressed in the final section.

Areas of Federal Law in Need of Reform

As set out in the recent HREOC report, federal law needs reform in the following areas:

- Superannuation
- Employee rights and entitlements
- Taxation
- Social security
- Medicare
- Immigration
- Recognition of same-sex couples in the ADF
- Parenting
- Access to the Family Court and its procedures with respect to:
 - Property Division
 - Spousal support

Commonwealth Constitutional Power to Legislate Reform

To pass the necessary laws to bring about legal equality in the areas listed above, the Commonwealth would need to rely on a number of heads of power. First, there are explicit heads of power in s 51 of the Constitution that the Commonwealth would rely upon to pass reforms in the areas of taxation, social security, medicare, immigration and same-sex couples in the ADF. These explicit heads of power would allow the Commonwealth to pass whatever type of recognition scheme it wished in the relevant areas.

With respect to superannuation and employee rights and entitlements, the Corporations power would be the main, though not necessarily sole, power relied upon.

Thus, the only areas where the Commonwealth does not have explicit heads of power it could rely upon to pass reform are in the areas of parenting, property division and spousal support. Nevertheless, the Commonwealth would be able to pass legislation in these areas relying upon 2 bases: the external affairs power and the legislation already passed (or to be passed) by the States and Territories referring power over children and “de facto” couples to the Commonwealth.

In 2003, the UN Human Rights Committee decided in the case of *Young v Australia* that the federal government had an obligation under the ICCPR to provide the same rights and entitlements to same-sex couples as it did to heterosexual couples. Thus, the Commonwealth has power relying on external affairs, the ICCPR and the *Young* decision, in the same way as it had power to pass legislation overriding the Tasmanian criminal code after the UNHRC decision in *Toonen*.

Finally, the legislation passed by all states and territories in the 1980s referring power over children and the legislation passed or to be passed referring power over “de facto” couples to the Commonwealth, is broad enough to also support legislation conferring equality in parenting matters and in recognition of same-sex couples.

With respect to recognition of same-sex couples, the uniform referring legislation defines a de facto relationship as “a marriage-like relationship....involving two persons”. This definition was purposefully chosen by the states and territories so that it would refer power over same-sex as well as opposite-sex couples, despite the current federal government’s refusal to recognize the former. The referring legislation gives the Commonwealth power over financial matters, including property division and spousal support.

Assumptions concerning the Substantive nature of Commonwealth Recognition

It is assumed that the commonwealth will legislate for full equality for same-sex couples. This is straight forward with respect to same-sex “de facto” couples, where the Commonwealth will simply be able to extend the plans it already has in place for federal assumption of power over heterosexual de facto couples.

It is also assumed that the Commonwealth will legislate to provide full recognition for those couples who have registered under state-based registration schemes, in a manner different from those same-sex couples caught by presumptive de-facto legislation. This recognition must be different from the recognition given to “de facto” partners, as registered partners have “automatic” access to rights and obligations under state law, without having to “prove” their relationship or satisfy cohabitation requirements. The legislative scheme adopted by the Commonwealth needs to reflect this, so that couples registered under state schemes have automatic access to rights and obligations under federal law. Any Commonwealth recognition must go further than simply treating registered relationships as a type of “de facto” relationship where the Deed of Relationship is simply regarded as evidentiary.

It should be noted that the analysis of Commonwealth power outlined above would also support Commonwealth legislation giving automatic access to federal

rights and benefits for those couples (heterosexual or same-sex) registered under state schemes. In particular, it should be noted that the state and territory legislation referring power to the commonwealth would already cover registered relationships that are “conjugal”, as these are “marriage like relationships between two persons”.

However, a problem does potentially arise for state schemes that allow non-conjugal “caring” relationships to be registered. Neither the UNHRC *Young* decision nor the state and territory referring legislation include such relationships. Thus, the Commonwealth currently has no power to legislate for property division or partner-support, when such relationships are involved. For the Commonwealth to legislate on these issues, a separate referral of power by the States and Territories would be necessary.

Wayne Morgan
ANU College of Law
August 2007



Tasmanian Gay & Lesbian Rights Group

Rodney Croome
Campaign Co-ordinator
Tasmanian Gay and Lesbian Rights Group

Wayne Morgan
Senior Law Lecturer
Australian National University

Graeme Innes
Human Rights Commissioner
Human Rights and Equal Opportunity Commission

re: Relationship Registries

Dear Mr Innes,

The *Same-sex: same entitlements* report, recently-released by the Human Rights and Equal Opportunity Commission, is an important step towards eliminating discrimination against same-sex couples. We commend the HREOC and you personally on the report.

However, we are concerned by aspects of the report related to relationship registries, such as the registry which currently operates in Tasmania.

Our concerns fall into three areas: firstly misrepresentations of the Tasmanian registry, secondly an under-estimation of the importance of registries, and thirdly the status of state registered relationships in federal law.

