

“How can we deny to others that which we freely enjoy for ourselves”

Thank you to the Rudd Labor Government for addressing the issue of same-sex equality so comprehensively, even extending beyond the research of HREOC and finding additional (non-financial) areas of inequality. I thank you wholeheartedly for addressing this issue so early within a new term of government.

Thank you to the Attorney-General and his dedicated team for their long hours and thorough work in improving the everyday lives of Australians, ensuring we all get a fair go.

You are all heroes in my book.

Defacto or interdependency for same-sex couples?

Key points:

- I support the defacto model for same-sex couples
- Independency is not appropriate for same-sex couples
- Interdependency for other types of relationships can be addressed separately (for example, two cohabitating siblings)
- I support not compelling partners in a defacto couple (including same-sex couples) to have to testify against one another.

1. The aim and purpose of these bills

I believe the two issues under consideration here are:

1. Should same-sex couples have **access to equal rights**?
2. Should these couples have **equal access** to those rights?

As to the first point, there is consensus from both sides of politics and from the “vast majority” of the Australian community that same-sex couples are entitled to equal rights, at least within the areas of superannuation and other financial matters, as seen in the quotes below:

This submission is addressed to all three inquiries,
however one section in the third part addresses superannuation specifically.

[On a PC, hold down the Alt key and press V and then D, to view the useful click-able document map.]

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“The government believes that people are entitled to respect, dignity and the opportunity to participate in society and receive the protection of the law regardless of their sexuality. The government is committed to removing discrimination against same-sex couples and their children.

This bill will implement the first part of this commitment by removing same-sex discrimination from Commonwealth superannuation laws.”

The Hon Robert McClelland MP
Hansard, p. 4524, 4 June 2008

“It is my belief that **many fair minded Australians** do not accept that the sexual nature of a relationship should have any bearing on the rights to property or the status of beneficiaries under superannuation policies of either of the parties to that relationship.”

The Hon Danna Vale MP
Hansard, p. 4495, 4 June 2008

“Consistent with other speakers and I believe the **vast majority of our community**, I support the intentions of the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008...

The intention to deal with areas of discrimination in tax treatment and payment of superannuation benefits for members of same-sex couples and the children of these individuals is a good intention.”

The Hon Alex Hawke MP
Hansard, p. 4512, 4 June 2008

“We believe in the equal right of every Australian citizen to be treated with dignity and respect. No Australian should pay a dollar more in tax or receive a dollar less in support by virtue of his or her sexuality.”

The Hon Dr Brendan Nelson MP
Hansard, p. 4478, 4 June 2008

“We commend the government for addressing some of the inconsistencies in current legislation as well as some of the legal and administrative impediments that are imposed on same-sex couples, which in effect deny them access to various financial and work related benefits that others in the community enjoy.”

Anglican Diocese of Sydney, quoted by the Hon Louise Markus MP
Hansard, p. 4520, 4 June 2008

As there is no disagreement that they should have these rights, let us move onto the second point.

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2. **There is only disagreement on the model for these rights**

The main issue seems to be the **model or vehicle** by which same-sex couples should be afforded those rights.

The bills confer defacto status onto same-sex couples. However, some members of the opposition would prefer same-sex couples be covered under interdependency, which also covers siblings and carers.

The vehicle chosen will have a significant impact on how same-sex couples will be able to access their new rights. **Equality is not only about the rights themselves, but about how those rights are delivered and how easily they can be accessed.** If access is more difficult then it is likely that inequalities will continue.

As only the issue of the vehicle remains contentious, I will focus on whether interdependency or defacto is more appropriate for delivering equal rights to same-sex couples.

Which relationship model more closely fulfils the purpose of these bills, which is to confer equality onto same-sex couples and their families?

3. **Similar situations**

“Central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations”

Is the love between those in a same-sex relationship, equal in love and depth to those in an opposite-sex defacto relationship?

If so, shouldn't they be afforded the same defacto rights?

“Why should Michael and Simon and my brother Nick be treated differently to me and my wife?

