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

Dear Sir/Madam

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

Thank you for the opportunity to make a submission to the Commission's inquiry into the discriminatory impact of Australian laws upon persons in same-sex relationships.

We note from the background briefing on the Inquiry, that a report will be produced which will make recommendations to the Commonwealth Attorney-General about ways in which discrimination against same-sex couples may be eliminated. Our submission is directed exclusively to this aspect of the Inquiry. In particular, it considers the constitutional factors which support or prevent certain options being pursued. It proceeds on the basis that the Inquiry will find numerous examples of differential treatment accorded to same-sex couples under Australian law.

Yours sincerely

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ERADICTAING DISCRIMINATION AGAINST SAME-SEX COUPLES

1. Would statutory amendment suffice?

Some may see it as preferable that instances of discrimination against same-sex couples are eliminated by means of statutory amendment on a case by case basis. This would most obviously involve the removal of gender-specific language, particularly in definitions of de facto relationships (see, for example, section 4 of the *Property (Relationships) Act 1984* (NSW). However, even this step (a significant undertaking given that the Inquiry is considering federal, state and territory laws) would not amount to true equality in the recognition of same-sex relationships. That would only be achieved by the extension to de facto relationships, as so enlarged, of all existing spousal rights and entitlements.

Although the position of de facto heterosexual couples presently approximates that of married couples, the two are not regarded as equivalent under the law. There may be a number of policy reasons underlying this, but paramount is the comparative difficulty in establishing that a de facto relationship exists. However, while heterosexual couples are able, should they be so minded, to avoid these disabilities and affirm the nature of their relationship for legal purposes through marriage, this is not an option open to same-sex couples. As a result, even wide-ranging statutory change which brings same-sex relationships within the meaning of de facto relationships fails to guarantee true and complete equality.

This is not, necessarily, to argue simply for same-sex marriage. But it is to acknowledge, at the outset, that ensuring equal recognition of same-sex relationships requires firstly enabling them to be recognised as de facto relationships *and then* either:

(i) removing all distinctions between spousal and de facto relationships; or
(ii) enabling some system of registration for same-sex couples which equates their union with a marriage.

The former path is clearly ruled out on grounds of policy and pragmatism. Apart from leaving us with the practical difficulties of verifying the status of particular relationships, it would amount essentially to the destruction of marriage as a legal institution. Conversely, those persons – including same-sex couples – who opt for a de facto relationship might legitimately object that such an approach effectively negates their freedom to *not* marry.

The second path is far more conservative and cautious. It preserves the crucial distinction between marriage and de facto relationships and the freedom to embrace either. At the same time, it enables same-sex couples *to make a similar choice* about having their relationship recognised under the law and to enjoy the consequences which flow from that. In doing so it addresses the core of discrimination against same-sex couples which is their present inability to formally declare their union for all legal purposes.

Thus, this submission proceeds on the basis that nothing less than the ability to enter into a legal union which equates to marriage will be effective in the removal of discrimination against same-sex couples.

2. Is recognition of same-sex unions an issue for the Commonwealth or the States and Territories?

Before turning to consider the particular constitutional constraints upon power relevant to this area, it is as well to make a preliminary determination as to which level of government is the most appropriate for handling the issue.

It is our sense that much of the discriminatory operation of laws against same-sex couples occurs at the State and Territory level; therefore, the establishment of civil unions in those jurisdictions would go a long way to improving upon this situation. However, without more, that would not remedy those instances of disadvantage which exist under federal law.

The converse approach, whereby a scheme of civil unions is established by the Commonwealth, has the attraction of applying not only to that level of government's own laws but also might extend to many of the laws of the States and Territories by virtue of the paramountcy of federal law under section 109 of the Commonwealth Constitution. It is also highly desirable that civil unions, like marriage, be recognised nationally and governed by a single legislative scheme.

3. Does the Commonwealth have power to legislate <u>for</u> same-sex civil unions?

3.1 The marriage power in section 51(xxi)

Under section 51(xxi) of the Commonwealth *Constitution* the Commonwealth Parliament has power to makes laws with respect to 'marriage'. That power is not defined by the Constitution. While s 5(1) of the *Marriage Act 1961* (Cth) defines marriage as 'the union of a man and a woman to the exclusion of all others voluntarily entered into for life', this does not necessarily reflect the full extent of the power.