1) Misrepresentations of the Tasmanian relationship registry

Section 4.5.1 (a) of the *Same-sex: same entitlements* report states

“Registration of a relationship does not confer legal rights in itself but it may assist in demonstrating the existence of a de facto relationship.”

This is not true. In Tasmania the only requirements for entering into a registered relationship are that the individuals concerned are residents, over the age of 18, and not already married or in another registered relationship. It is not a requirement that individuals who sign a Deed of Relationship be in an existing, unformalised relationship. As with a civil union or a marriage, the registration of a relationship allows the intending

partners immediate access to all relationship rights, including those partners who may previously have had none of these rights at all.

Of course, some partners in an existing, unformalised relationship may register a Deed of Relationship in order to prove that their union, in fact, exists. But by doing this they create, in law, an entirely new relationship.

A footnote to this section states that take-up of registries in Tasmania and elsewhere are low (the implication being that this is because the role of registries is simply to certify existing relationships), and that take up is much higher amongst men and in urban areas.

The figures cited from Tasmania were over a year and a half old when the Report was published. In that time the number of registered couples has almost doubled, reflecting growing familiarity with the benefits of what was, after all, Australia's first formal recognition scheme for unmarried couples. The number of registered relationships in Tasmania is now roughly proportional with the number of couples who have entered into civil unions in New Zealand.

Moreover, since its inception the number of male and female couples registering under the Tasmanian scheme has been roughly equal. We do not have figures for their geographic dispersal, but anecdotal evidence would also suggest a roughly equal spread between urban and rural areas.

2) The importance of registries generally

Section 4.5.3 of the Report says that formal recognition of same-sex relationships is "helpful but not necessary" when it comes to accessing financial entitlements.

The argument is that some couples may not formalise their relationships, and therefore presumptive recognition, in this case as "de facto partners", is the preferred option for ensuring as many couples as possible have equal legal protections.

We agree that it is important for there to be presumptive recognition. However, we believe it is equally important there be an opportunity for couples to access relationship entitlements through a formal process such as registering their relationship.

Two practical reasons for this are,

- a) couples should be able to access relationship rights without necessarily fulfilling the criteria laid down for presumptive recognition, including cohabitation for a fixed period, and
- b) there are some entitlements, including those granted by foreign governments, which are available to formally recognised couples, but not to couples in unformalised relationships

We note that the *Same-sex: same entitlements* inquiry received evidence backing the practical necessity of formal recognition. This evidence came from itinerant partners for whom fixed-period cohabitation was impossible and formal recognition preferable, and from same-sex partners who have found it easier to secure their financial entitlements from the British Government through the registration of their relationship in Tasmania.

We also note that there was support for the recognition of formalised relationships in federal law from other groups making submissions to the inquiry. These groups included ACT GLBTI advocacy group, Good Process.

Clearly, there exists both an important role and significant support for formal recognition in securing the relationship entitlements of same-sex partners.

3) The status of state registered relationships in federal law

The *Same-sex: same entitlements* report is quite specific about what kind of same-sex relationships will be recognised under federal law. It's strong preference is for presumptive or de facto partners to be recognised, and is largely indifferent to couples in any kind of formalised relationship.

Section 4.6.2 of the Report provides a model for defining the existence of a de facto relationship which includes an option referring to registered couples. However, in this option a state registered relationship is only seen as evidence of the existence of a de facto relationship in federal law. It is not recognised as a relationship in its own right. (We are also concerned that the wording of this option suggests it only be taken up if states other than Tasmania adopt relationship registries. The last time we looked Tasmania was a full and equal member of the federation).

This approach is consistent with the mis-characterisation of registered relationships in other parts of the Report (as we have explained registered relationships are wrongly seen as evidence of an existing relationship and as having little practical value in themselves).

Just as we object to the Report's misconceptions about the nature of registered relationships, so we object to the role assigned to registered relationships in federal law based on these misconceptions.

In our view, registration of a relationship at a state level should provide the registering couple with full and equal entitlements in federal law as a registered couple.

Registered couples should not be compelled to fulfill further criteria, such as those associated with de facto partnerships, in order to qualify for relationship entitlements in federal law. The absurdity of such a situation is highlighted by the fact that some foreign governments, including that of the United Kingdom, automatically credential Tasmanian registered relationships as civil partnerships, with all the same entitlements in UK law as married couples.

Nor should a couple's state Deed of Relationship simply qualify them to be considered federal de facto partners as per the option in section 4.6.2. Couples register precisely because they wish to formalise their unions and not be in an unformalised relationship. To then compel these couples to obtain federal relationship rights by reverting to an unformalised union is dismissive of the choice they have made.

Registered relationships are a legal and social fact of life in modern Australia. They are a legitimate and equal choice along with de facto partnerships for those same-sex couples living in jurisdictions which allow them. They deserve to be treated with the same level of

respect by all tiers of government.