Michael and Simon are fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means and warmed and cooled by the same winter and summer as any Christian or any other member of our community.

If you prick them, do they not bleed? If you tickle them, do they not laugh?”

The Hon Graham Perrett MP
Hansard, p. 4500, 4 June 2008

Ultimately, the crux of the matter is whether you believe a same-sex relationship has more in common with an opposite-sex defacto relationship, or a relationship between two siblings.

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“I contend that the overall issue is not about same-sex relationships but about interdependent relationships, of which same-sex relationships are but a subset.”

The Hon Stuart Robert MP
Hansard, p. 4491, 4 June 2008

Most types of interdependency relationships are platonic – for example: siblings, carers, people with disabilities, friends. Are same-sex relationships really only a subset of a wider (mostly platonic) interdependency category – or are they a couple relationship?

“I spoke about the importance of treating every human being with dignity and respect.

That is the principle which in the end underlies all varieties of antidiscrimination laws, including this bill.”

The Hon Dr Brendan Nelson MP
Hansard, p. 4480, 4 June 2008

“Words are important tools.”

The Hon Danna Vale MP
Hansard, p. 4495, 4 June 2008

Would interdependency confer same-sex couples with dignity and respect? Would you feel it respectful for your relationship to be considered equivalent to that of two siblings?

Do you regard a same-sex *de facto* relationship to be equivalent to an opposite-sex *de facto* relationship?

“The new definition of ‘interdependency relationship’ in the SIS Act [ie Superannuation Industry (Supervision) Act] and ITAA 1936 adopts almost word for word the **second limb** of the definition in section 5(1)(b) of the *Property (Relationships) Act 1984 (NSW)*, with the addition of a requirement of financial support.

This is problematic, as it squeezes same-sex couples into a definition which was specifically drafted to deal with *non-couple* relationships, and which contains a long list of criteria, all of which must be satisfied.”

Assoc Prof Miranda Stewart
University of Melbourne Law School
HREOC Submission, No. 266, p. 13, 16 June 2006¹

¹ http://www.hreoc.gov.au/human_rights/samesex/inquiry/submissions.html

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Why have we been using criteria drafted to deal with non-couple relationships, in order to assess whether a same-sex couple relationship exists?

Why did the Howard government implement interdependency criteria for use with same-sex couples, if these include non-couple criteria? It is because they did not regard same-sex couples as legitimate relationships, and wished to put them into an ‘other’ category which would include all other types of relationships – a ‘catchall’ for everything else. To me, this is clear discrimination, and a failure to acknowledge the reality of these relationships.

Furthermore, isn’t it ironic that same-sex couples are currently required to meet more superannuation interdependency criteria than opposite-sex defacto couples in order to prove that they are a couple, yet the opposition considers their relationships inferior to defacto couples, even though they have had to meet a higher standard than opposite-sex defacto couples.²

“The opposition would like to see the definitions in this bill refined to clearly encompass bona fide interdependent domestic relationships...

... ensuring clear definitions in the bill that included bona fide interdependent domestic relationships would benefit many households that encompass many of the hallmarks of same-sex couple relationships.”

The Hon Chris Pyne MP
Hansard, p. 4486, 4 June 2008

If the opposition can see such similarities or “hallmarks” between same-sex couples and sibling/carer relationships, then why aren’t they proposing that siblings be given defacto rights?

It is because they too recognise that there are fundamental differences between these types of relationships. They recognise the difference between situations where unrelated people come together primarily because of a sexual attraction to one another, and where people have come together because they are related by birth (siblings), or because one of them had a disability or was an elderly family member (carer).

4. These issues can be considered separately

“Careful consideration should be given to these complex issues to do with recognising interdependent relationships, particularly caring relationships, in Commonwealth legislation.

