

Submission

on the

Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008

to the

Senate Legal and Constitutional Affairs Committee

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1. Introduction

On 18 June 2008, the Senate referred the *Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008* to the Legal and Constitutional Affairs Committee for inquiry and report by 30 September 2008 or after the consideration of any related bill or bills that may be introduced to give effect to the recommendations of HREOC's report *Same Sex: Same Entitlements*, whichever is the sooner.

The purpose of the Bill is said to be to eliminate discrimination against same-sex couples and the children of same-sex relationships in Commonwealth legislation that provides for reversionary superannuation benefits upon the death of a scheme member, and in related taxation treatment of superannuation benefits. The Bill would amend the Commonwealth civilian and military (defined benefit) superannuation schemes, the parliamentary, judicial and statutory legal officer pension schemes, and the pension scheme for the Governor-General, established under the following Acts:

- *Defence Force Retirement and Death Benefits Act 1973*
- *Defence Forces Retirement Benefits Act 1948*
- *Federal Magistrates Act 1999*
- *Governor-General Act 1974*
- *Judges' Pensions Act 1968*
- *Law Officers Act 1964*
- *Parliamentary Contributory Superannuation Act 1948*
- *Superannuation Act 1922*
- *Superannuation Act 1976*

The Committee has invited written submissions which are due by 25 July 2008.

2. Superannuation

Several, if not all, of the superannuation and pension schemes that would be amended by this Bill involve reversionary benefits payable to certain persons on the death of a scheme member. These benefits can in some cases be paid as a pension for the rest of the life of the beneficiary.

The explanatory memorandum for the Bill¹ notes that “the measures in this Bill will result in [an] approximate increase in unfunded liability on commencement of the Act” totalling \$112.5 million.

Serious consideration needs to be given as to whether there is sufficient justification for this increase in unfunded liabilities.

There are good reasons for the Commonwealth to provide appropriate pensions for the spouses and children of married parliamentarians, judges, service men and women and so forth.

It is not at all clear why a person should be the recipient of a taxpayer funded pension merely because they had a homosexual relationship with a parliamentarian, judge or service man or woman.

3. The uniqueness of marriage

Peter Sprigg of the US Family Research Council has put a strong case against extending to same-sex relationships the benefits given to marriage. In evidence to the Maryland House of Delegates on 28 February 2008, he said:

“Society does not give ‘benefits’ to marriage because individuals want them or would be helped by them. Society gives ‘benefits’ to marriage because marriage gives benefits to society. Therefore, when those who are not married, such as people in homosexual or cohabiting relationships, seek to receive such public ‘benefits’, they bear the burden of proof. They must show that such relationships benefit society (not just themselves) in the same way and to the same degree that the authentic, natural institution of marriage between a man and a woman does. This is a burden they cannot meet. Only the union of a man and a woman can result in the natural reproduction that is essential literally to continue the human race. And research clearly demonstrates that married men and women - and children raised by their married, biological mother and father - are happier, healthier, and more prosperous than people in any other living situation. These are the true ‘benefits of marriage.’

“The legal and financial ‘benefits’ of marriage are not an entitlement for every citizen regardless of lifestyle. They give an incentive to enter into the socially beneficial relationship of authentic marriage, and give protection to the social institution of marriage. Awarding such benefits to the unmarried makes no more sense than giving veterans' benefits to people who never served in the military.”²

There are good reasons for society, and therefore also for government, to distinguish marriage from other possible relationships, including male-female cohabitation and same-sex relationships, and to privilege marriage over such relationships by bestowing particular benefits only on married couples.

Marriage, as defined in the *Marriage Act 1961* at section 5 means “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”.

There are two key reasons for distinguishing marriage from other relationships and granting it a privileged status in comparison to other relationships. Firstly, marriage provides the best environment for raising children. Secondly, marriage regulates the relationships between men and women in a way that benefits both men and women as well as society.

3.1 Marriage provides the best environment for raising children.

A large body of social science research confirms the near universal belief, across times and cultures, that marriage is the best environment for raising children.

Children flourish best, on a range of indicators, (including educational outcomes, school misbehaviour, smoking, illegal drugs, and alcohol consumption, sexual activity and teen pregnancy, illegal activities and psychological outcomes), when they are raised by a mother and a father in a publicly committed, lifelong relationship.³

A few examples of particular research findings illustrate this general conclusion.

Three- and four-year-old children with two biological parents are three times less likely than those in any other type of families to have emotional or behavioural problems such as attention deficit disorder or autism.⁴

Girls whose fathers left the family early (before age 5) were five times more likely in the U.S. and three times more likely in New Zealand to become pregnant as a teenager compared to girls from traditional families.⁵

Male adolescents in all types of families without a biological father (mother only, mother and step-father, and other) were more likely to be incarcerated than teens from two-parent homes, even when demographic information was included in analyses. Youths who had never lived with their father had the highest odds of being arrested.⁶

Children's well being is adversely affected by being deprived of either a mother or a father. Fathers and mothers make different contributions to a child's upbringing. Neither can adequately substitute for the other.⁷

Marriage is the institution which regulates the relations of men and women in a way that benefits both men and women. Marriage socialises men in important ways. Societies with significant numbers of unmarried men often have significant social problems.

A 2005 report on findings from social sciences on the significance of marriage concludes:

*“Married men drink less, fight less, and are less likely to engage in criminal activity than their single peers. Married husbands and fathers are significantly more involved and affectionate with their wives and children than men in cohabiting relationships (with and without children). The norms, status rewards, and social support offered to men by marriage all combine to help men walk down the path to adult responsibility.”*⁸

Associate Professor in Sociology at La Trobe University, David de Vaus, writing in *Family Matters*, says that women also benefit significantly from marriage, with better mental health outcomes. *“When a range of types of mental disorders are considered, marriage reduces the risk of mental disorders for both men and women.”*⁹

These social benefits for children, men and women are sufficient grounds for society and governments to encourage marriage by granting it a unique legal status, and to bestow particular benefits only on married couples.