In conclusion, we feel that the errors, omissions and conclusions cited above unfairly diminish Tasmania's relationships registry and registries generally.

This is a concern because it potentially demeans the legal and social status of partners in Tasmanian registered relationships.

It is also of concern as debate grows over state-based registries in other states and policy-makers look to HREOC for guidance.

Most of all, it is of concern as the Commonwealth moves toward greater recognition of same-sex relationships.

For these reasons we ask that, if possible, you amend the Report in response to the concerns we have raised. We also ask that in future publications dealing with registries you seek out accurate and up-to-date information from authoritative sources including the Tasmanian Department of Justice, and that in your publications registered relationships are treated equally with other forms of legally-entitled unions.

Yours Sincerely,
Rodney Croome and Wayne Morgan

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Please find below the three sections of the *Same-sex: same entitlements* report cited above.

4.5.3 Formal relationship recognition is helpful but not necessary to access financial entitlements

Almost all of the financial entitlements discussed throughout this report are available to opposite-sex couples, whether or not they are married. The goal of this Inquiry is to ensure that same-sex couples also have access to all financial entitlements, whether or not they are married.

Even if there were formal relationship recognition schemes for same-sex couples, only some same-sex couples will choose to formalise their relationships. This is no different to opposite-sex couples, only some of whom choose to formalise their relationships.

So, while marriage, civil unions or relationship registration might help some same-sex couples prove a genuine relationship, formal recognition is not, and should not be a necessary prerequisite.

Thus, the following recommendations focus on ensuring that same-sex couples can access the same financial entitlements available to opposite-sex couples – irrespective of formal recognition schemes.

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4.5.1 (a) Relationship registration for same-sex couples

Registration of a relationship does not confer legal rights in itself but it may assist in demonstrating the existence of a de facto relationship.

Tasmania introduced registration for 'significant relationships' under the *Relationships Act 2003* (Tas). Both same-sex and opposite-sex couples can register their relationship.^[i] Some city councils have also introduced relationship registration schemes.^[ii]

However, it seems that few couples have registered under these schemes.^[iii]

[i] *Relationships Act 2003* (Tas), s 11(1).

[ii] In September 2005, the City of Sydney adopted a Relationships Declaration Program. While making a relationship declaration does not confer legal rights in the way marriage does, it may be used to demonstrate the existence of a de facto relationship within the meaning of the *NSW Property (Relationships) Act 1984* (NSW) and other legislation: City of Sydney, *Relationship Declaration Program Information Pack*, 2005, p2. Melbourne City Council launched a Relationship Declaration Register on 2 April 2007: City of Melbourne, *Relationship Declaration Register*, <http://www.melbourne.vic.gov.au/info.cfm?top=208&pg=3483>, viewed 20 April 2007.

[iii] As at 1 January 2006, 57 couples had registered a 'significant relationship' in Tasmania. Of these relationships, 45 were same-sex couples (24 gay male and 21 lesbian couples) and 12 were opposite-sex couples: J Millbank, 'Lesbian and Gay Families in Australian Law – Part One: Couples', *Federal Law Review*, vol 34, no 1, 2006, p27. There is evidence of a low take up of registration regimes internationally, 'with a much lower take up by women, and a high urban concentration': K Anthony and T Drabsch, *Legal Recognition of Same-Sex Relationships*, NSW Parliamentary Library Research Service, Briefing Paper No. 9/06, June 2006, pp4-5.

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4.6.2 (b)

a) A model definition of 'de facto relationship' and 'de facto partner'

The following is the definition of 'de facto relationship' which the Inquiry recommends be introduced into federal laws conferring financial and work-related entitlements.

(1) 'De facto relationship' means the relationship between two people living together 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 their 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) their degree of mutual commitment to a shared life*
- (g) whether they mutually care for and support children*
- (h) the performance of household duties*
- (i) the reputation, and public aspects, of the relationship between them*
- (j) the existence of a statutory declaration signed by both persons stating that they regard themselves to be in a de facto relationship with the other person.*

(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 two people, irrespective of gender.

(5) Two people may still be in a de facto relationship if they are living apart from each other on a temporary basis.

If the various states and territories adopt a relationship registration scheme (like that which exists in Tasmania), subsection (6) could be added to the definition of 'de facto relationship' along the following lines:

(6) If a relationship is registered under a state or territory law allowing for the registration of relationships, registration is proof of the relationship from that date.

If the various states and territories adopt a civil union scheme, subsection (7) could be added along the following lines:

(7) If two people enter into a civil union under a state or territory law, evidence of that civil union is proof of the relationship from that date.

If relationship registration or civil unions become relevant to the definition, subsection (3) should change to read:

(3) No one factor, or any combination of factors, under (2), (6) or (7) is necessary to establish a de facto relationship.

