

THE 7.30 REPORT

Tabled paper:

Inquiry into the Provisions of the Family Law Amendment (Defacto Financial Matters and Other Measures Bill) 2008

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McClelland strikes out against discrimination against same sex couples

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Reporter: Kerry O'Brien

Kerry O'Brien interviews Attorney-General Robert McClelland about the Government's announcement to strike out against discrimination against same sex couples.

Transcript

KERRY O'BRIEN: Attorney-General Robert McClelland had to engage in some fancy footwork on two fronts today, defining the difference between acceptable same sex unions and unacceptable same sex unions and defending the credibility of the Government's quasi-judicial inquiry into the Haneef affair.

Mr McClelland announced today that the Government would move to strike out discrimination against same sex couples in Commonwealth law, affecting, for instance, superannuation, tax, social security and aged care. But he won't countenance extending the principle to legally recognising marriage of same sex couples.

In the Haneef matter, the Government-commissioned inquiry began today into the badly bungled case alleging involvement in terrorism by Indian doctor Mohammed Haneef, which deeply embarrassed the Howard Government before the last election. It's being conducted by former Supreme Court Judge John Clarke QC and will examine the roles of then Immigration Minister, Kevin Andrews, and Federal Police Commissioner, Mick Keelty, leading to the criminal case against Dr Haneef collapsing before his visa to Australia was revoked.

Labor, in Opposition, promised a full judicial inquiry and the Attorney-General is now fielding criticism that Mr Clarke's powers are insufficient to conduct a credible inquiry.

Mr McClelland joins me now.

KERRY O'BRIEN: Robert McClelland, the Haneef case, arguably, was a monumental stuff up, possibly even an abuse of power. If you're serious about wanting to bring all the facts to light, why haven't you written terms of reference and given the inquiry the kinds of coercive judicial powers that would guarantee the kind of outcome you profess to want?

ROBERT MCCLELLAND, ATTORNEY-GENERAL: I don't think there's been criticism of the terms of reference. I think the subject matter of the terms of reference have been - been accepted as legitimate. In terms of the powers of Mr Clarke himself, we quite frankly discussed the issues with him. The focus of the inquiry will essentially be the conduct of the national security agencies - that's the whole focus of it. They - the representatives will obviously be officers of the Commonwealth. The agencies have all committed to cooperate fully with the inquiry, as they said today. And on that basis, in discussions with Mr Clark, we didn't think the powers of compellability were necessary because there is an undertaking to provide him with documents of relevance, to provide those persons who he believes will be able to assist

him in his investigations.

KERRY O'BRIEN: Well, it's one thing for agencies to promise to cooperate but people within those agencies have reputations to protect. There's been a lot of criticism of the way that case was conducted. Last July, Kevin Rudd as Opposition Leader demanded a full judicial inquiry into the Haneef case, to ensure public confidence in Australia's anti-terror laws. That at least implies a review with strong judicial powers. But you've restricted those powers. Why, for instance, won't witnesses have to give evidence under oath?

ROBERT MCCLELLAND: Well, well again, the procedure has been determined by Mr Clark as part of cooperation that in accordance with their undertaking, we would expect that they will of course give truthful evidence. If, at any stage, he believes that that cooperation isn't forthcoming in the context of the disclosure of such documents as are of relevance, such evidence as he genuinely believes someone may be able to provide, we have indicated to him and he acknowledges he has an invitation to come back to the Government to explain that. I should say, I don't expect that will happen. I expect the agencies will cooperate. Anyone who is interviewed by him will be - do so in the presence of Mr Clark. He will have council assisting, legal officers assisting. There will be scrutiny of the evidence that they provide.

KERRY O'BRIEN: We saw in the wheat board inquiry which you, in Opposition, Kevin Rudd in Opposition, vociferously criticised for being, essentially - not given proper terms of reference and we saw Ministers of the Crown in public hearings taking evidence - giving evidence under oath. Now, you'd have to acknowledge that Commissioner Keelty is under the gun here in terms of the criticism that has been directed at him as recently as this morning in the paper, criticism that seems to have come from Kevin Andrews.