It is reasonably settled that the Commonwealth cannot define the constitutional meaning of marriage through legislation. In *Re F; Ex parte F* (1986) 161 CLR 376 at 389, Mason and Deane JJ held that:

> Obviously, the Parliament cannot extend the ambit of its own legislative powers by purporting to give to "Marriage" an even wider meaning than that which the word bears in its constitutional context. Nor can the Parliament manufacture legislative power by the device of deeming something that is not a marriage to be one or by constructing a superficial connection between the operation of a law and a marriage which examination discloses to be but contrived and illusory.

Even more clearly, in the case of *Singh v Commonwealth* (2004) 209 ALR 355 at 371 Justice McHugh said of 'marriage' that it is for the High Court and other courts exercising the judicial power of the Commonwealth to define the term.

What then is the constitutional meaning of 'marriage'? In *Singh* at 369, fn 46, Justice McHugh added:

> In 1900, for example, "marriage" in s 51(xxi) of the Constitution meant a voluntary union for life between a man and a woman to the exclusion of others. By reason of changing circumstances, it may now extend to a voluntary and permanent union between two people.

This echoes his Honour's earlier comments in *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 at 553:

> [I]n 1901, 'marriage' was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably 'marriage' now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of all others.

This raises squarely the likely division over interpreting section 51(xxi) to empower the Commonwealth to provide for same-sex unions. On one view, the permissible meanings of the provision of the Commonwealth Constitution are limited by the framer's intentions. If one takes the essential meaning of 'marriage', as they used that term, to apply only to different-sex unions, then the scope of the power cannot now be enlarged. Alternatively, as Justice McHugh's comments indicate, it might be argued that gender is not actually central to the idea of 'marriage' which is instead focussed upon the commitment of two people to a voluntary and permanent union. The latter is an example of evolving interpretation in which the Constitution retains its essential meaning while accommodating later understandings as to what may fall within those concepts. The fact that a same-sex union was most certainly not within the intended meaning of 'marriage' when used by the Constitution's drafters in 1900 need not preclude such an interpretation today.

On balance, it cannot be said with any great certainty that the Commonwealth possesses legislative power to permit same-sex unions under section 51(xxi). Indeed, the safest conclusion is that the meaning which is currently reflected in the *Marriage Act* represents the true extent of the Commonwealth's power. That is, the Commonwealth lacks the power to include same-sex unions within the meaning of 'marriage'.

3.2 The external affairs power in section 51(xxix)

It might be suggested that the Commonwealth is able to provide for same-sex unions by means of another constitutional power. The only immediately likely option in this regard is the power to make laws with respect to external affairs in section 51(xxix). Under this grant of power, the Commonwealth can enact domestic legislation which gives effect to its international obligations.

Two major obstacles arise in this context. First, the relevant international instrument, the *International Covenant on Civil and Political Rights*, is far from explicit in affording protection from discrimination on the basis of sexual preference. Second, even if the ICCPR was interpreted broadly enough to protect persons on that ground, the Commonwealth's ability to provide for same-sex unions as a result would be vulnerable to challenge as a disproportionate response to such an obligation. The domestic law has to have a clear and proportionate relationship to the international obligation in order to be valid. Article 26 of the ICCPR cannot be said to provide a secure footing for federal regulation of same-sex unions.

3.3 The Territories power in section 122

It should be noted that the Commonwealth could use its plenary power with respect to territories to enable same-sex unions. The Commonwealth has an unlimited power to make law

in these jurisdictions and is not constrained by the specific grants of power conferred to it by section 51 when doing so.

By arranging for the solemnisation and registration of same-sex unions in the territories, the Commonwealth could then at least remove the discrimination which existed against those couples under federal law. This mechanism also has the potential to operate more comprehensively with State co-operation. States could simply legislate so as to recognise same-sex unions conducted under Commonwealth law in the territories. In this way, a single national system can be achieved.

3.4 State referral of power

Lastly, on the assumption that the Commonwealth does *not* possess a power with respect to same-sex unions, then the States, who must by correlation hold such a power, can always elect to refer it to the Commonwealth so as to overcome its deficiency. The Commonwealth can then utilise that referral to make laws under section 51(xxxviii).

Indeed, if the Commonwealth and all States were in favour of allowing same-sex unions this would be the simplest and most certainly constitutional method of achieving this.