The Inquiry further recommends the following definition of 'de facto partner':

'de facto partner' means one of two people in a de facto relationship.



Tasmanian Gay & Lesbian Rights Group

15 June 2006

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

Via email: samesex@humanrights.gov.au

Dear Sir/Madam

National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits

Submission on behalf of the Tasmanian Gay and Lesbian Rights Group

We thank you for the opportunity to submit to this vitally important inquiry. Considering comments by the Prime Minister, John Howard, in recent days suggesting his government had remedied much of the discrimination affecting same-sex couples, an inquiry into these matters is indeed timely. As will be demonstrated below, discrimination against same-sex couples can still be found in many areas of national financial laws and regulations governing the lives of all Australians. In fact, the Australian government has removed this discrimination in only one area of law relating to financial matters - private superannuation lump-sum death benefits.

To place this submission in some context, the Tasmanian Gay and Lesbian Rights Group (TGLRG) was formed in 1988, as part of the effort to reform Tasmania's repressive anti-gay legislation. The TGLRG has since played a significant role in assisting Tasmania to the forefront of legislative recognition of lesbian, gay, bisexual, transgender and intersex (LGBTI) human rights - with the state now arguably having the most progressive anti-discrimination and relationships legislation in the country, along with the nation's only inclusive social plan process, *Tasmania Together*. In addition, the TGLRG contributes to policy development and implementation within a number of government agencies through participation in several LGBTI reference groups, as well as playing an active role in national LGBTI issues. This role has been recognised by a number of awards including the Tasmanian Award for Humanitarian Activity (1994), the International Felipa da Souza Award (1995) and the National Human Rights Award for Community Groups (1997).

The TGLRG is in contact with same-sex couples and their families across Tasmania, and conducts regular consultation both with these families and the broader LGBTI community. The outcomes of these consultations form the basis of this submission.

The Inquiry seeks to ensure that Australia is in compliance with three particular United Nations conventions –

- the *International Covenant on Civil and Political Rights*;
- the *Convention on the Rights of the Child*; and
- the *Discrimination (Employment and Occupation) Convention 1958*;

It should be noted that each of these conventions takes its mandate from the *Universal Declaration of Human Rights*, in which the preamble begins with –

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,”¹

From this, it can only be concluded that any Australian law not ensuring equal access and treatment to same-sex couples is in breach of both the Universal Declaration of Human Rights and the concomitant conventions relating to this inquiry.

This principle has been extended to recognise the human rights of people discriminated against on the basis of their sexual orientation by the UN Human Rights Committee in its findings involving violations of the ICCPR. Significantly, the case in which the UNHRC found international human rights guarantees to protect human rights regardless of sexual orientation was against Tasmania’s former anti-gay laws². Equally significantly, the case in which this finding was confirmed was against discrimination in Australian federal spousal entitlements³.

The above principles and jurisprudence make it clear that any Australian law not ensuring equal access and treatment to same-sex couples is in breach of Australia’s international human rights obligations. For example, the 2004 passage of an amendment to the *Marriage Act 1961*, specifically defining marriage as between a man and a woman. This is in serious breach of Australia’s obligations since it acts to legislatively deny same-sex attracted individuals equality, on the basis of their sexuality. Similarly, the failure of successive federal governments to provide any formal or presumptive recognition of same-sex couples has ensured continuation of this breach through a raft of legislation, which discriminates against these couples. This issue is discussed in more detail below.

While not claiming to provide an exhaustive list of Australian legislation discriminating against same-sex couples, the TGLRG offers that there are a number of areas in which discrimination clearly occurs and affects the financial circumstances and employment of thousands of same-sex couples. These are Superannuation, Defence and Veterans’ Affairs, Medical and Aged Care and Taxation. Social Security also creates problems for same-sex couples. These issues are dealt with under separate headings below.

¹ Taken from the United Nations website - www.un.org/Overview/rights.html (accessed on 24/05/06)

² Toonen v Australia, HRC 488/1992

³ Young v Australia, HRC 941/2000

Superannuation

In 2005, the Australian Government amended a number of superannuation laws to provide some parity of treatment for same-sex couples and other close interdependent relationships. Primarily, the amendments recognised such close personal relationships to allow a surviving dependent person to receive a deceased person's superannuation (the so-called 'death benefit') and gain the same tax exemption heterosexual de facto or married couples receive.

The changes were achieved through the passage of the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2005*, which amended the following legislation:

- *Income Tax Assessment Act 1936; sections 27A, 27AAA and 27AAB.*
- *Retirement Savings Account Act 1997; sections 16 and 20A*
- *Superannuation Industry (Supervision) Act 1993; sections 10 and 10A*

This legislation, however, has not provided treatment for same-sex couples and other interdependent relationships equal to that granted to heterosexual couples.