² Associate Professor Miranda Stewart, University of Melbourne Law School, “The definition of ‘interdependency relationship’ contains four, or perhaps five, separate criteria that must be satisfied. Most importantly, the criterion requiring ‘domestic support and personal care’ is over and above the usual requirements for a *de facto* spouse relationship.”, p. 13, Submission 266, HREOC. (Assoc Prof Stewart was Senior Lecturer at the time of this writing this submission.) http://www.hreoc.gov.au/human_rights/samesex/inquiry/submissions.html

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Indeed, how to best recognise caring relationships is being considered by an inquiry by the House of Representatives Standing Committee on Family, Community, Housing and Youth.

However, this is a separate issue to removing discrimination against same-sex couples and should not hold up the implementation of these important reforms.”

The Hon Robert McClelland MP
Hansard, p. 4523, 4 June 2008

I agree with the Attorney-General that the issue of interdependency for carers and siblings is complex, and that these issues can be considered separately.

There are still many outstanding interdependency issues that need to be settled, while on the other hand all of the research and consultation into the rights of same-sex couples has been completed.

These two issues can be dealt with separately. There is no need to delay one for the other.

5. Interdependency is complex and will take time to work through

As interdependency is so complex, it may take a great deal of time to work through, thus holding up the present bills for a long time.

One of the reasons why interdependency is so complex is because of the large variety of situations it may cover:

“Mothers who live with their sons for a long time or two friends that have lived together for 40 or 50 years. These relationships are real”.

The Hon Alex Hawke MP
Hansard, p. 4512, 4 June 2008

“Two sisters living together or a disabled person living with a loving family”.

The Hon Stuart Robert MP
Hansard, p. 4491, 4 June 2008

“Within many Australian families there may be two sisters or two brothers who live together in economically and socially supportive relationships, and many of us have such relationships within our own families.”

The Hon. Danna Vale MP
Hansard, p. 4496, 4 June 2008

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“There is an infinite variety of circumstances in which two people who are not married to one another might nevertheless decide to live their lives together.”

The Hon Dr Brendan Nelson MP
Hansard, p. 4480, 4 June 2008

Dr Nelson states that there is an “infinite variety” of interdependent relationships. Mr Hawke even proposes two friends could be considered interdependent.³

And I put it to you, that it is even still to be decided whether there can only be two people within an interdependent relationship, or whether there can be three or more. Mr Robert raises the example of “a disabled person living with a loving family” as being interdependent, suggesting there are more than two people involved. And one can easily imagine an interdependent relationship where two sisters look after their disabled brother, each party dependent on one another. There is also a new type of household emerging, due to the rising costs of living, where groups of platonic pensioners now gather to share a house together in order to combine economies of scale and save on living costs.

These and other interdependency issues are yet to be decided by the House of Representatives Standing Committee on Family, Community, Housing and Youth. Needless holding up the current bills in order to wait until these interdependency issues have been resolved, would only cause unnecessary distress and discrimination.

6. Siblings, carer and disability groups have not been consulted

The same-sex community have been widely consulted about their equality. These include consultations by HREOC, the ACT Government, the Gay and Lesbian Rights Lobby (NSW), and the Victorian Gay and Lesbian Rights Lobby.

Through these consultations, the same-sex community have become aware that if they are given equality, some of their benefits will reduce as they will now be means-tested on their partner’s income.

However siblings, carers, disability and pensioner groups have not been widely consulted about interdependency. Is interdependency the relationship model they want, and would they be willing to wear reductions in benefits? These reductions would be significant, especially for pensioners.

Let me take the example of two elderly sisters who live together and look after each other, which was raised by the opposition in debate, as I have noted. Suppose each sister currently receives the age pension at the single rate of \$546.80 per fortnight. If, as the opposition proposes, they were recognised as a couple under Commonwealth laws, each

³ If Mr Hawke realises that even two friends can stay together for 40 or 50 years, then perhaps some other members of the opposition will realise that same-sex couples can also stay together for a long time, and these relationships are also real.

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would receive the couple rate of \$456.80 per fortnight—that is, their payments would go down. In other words, they would be \$180 worse off per fortnight. Currently, each would also receive a utilities allowance of \$500 per year. In other words, they are treated as individuals. If, as the opposition proposes, they were recognised as a couple, they would only receive one utilities allowance between them, losing a further \$500. And there are likely to be other negative financial implications, such as telephone allowances and rent assistance.