4. Does the Commonwealth have power to legislate <u>against</u> same-sex civil unions enabled by State legislation?

This question needs to be addressed because the current Commonwealth government has indicated that it does not favour same-sex unions being included within, or too closely equated with, marriage. The *Marriage Legislation Amendment Act 2004* (Cth) was enacted to clarify that 'marriage' is an exclusively heterosexual union. This was done with a view to forestalling any novel interpretations by the courts. This amendment might also be said to prevent any State attempts to legalise 'gay marriage' by rendering that inconsistent with the Commonwealth's understanding of the concept. In the event of an inconsistency, s 109 of the Constitution provides that the Commonwealth law prevails.

However, the ability of the Commonwealth Parliament to close off same-sex unions is far from certain. In Part 3 of this submission a number of ways in which the Commonwealth might be empowered to provide a system of same-sex unions was considered. It should be noted that those ways canvassed in 3.2, 3.3 and 3.4 would only be means by which the Commonwealth could legislate *for* same-sex unions – those options would not assist in pursuit of a Commonwealth policy to prevent same-sex unions in Australia. Only the first potential area of law-making power – section 51(xxi) itself – might conceivably be used to restrict the States from legislating for same-sex unions.

As was discussed, however, there are strong grounds for the view that the Commonwealth power over 'marriage' does not extend to include same-sex unions. If the reach of the power is confined to heterosexual unions, then not only can the Commonwealth not legislate to recognise same-sex unions but it also *cannot legislate to deny States the power* to do so. Quite simply, if same-sex unions are not within the marriage power, then no inconsistency between Commonwealth and State powers arises if the latter establish a scheme of same-sex civil unions. Those will not be a 'marriage' in Australian law but they can be afforded similar recognition as a means of overcoming legal discrimination, at least under State law.

An example of what this might look like at State level is provided by the Australian Capital Territory's recent *Civil Unions Act 2006*. Section 5(2) of that law provides that '[a] civil union is different to a marriage but is to be treated for all purposes under territory law in the same way as a marriage'. Additionally, section 24(1) clearly operates to pick up recognition of same-sex unions under the law of a foreign country but which are not recognised as a marriage under the *Marriage Act 1961* (Cth).

At the drafting stage, the Commonwealth indicated that it would use its unlimited legislative power with respect to the territories to invalidate the Act if it amounted to an attempt to enlarge the existing definition of 'marriage' in its own legislation. Changes were made as a result and the Act has survived that threat. But while Territory legislation always remains vulnerable to use of the Commonwealth's plenary power in s 122, we would submit that State legislation passed in similar terms would not be inconsistent with the *Marriage Act 1961* (Cth). This is not simply because the latter presently limits 'marriage' to heterosexual unions but rather because our view is that that is the full extent of the Commonwealth's power.

5. A State-based scheme for same-sex civil unions?

In light of the above, for the reason of Commonwealth legislative incapacity, if nothing else, a move towards formal legal recognition of same-sex unions should occur at the State level. Not only do States possess the residue of legislative power to enable such a scheme, but it is also the option most likely to be immune from potential inconsistency with Commonwealth power.

If the states and the Northern Territory were to follow the lead of the ACT in this regard, it would be optimal if they could mirror the latter's legislation as much as possible in order to achieve uniformity. This objective is clearly contemplated by sub-sections 24 (2) and (3) of the *Civil Unions Act* which provide for recognition of civil unions made under corresponding laws.

In the event that the Commonwealth is content to have the other governments provide the mechanism for same-sex unions (if only perhaps as a means of maintaining the distinction between them and its own control over 'marriage'), it could still usefully eradicate same-sex discrimination under federal law by acknowledging the existence of same-sex unions under State law and extending spousal benefits and entitlements to parties to those unions. This is not, as it might first appear, a triumph of form over substance but simply an acknowledgment of the limits of Commonwealth power and inclination to legislate for same-sex unions while still achieving the fair and practical result of removing discrimination.

6. Conclusion

This submission has sought to identify legal options for eliminating discrimination against people in same-sex relationships.

We have submitted that:

- Equality in entitlements and treatment for people in same-sex relationships can only be achieved through legal recognition of same-sex marriage or a civil union equivalent to marriage.

- For consistency and universality, legislation recognising same-sex unions would ideally be promulgated at the Commonwealth level.

- However, the Commonwealth probably does not have the constitutional power to legislate for same-sex unions in the States, but can do so for the Territories.

- Even if the current Commonwealth *Marriage Act* retains its definition of marriage as between a man and a woman, the States could legislate to allow same-sex unions without that legislation being inconsistent with the Commonwealth Act.

- If the States allowed same-sex unions, the Commonwealth could grant people in those unions the same benefits and entitlements as are currently granted to married couples by federal law.