Problems of definition of interdependency in current legislation: The definition of interdependent relationship inserted into the legislation by the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2005* is anomalous with both other federal legislation (like section 238 of the *Migration Act 1958*) or broader-defined state based legislation. The definition of interdependent utilised in superannuation law requires cohabitation by the same-sex couple.

This directly discriminates against same-sex couples who may be forced to live apart for bona fide reasons - work relocation, sickness and frailty, military or national service, institutionalisation or other such reasons. A number of states, including Tasmania, do not require cohabitation as a compulsory requirement of being defined as being in an interdependent or same-sex de facto relationship under state law. We recommend that HREOC consider the relationship definitions enshrined in the *Tasmanian Relationships Act 2003*, as the basis for defining interdependency in its final report.

Federal public sector employees: An anomaly now exists, as the 2005 legislation only covers the taxation treatment for death benefit payouts for people in superannuation schemes run pursuant to the *Superannuation Industry (Supervision) Act 1993*. This results in same-sex couples still paying a 30 per cent rate of taxation for benefits in federal government superannuation schemes. This problem encompasses not only Federal government employees, but employees of the ACT government and members of various Defence Forces schemes.

Superannuation co-contribution rules: Another anomaly has been created with the Government's introduction of the *Tax Laws Amendment (Superannuation Contributions Splitting) Act 2005* offering people in heterosexual relationships the ability to make superannuation co-contributions into each other's superannuation funds. This gives beneficial taxation treatments to many opposite-sex couples, which are denied to same-sex couples.

Superannuation splitting rules on relationship dissolution: Another large anomaly has been recently created by the Federal Government's *Superannuation Legislation Amendment (Family Law and Other Matters) Act 2005* allowing the Family Court to divide superannuation funds when relationships break down. This legislation ignores same-sex couples as the Federal Government has not amended various parts of the *Family Law Act 1975* (and specifically Part VIII B) to allow the Family Court to resolve property disputes among same-sex couples, despite the government being given a referral of powers from the states in 2003-2004 to allow the Federal Government to grant access to the Family Court for

same-sex couples. This includes tax rebates for a spouse making a superannuation contribution on behalf of a low-income or non-working partner, pursuant to the *Income Tax Assessment Act 1936*.

Defence and Veterans' Affairs

On 21 October 2005, the Australian Defence Forces amended a number of internal policies to provide some parity of treatment for same-sex couples and other close interdependent relationships. These policy changes recognised same-sex couples and other close personal relationships for the purposes of numerous ADF-related benefits so such relationships gained the same benefits enjoyed by heterosexual de facto or married couples.

The policy changes amend sections of the *Defence Instruction (General) Manual* and the *ADF Pay and Conditions Manual*, and amended policies like:

- *Defence Housing Authority assistance.*
- *Housing removal, relocation and travel benefits.*
- *Personal and carer's leave policies.*
- *Other benefits such as educational assistance.*

This policy change, however, has not provided equal treatment for same-sex couples and other interdependent relationships to that granted to heterosexual couples. A number of benefits granted to serving ADF personnel and veterans are administered by legislation, which remains unchanged.

Problems of definition of interdependency in ADF policy: While the ADF's moves are meritorious, it appears the definition of interdependent relationship utilised in the policy is anomalous and problematic for serving personnel separated from partners by relocation. The definition of interdependency utilised by the ADF policy requires the persons to be in a close personal relationship, where there are both financial and domestic support commitments. This directly discriminates against same-sex couples forced to live apart for bona fide reasons, like separation by the ADF due to military relocation or service itself, sickness and frailty, institutionalisation or any other reason. Several states, including Tasmania, do not require cohabitation as a compulsory requirement for recognition of an interdependent or same-sex de facto relationship under state law. Again, we recommend that HREOC consider the relationship definitions enshrined in the Tasmanian Relationships Act 2003, as the basis for defining interdependency in its final report.

Benefits for serving personnel defined in legislation are anomalous: An anomaly now exists as the ADF can only change policies it directly administers to extend fairness to interdependent and same-sex couples. Other benefits are contained in legislation and require legislative action to extend equality. These benefits include housing loans, superannuation and retirement benefits and death benefits for current and former ADF personnel, as well as rehabilitation and compensation systems. So, the ADF now recognises close personal relationships and same-sex couples under operational ADF policies, but the Federal Government does not recognise these same relationships for ADF benefits pursuant to legislation.

Superannuation schemes for ADF personnel discriminate in a similar way to other Federal government employees in which same-sex partners and other interdependent persons are not recognised for taxation relief on death benefit payouts.

Benefits for former service personnel and veterans: A similar anomaly has also arisen in relation to benefits granted to the veterans and their dependants – with same-sex couples again not yet treated

equally under legislation. This results in same-sex couples being recognised partially while in active service and not recognised after service ends.