The Hon Robert McClelland MP
Hansard, pp 4522-4523, 4 June 2008

Same-sex couples are willing to take some of the pain of equality, as there will be benefits (many of them social and non-monetary) - but what gain would there be for interdependent pensioners?

Further investigation needs to be done on interdependency for siblings/carers, which may take a long time. There is no need to delay one set of confirmed equality measures, because you are waiting on the results of another.

I wonder if these inquiries will even receive *one* submission from a sibling-sibling, carer-charge, parent-son/daughter, friend-friend, (etc) relationship. If the opposition thinks that these groups would benefit from the extension of interdependency, then where are their submissions (in support of this)?

To my knowledge, this community has not been comprehensively surveyed as to what their needs or preferences are.

On the other hand, the same-sex community have been comprehensively consulted and researched for over a decade. The results are in, and you now have all you need to act.

7. Further economic modelling on interdependency needs to be done

In The Australian, Mr John Challis states that he was informed in 2007 by the Hon Malcolm Turnbull MP that,

“It was impossible to calculate the additional number of interdependent relationships, other than same sex couples, and therefore calculate the costs”.⁴

The economic modelling of interdependency is yet to be completed, while the costing of same-sex couples rights have already been calculated by Treasury.⁵

Waiting for the completion of the interdependency modelling would only delay the introduction of these bills even further.

⁴ John Challis as reported by Patricia Karvelas, The Australian, 6 June 2008, Coalition backflip on superannuation rights, <http://www.theaustralian.news.com.au/story/0,25197,23818710-5013871,00.html>

⁵ Same-sex equality will produce a net saving of \$66 million over four years.

8. Proving interdependency is onerous and complex

The following is a list of the information and documents a superannuation company may ask you to provide for the purposes of proving that you were a same-sex interdependent couple.

You will be asked to provide evidence that you had sex with your partner, whether you were ‘out’ as a couple in public (public repute test), the degree of emotional support you provided each other, the extent to which the relationship was merely for the sake of convenience, whether you had children together, the degree of mutual commitment to a shared life, the length of time the relationship existed for, whether you owned or used property together, whether you provided the type of care normally provided in a close personal relationship, and provide evidence suggesting that both parties intended for the relationship to be permanent.

You will be asked to supply statutory declarations, copies of bills in both your name and your partner’s name, copies of other documents showing the same address, and proof of payments you made for your partner and visa versa.

In addition, you will be asked to approach your friends, relatives and associates to ask them to write statements describing your relationship including any domestic support and/or personal care you provided each other.

It will be up to the superannuation fund representative to decide whether or not your relationship actually exists – and depending on their determination, you may or may not receive your deceased partner’s superannuation funds.

This is obviously an onerous, uncertain and lengthy process – I have been told it typically takes a month to gather this plethora of information.

The above information was gained from the attached correspondence I received from superannuation funds. Please note that while not all of the points need to be satisfied, the attached correspondence from Zurich Financial Services does specify that the Trustee must consider *each* of the above criteria when making a determination as to whether they are a couple.

Same-sex couples/partners are in a financially precarious position. In the event of one’s death, they have no certainty that their partner will receive their superannuation, as it is up to the person assessing their claim to interpret whether or not they have met the criteria. In addition, it would be rather insulting and harrowing, especially at a time of bereavement, to be told by the Trustee after you submitted your evidence, that they did not consider your relationship to have ever existed.

In addition, information about the types of evidence that the Trustee requires are also often not commonly known or available, and requirements can vary from fund to fund.

I have been trying to find out what documentation is required by superannuation funds in order to know what documentation to prepare ahead of time, however sometimes the information provided by these funds can also be quite sparse or difficult for

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the layperson to understand, as shown in the reply received from MLC Limited.⁶ In their reply, they wrote,

“The claimant would need to provide evidence that they [were] ... interdependent with the deceased at date of death as defined by section 10A and regulation 1.04AAAA of the Superannuation Industry (Supervision) (SIS) Act”

and then they attached those sections of legislation. This answer was complex and did not help a layperson like me to understand what documents MLC required from a surviving partner to prove interdependency.