ROBERT MCCLELLAND: Obviously, I don't want to comment on any potential witness to the inquiry, whether it's Mr Andrews or Mr Keelty. But in terms of the - well, certainly in terms of the Cole inquiry, we criticised the inadequacy of the terms of reference - there's no doubt about that. But it is the case, even in respect to a Royal Commission, that the Royal Commission itself would determine how it accepted evidence. I mean, if you go back to the building industry Royal Commission, for instance, there was only limited cross-examination permitted in those circumstances. It's, again, something that is traditionally - the procedure is traditionally for the inquirer.

KERRY O'BRIEN: But, without asking you to comment specifically on evidence or claims and counterclaims ...

ROBERT MCCLELLAND: Yeah.

KERRY O'BRIEN: But we've already seen the situation as I said this morning where Kevin Andrews - whose handling of the affair deeply embarrassed his Government at the time - has been granted that privilege of giving his evidence without cross-examination behind closed doors. But what he's going to say has been leaked all over the front page of The Australian newspaper before he even opens his mouth at the inquiry, a leak that's very favourable to Mr Andrews and directed against Mr Keelty. Now, you can't be happy with that because it suggests that this inquiry is open to manipulation.

ROBERT MCCLELLAND: Um, again, I was - have that ball placed in front of the goal post ready for me to kick today and I didn't accept the invitation. I'm not going to, as tempting as it is, to engage in political debate, criticise Mr Andrews for those statements. But let me say that we would expect he and indeed all participants to respect the fact that Mr Clark now has a job to do. Mr Clark, in undertaking another inquiry, has been very vigorous in insisting that he be permitted to do so without interference and we expect he will do so here.

KERRY O'BRIEN: Well, I guess the proof of the pudding is going to be in the eating. If we can look briefly at the Government's ...

ROBERT MCCLELLAND: That's precisely. Yeah, yeah.

KERRY O'BRIEN: ... decision to remove discriminatory practice from Commonwealth laws so de facto same sex relationships will now be legally recognised, but not formal same sex marriage. I'm just curious to know what the logic is in that discrimination, if you like, that difference, because surely it is fundamentally discriminatory?

ROBERT MCCLELLAND: The logic is essentially Labor Party policy. We went to the election ..

KERRY O'BRIEN: That's not necessarily logical.

ROBERT MCCLELLAND: ... with a - but, we're honouring the election commitment. We're removing discrimination from some 100 pieces of legislation that have real practical significance to people in same sex relationships. In terms of the issue of recognition of relationships, we favour and positively favour and indeed encourage all states and territories to implement a uniform system of registration of relationships that are in existence whether they be same sex or close personal relationships. Indeed, the policy was based on the Tasmanian model. We positively encourage all states and territories to do that. But what we don't support - and again, consistently with our policy - we don't support a measure that mimics marriage. We ...

KERRY O'BRIEN: Well, just before you go on. I'm not asking you to defend party policy. I'm just asking to explain what to me seems, on the face of it, to be undeniably discriminatory. A male and female de facto couple has the right to choose to formally legally marry or not to marry; a same sex couple does not.

ROBERT MCCLELLAND: The system of registration essentially recognises a relationship that is in existence. The system that is proposed or has been discussed as being proposed in the ACT would be a system that would, as a result of a ceremony, create a legal relationship which essentially is something akin to the traditional concept of a marriage.

KERRY O'BRIEN: But the mere fact that you use the word "mimic" to describe that could imply for some that you're essentially looking down your nose at it.

ROBERT MCCLELLAND: People in same sex relationships are entitled to - for too long they've been discriminated against. I think that's accepted across the political spectrum happily today. In terms of the issue of marriage, both parties supported during the course of the last 18 months or so legislation that defined marriage as being between a man and a woman. It was the policy of the Labor Party before the election ...

KERRY O'BRIEN: Yes, but I'm asking you why it's not discriminatory to say that a same sex couple can't engage in that ceremony legally but a man and a woman. Why isn't that discriminatory under law?

ROBERT MCCLELLAND: Well, we - what you are talking about is providing a positive system of recognising at law a relationship that is in existence as a result of the registration of that, as is occurring in Tasmania and as is occurring in Victoria. That is something that is appropriate because it actually recognises something that is in existence. What we don't support is legal measures that create a relationship that is akin to marriage.

KERRY O'BRIEN: I'm still not sure why that's not discriminatory, but I think that's where we're gonna have to leave it.

ROBERT MCCLELLAND: Sure.

KERRY O'BRIEN: Robert McClelland, thanks for joining us.

ROBERT MCCLELLAND: That's my pleasure.

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