In August 2003, the UN Human Rights Committee (in the case of *Young v Australia*, UN Document CCPR/C/78/D/941/2000) determined that Australia was in breach of article 26 of the Optional Protocol to the International Covenant on Civil and Political Rights by denying both a pension and a bereavement payment to Mr Edward Young, who had been in a 38-year-long relationship with veteran Larry Cairns who died in 1998. Indeed, this UNHRC ruling found broadly that Australian law discriminating against same-sex couples violates the right of everyone to equal treatment by the law. Rectification of veterans' benefits for non-heterosexual couples will result in Australia complying with international human rights obligations as well as removing anomalies within law. Other cases of veterans' benefits for surviving partners being denied also exist, including a similar case in 2005 of Mr Jiro Takamisawa, who lived in a 20 year relationship with veteran John George.

Medical and Aged Care

In 2003-2004, the Howard Government made changes to the way the Medicare and PBS safety nets work, granting greater concessions for couples and families. There are two Medicare safety nets – one for out-of-pocket medical expenses and one for the gap between the cost of a medical service and the Medicare Schedule fee. The PBS safety net exists to help individuals and families, by heavily discounting PBS prescription medicines once a threshold has been reached. As part of this legislation, both the Medicare and PBS safety nets contain definitions of couples and family groups for registration under each safety net scheme, contained in the following legislation:

- *Health Insurance Act 1973; sections 10AA-10AE*
- *National Health Act 1953; sections 84 and 84B*

The definitions contained in these sections of the legislation, however, do not recognise same-sex couples for the safety net systems. This creates an anomaly where a couple, with or without children, cannot register as complete family unit and renders one of the same-sex couple as an individual.

Current legislation unfairly applies two safety nets to same-sex couples: Because both the *Health Insurance Act 1973* and the *National Health Act 1953* contain family definitions for the safety net schemes that exclude same-sex couples, it creates a discriminatory regime for non-heterosexual couples and their families. The legislative anomaly creates two separate problems. Firstly, it means a same-sex couple has two separate safety net thresholds in each safety net system, since neither system allows them to jointly register as a family unit. Secondly, Medicare and PBS expenses of the same-sex couple are split between the two separated thresholds in each system and make it harder to reach each of the two separate thresholds. This imposes extra financial burdens on same-sex couples that heterosexual couples do not face - due to their unitary thresholds with all family members' expenses contributing to reach that one threshold in each safety net system.

Aged and nursing home care subsidies: A number of other anomalies exist in law in relation to aged care access and provision. Primarily, the *Aged Care Act 1997* does not recognise same-sex couples as couples or partners under the legislation. This results in a person in a same-sex relationship having 100 per cent of their individual assets being utilised for assessment criteria rather than 50% of the joint assets of the relationship. This is especially problematic when a same-sex couple owns assets jointly, and invariably results in a person in a same-sex relationship qualifying for less financial assistance under the residential care subsidy scheme.

Recognising same-sex couples under the *Aged Care Act 1997* would provide a consistent assets assessment regime for both same-sex and heterosexual couples under the Act and remove financial hardship experienced by elderly same-sex couples.

Residential aged care codes of practice: The Councils on the Ageing and National Seniors Associations, in their *National Policy Document 2004*, recommended the Federal Government incorporate into their code of practice for residential aged care that facilities be provided for couples, including same sex couples, requiring different levels of nursing care to enable them to remain together and care for each other in the same establishment should they so choose.

Providing residential aged care supportive of same-sex couples remaining together allows such couples the same dignity and respect as heterosexual couples in comparable situations, with a failure to amend Federal Government codes of practice ensuring continuation of negative outcomes for elderly same-sex couples in comparison to their heterosexual counterparts.

Taxation

Australia's taxation laws have various offsets and deductions to assist taxpayers in their individual and family situations. Families receive numerous tax offsets and benefits to help ease the financial burden of raising a family or having a dependent. A dependent of an individual includes their spouse, which is defined as a heterosexual partner only. Other dependents include children under 16 (or under 25 if a full-time student), the parents of the individual or their spouse, an invalid sibling or child.

Because same-sex couples are not recognised as each other's spouse, an individual cannot treat the children or parents of their same-sex partner as their dependents. Therefore, they are denied various taxation benefits and concessions heterosexuals can utilise to help defray the costs of dependent partners, children, parents and family members.

For the same reason, an individual cannot treat the children or parents of their same-sex partner as their dependents. This means they are denied various taxation benefits and concessions heterosexuals take for granted. For example, an individual in a same-sex relationship cannot claim the newly proposed 30% Child Care tax rebate if they pay the child care costs relating to their partner's children or the Spouse's Parent tax offset for their same-sex partner's dependent parents dependent on them – currently up to \$1,414 per parent per year. Neither can the individual claim their same-sex partner under the Dependent Spouse tax offset – worth up to \$1,572 per year. If an individual cares for an invalid child of their same-sex partner, they aren't able to claim the Invalid Relative tax offset – worth up to \$708 per dependent invalid child. And if the child of their same-sex partner keeps house, the individual is not eligible to claim for the Child-Housekeeper tax offset – worth up to \$1,885 per year.