Generally, it is often difficult for a couple to be completely certain that they possess enough interdependency evidence to satisfy a Superannuation Trustee.

For example, how does one supply evidence to prove that your relationship was not merely for the sake of convenience?⁷ Besides being insulted at being requested to prove this, how would you start to prove it?

Furthermore, this process also occurs at a difficult time in one’s life – the death of one’s partner – where one’s mental state may not be clear enough to adequately gather all of the requested information. (Assisting couples to prepare this documentation ahead of time would help to remedy this – they need to be sure of what documentation would be accepted and that it would be sufficient.)

9. Proving interdependency intrudes on personal privacy

“Not all [interdependent] relationships are sexual, nor is it any of society’s business whether or not they are.”

The Hon Dr Brendan Nelson MP
Hansard, p. 4480, 4 June 2008

“For information purposes, the following is a list of the matters the Trustee must consider when determining if an interdependency relationship existed. ...

- Whether or not a sexual relationship existed”.

Michelle Taylor, Compliance Manager
Zurich Financial Services Australia Limited
Letter, 5 (6) December 2005, p. 1 (attached)

⁶ I would like to thank Zurich Financial Services who have been very helpful in my enquiries, particularly their Compliance Manager, Michelle Taylor. I was very glad to receive Zurich’s responses, written in plain language and in what I sensed was a genuine effort to truly assist me. However, MLC Limited, in my opinion, gave very guarded answers to my questions, and their answers were not very helpful in helping me to understand MLC’s process and what they require to establish interdependency.

⁷ This is one of the criteria, as you can see from the top of page 2 of the Zurich Financial Services Letter, 5 (6) December 2005 (attached).

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Same-sex couples are currently required to reveal the sexual nature of their relationship and to provide proof that one existed, as this is one of the criteria that the superannuation Trustee uses to assess the existence of an interdependency relationship.

Having to reveal the sexual activities and nature of one’s relationship is a clear intrusion on personal privacy. As Dr Nelson states, it is none of society’s business, and it should not be a requirement to access one’s rights.

“In regard to the establishment of a sexual relationship, if friends and/or relatives attested to the fact that a couple were partners, we would assume that a sexual relationship may have existed.”

Michelle Taylor, Compliance Manager
Zurich Financial Services Australia Limited
Letter, 5 (6) December 2005, p. 2 (attached)

Furthermore, these couples are required to ask their friends and relatives to write statutory declarations describing the couple’s relationship, as evidence of the sexual nature of it. One person I know who had to do this, said that this was very embarrassing for him.

Would you feel comfortable in asking your friends and relatives to write statutory declarations about the nature of the relationship you have with your spouse/partner?

10. Interdependency is complex for industry

“Assessing whether two parties were in an interdependency relationship is a complicated process.”

Michelle Taylor, Compliance Manager
Zurich Financial Services Australia Limited
Letter, 5 (6) December 2005, p. 1 (attached)

“These requirements are quite lengthy”.

Keith Stribling, Complaint Resolutions
MLC Limited
Letter, 10 January 2006, p 1 (attached)

Proving interdependency can also be a complicated and lengthy process for the companies which have to administer it, such as superannuation funds. It adds an extra burden onto these businesses.

“The Trustee Office for Zurich Australian Superannuation is currently reviewing their processes in terms of what information will be requested for death claims.”

Michelle Taylor, Compliance Manager
Zurich Financial Services Australia Limited
Letter, 5 (6) December 2005, p. 3 (attached)

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As seen in the above quote, the interdependency requirements of superannuation funds can also change over time, as they are sometimes reviewed. Therefore, claimants need to periodically check with their superannuation funds to see if they still have the required or sufficient documentation. It also creates more work for businesses, which have to field regular requests for updated information.

Interdependency is a complicated, uncertain and onerous relationship model for same-sex couples, their families, and industry.