Social Security

Since Centrelink legislation defines a couple as heterosexual, same-sex relationships are not recognised in determining eligibility for any benefits from that agency. This results in some financial advantages for same-sex couples, but also some very significant and discriminatory disadvantages.

Under some benefits, individuals in same-sex relationships don't have their partner's income or assets tested. As a partner's situation may reduce or eliminate the benefit, this may result in increased benefits compared with a similar heterosexual couple. However, heterosexual couples are advantaged by higher combined asset test limits. This can assist heterosexual couples with an unequal distribution of assets to still qualify for payments. Since same-sex relationships are not treated this way, it may disadvantage or disqualify a same-sex partner with large assets from a benefit.

The greatest discrimination for same-sex couples comes with the death of a partner. For many Centrelink payments, a surviving heterosexual partner can be paid a lump sum or continuing bereavement payment of up to 14 weeks of benefit payments.

In addition to the above, because their relationships are not recognised, the surviving member of a same-sex couple does not qualify for a widow's pension or payments. The pain suffered from the loss of a same-sex partner is the same as that of a lost heterosexual partner – and bereavement benefits should be equal to those available to heterosexuals.

Marriage

The Howard government passed an amendment to the Marriage Act 1961 in 2004, defining marriage as a union specifically and exclusively between a man and a woman. In doing so, it cemented discrimination against same-sex couples into both legislation and Australian society. This amendment was aimed at circumventing planned legal challenges by several same-sex couples legally married in overseas jurisdictions. The amendment is clearly discriminatory because it excludes same-sex couples from equal treatment and access to a valued societal institution. It also contravenes the inalienable rights guaranteed all citizens by the Universal Declaration of Human Rights.

As noted in relation to several issues above, the failure to recognise same-sex relationships results in financial problems for these couples in many areas - difficulties not faced by heterosexual couples. Marriage provides heterosexual couples with an opportunity to prove their relationship's existence in order to qualify for benefits and entitlements - including such employment-related entitlements as carer's leave and bereavement leave when these relate to a partner. For same-sex couples, however, even this option is not available.

Marriage both validates a relationship in the eyes of the wider community and provides formal recognition of that relationship. This certification of the relationship's existence provides immediate access by married couples to all benefits and entitlements discussed above. The government's amendment of the Marriage Act 1961 not only denies partners in same-sex relationships immediate and unchallengeable access to all such benefits, but also actively discriminates against them by deliberately denying their human rights and their full and equal status as citizens.

Anomalies relating to State-based recognition of same-sex relationships

Today, all states excepting South Australia grant some degree of recognition to same-sex couples, ranging from provision of an equal status to de-facto heterosexual relationships (as in NSW) to provision of rights equal to those of a married couple (Tasmania's *Relationship Act 2003*). However, this recognition at State level is of no value in relation to national law. Because the Australian government remains out of step with almost all its member states, same-sex couples find themselves being accepted at a State level and their relationships denied existence federally. Thus, while treated as a couple for State taxation purposes and other business regulated by State legislation, they remain non-existent for the purpose of almost every benefit and entitlement controlled by Commonwealth law.

One glaring example of this particular problem relates to Tasmania's *Relationship Act 2003*, which provides for the adoption of an individual's child, a child related to that person or cared for by that individual, by the individual's same-sex partner. While this provides the partner with legal recognition as the child's parent for the purpose of Tasmanian laws, it does not do so for any of the various areas and legislation controlled by the Australian government. Hence, for the purpose of taxation, Medicare, Centrelink, ADF benefits and Family Law, the same-sex partner is not recognised as a parent. This can

only be financially and socially damaging for the parents and any child treated in this manner by Federal law.

The above must be considered not only in the light of the *Universal Declaration of Human Rights*, but also within the discussion of a child's inalienable rights, as set down in the *Convention on the Rights of the Child*. The preamble of this convention states -

*Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,*⁴

The failure of the Australian government to recognise the legal status of these same-sex adoptive parents places the government in breach of its obligations under this convention – as there are obvious legal and financial obstacles created for the parent in providing optimal care and developmental opportunity for the child.

Tasmanian Law

While there is no outstanding discriminatory Tasmanian legislation relevant to the terms of reference of the Inquiry, we feel it appropriate to discuss two issues affecting same-sex couples and yet to be rectified by Tasmania's Parliament – presumptive parenting and adoption of a relinquished child. An amendment to the 2003 *Relationships Bill*, legislative recognition of presumptive parenting was passed through the Tasmanian House of Assembly, but rejected by the Upper House.

Presumptive parenting arises in situations where a woman in a same-sex relationship gives birth to a child conceived through fertility procedures using sperm from an unknown donor. The woman's same-sex partner is then "presumed" to be the other parent and legally recognised as such. This is the existing legal situation for the male partner of a heterosexual relationship where his partner conceives and gives birth through "unknown donor" fertility procedures. Parliament's failure to recognise a same-sex partner as a legal parent in these circumstances denies the child the right to two parents and the legal protection this recognition provides in the event of the birth parent's death or incapacity.

Adoption of a relinquished child relates to a child placed for general adoption by a relinquishing birth mother and not known to the adoptive parents. Under Tasmanian adoption legislation, prospective heterosexual adoptive parents do not need to be married and both partners are registered as the child's parents. However, a same-sex couple is not afforded the same right to adopt as a couple. This is very clearly discriminatory and potentially denies a child those fundamental rights guaranteed under the *Convention on the Rights of the Child* as discussed earlier. Extension of this legislation to include same-sex couples was a key recommendation of the Tasmanian Law Reform Institute in 2003, when it urged that prospective adoptive parents should be assessed, on a case-by-case basis, on their suitability as prospective parents - and not on their sexual orientation.⁵

⁴ *Convention on the Rights of the Child*, cited from the United Nations website - www.unhcr.ch/html/menu3/b/k2crc.htm (accessed on 25/05/06)

⁵ *Adoption by Same Sex Couples*, final report no. 2, by the Tasmanian Law Reform Institute for the Attorney-General (May 2003)

Legislation requiring attention

The following list provides details of legislation requiring some amendment to eliminate its existing discrimination against same-sex couples. The list is not exhaustive, but may be of assistance to the Inquiry.

AGED CARE

- *Aged Care Act 1997*

BANKRUPTCY

- *Bankruptcy Act 1966*

CHILD SUPPORT

- *Child Support (Assessment) Act 1989*

CRIMINAL

- *Crimes Act 1914*

DEFENCE/VETERANS' AFFAIRS

- *Defence Force Retirement and Death Benefits Act 1973*
- *Defence Act 1903*
- *Military Rehabilitation and Compensation Act 2004*
- *Defence Force (Home Loans Assistance) Act 1990*
- *Defence Force Retirement Benefit Act 1948*
- *Defence Housing Authority Act 1987*
- *Defence Service Homes Act 1918*
- *War Gratuity Act 1945*
- *Military Superannuation and Benefits Act 1991*
- *Veterans' Entitlements Act 1986*

FAMILY LAW

- *Family Law Act 1975*

HUMAN RIGHTS & EQUAL OPPORTUNITY

- *Human Rights and Equal Opportunity Commission Act 1986*

INDIGENOUS

- *Aboriginal and Torres Strait Islander Act 2005*

INSURANCE

- *Health Insurance Act 1973*
- *Life Insurance Act 1995*

- *Private Health Insurance Incentives Act 1998*

MEDICARE/NATIONAL HEALTH

- *Medicare Surcharge Act 1986*
- *National Health Act 1953*

MIGRATION

- *Migration Act 1958*

OTHER

- *Commonwealth Electoral Act 1918*
- *Disability Discrimination Act 1992*
- *Evidence Act 1995*
- *Judicial and Statutory Officers (Remuneration and Allowances) Act 1984*
- *Judges' Pension Act 1968*
- *Marriage Act 1961*
- *Parliamentary Entitlements Act 1990*
- *Privacy Act 1988*
- *Retirement Savings Accounts Act 1997*
- *Safety, Rehabilitation and Compensation Act 1988*
- *Governor-General Act 1974*
- *Witness Protection Act 1994*
- *Youth Allowance Consolidation Act 2000*

SEX DISCRIMINATION

- *Sex Discrimination Act 1984*

SUPERANNUATION

- *Parliamentary Contributory Superannuation Act 1976*
- *Superannuation Act 1976*
- *Superannuation Act 1990*
- *Superannuation Act 2005*
- *Superannuation Contributions Tax (Assessment and Collection) Act 1997*
- *Superannuation (Government Co-Contribution for Low Income Earners) Act 2003*
- *Superannuation Act 1922*

TAXATION

- *A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Act 1999*
- *A New Tax System (Goods & Services Tax) Act 1999*
- *A New Tax System (Family Assistance) Act 1999*
- *Income Tax Assessment Act 1936*
- *Income Tax Assessment Act 1997*
- *Medicare Levy Act 1986*
- *Tax Law Improvement Act 1997*

WELFARE

- *Social Security Act 1991*
- *Social Security (Administration) Act 1999*
- *Student Assistance Act 1973* (definition “partner”)

WORKPLACE RELATIONS

- *Workplace Relations Act 1996*

It is sincerely hoped that all of the above is of value to the Inquiry. Should any further discussion be required in relation to this submission, please contact the Tasmanian Gay and Lesbian Rights Group at tglrg@trump.net.au, by phone on 03-62243556 or mail to GPO Box 1733, Hobart, Tasmania, 7001.

Yours sincerely,

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