There is no valid reason to extend any similar, let alone identical, benefit to same-sex relationships. These relationships are of no interest to society and those who enter into them do not enter into a “union” equivalent to marriage. The parties to such relationships should take care of their own future financial needs and have no just claim on Commonwealth pensions.

3.2 Same-sex relationships are not equal to marriage

No matter how intense they may appear to be, same-sex relationships cannot be considered the equivalent of marriage. They confer none of the unique benefits of marriage and family on Australian society.

Both male homosexual and lesbian relationships are significantly more unstable than marriage, with lesbian relationships breaking up within the first 8 years at *over three times* the rate of marriages.¹⁰

Same sex relationships are naturally sterile. Same sex relationships are not capable of producing children. Society has no valid interest in encouraging those in such relationships to procure children through either adoption or reproductive technologies, because these processes necessarily involve a third party biological parent. Whatever means are used to procure a child, the child is intentionally deprived of a genuine parental relationship with either a father or a mother.

A key Australian study has shown significant detrimental outcomes from homosexual parenting. Dr Sotirios Sarantakos, when Associate Professor of Sociology at Charles Sturt University, Wagga Wagga, NSW, undertook a number of studies on heterosexual and homosexual couples. In 1996 he published a paper, *Children in three contexts*, where he explored the relationship between family environment and behaviour of primary school children living in three family contexts - married heterosexual couples, cohabiting heterosexual couples and homosexual partners.¹¹

The major finding of the study was that family type did make a significant difference to the children's school achievements. Children in families where their biological parents were married to each other scored best of the three groups in language ability (7.7), mathematics (7.9) and sport (8.9). Children of cohabiting heterosexual couple families generally did next best in these areas (6.8, 7.0 and 8.3), while children of homosexual partners scored lowest (5.5, 5.5, 5.9). In class behaviour more children of homosexual partners were reported to be timid and reserved, unwilling to work in a team or talk about family life and holidays. In general they felt "uncomfortable when having to work with students of a sex different from the parent they lived with". Sex identity was reported by teachers to be a problem area for some children of homosexual families. Sarantakos cautiously concludes that "married couples seem to offer the best environment for a child's social and educational development".

Advocates of parenting by homosexual partners frequently claim that about 50 studies have "proved" there is no difference in outcome between children raised by married couples or by homosexual partners. Any social science study depends for its validity on following rigorous statistical and research procedures. Dr Robert Lerner and Dr Althea Nagai, experts in quantitative analysis, after dissecting each of 49 of such studies found at least one fatal research flaw in each study.¹² These studies are therefore no basis for good science or good public policy.

Professor Lynn D Wardle shows that, even those studies which conclude in favour of homosexual parenting include evidence that homosexual parenting may be harmful.¹³ There is a greater incidence of homosexual orientation in the children raised by homosexual partners with resulting problems including suicidal behaviour, promiscuity, etc. There is also a greater incidence of anxiety, sadness, hostility, defensiveness and inhibitions (some of these especially among boys of lesbian mothers).

In the light of this research data there is no compelling reason for any benefit currently given to married couples to be extended to two men or two women in a same-sex relationship. The parties to such relationships should take care of their own future financial needs and have no just claim on Commonwealth pensions.

Recommendation 1:

As there is no compelling reason to extend to same-sex relationships the benefits given to married couples, the Bill should not be supported.

4. "Marriage" v "couple relationship"

The Bill would introduce a new term into Commonwealth law, namely "couple relationship". Because the Bill would bestow the same benefits currently given to spouses on persons in a same-sex relationship all references to "spouse", "husband" or "wife" in the statutes to be amended will be replaced by the new catch-all term "partner". All references to "marriage" or "marital relationship" would be replaced by the new term "couple relationship".

Clause 3 of Schedule 1, and parallel clauses in the other schedules, states: "A person is the partner of another person if the two persons have a relationship as a couple (whether the persons are the same sex or different sexes)."

The Bill would replace the existing definitions of “marital relationship” in the various statutes with the following definition of “couple relationship” (example taken from Schedule 1 of the Bill as applied to the Parliamentary Contributory Superannuation Act 1948.

4B Couple relationship

(1) For the purposes of this Act, a person had a *couple relationship* with another person at a particular time if the person ordinarily lived with that other person as that other person’s partner on a permanent and *bona fide* domestic basis at that time.

(2) For the purpose of subsection (1), a person is to be regarded as ordinarily living with another person as that other person’s partner on a permanent and *bona fide* domestic basis at a particular time only if:

(a) the person had been living with that other person as that other person’s partner for a continuous period of at least 3 years up to that time; or

(b) the person had been living with that other person as that other partner for a continuous period of less than 3 years up to that time and the Trust, having regard to any relevant evidence, is of the opinion that the person ordinarily lived with that other person as that other person’s partner on a permanent and *bona fide* domestic basis at that time;

whether or not the person was legally married to that other person.

(3) For the purposes of this Act, a couple relationship is taken to have begun at the beginning of the continuous period mentioned in paragraph (2)(a) or (b).

(4) For the purpose of subsection (2), relevant evidence includes, but is not limited to, evidence establishing any of the following:

(a) the person was wholly or substantially dependent on that other person at the time;

(b) the persons were legally married to each other at the time;

(ba) the persons’ relationship was registered under a law of a State or Territory prescribed for the purposes of paragraph 4AB(4)(ba) of the Judges’ Pensions Act 1968, as a kind of relationship prescribed for the purposes of that paragraph;

(c) the persons had a child who was:

(i) born of the relationship between the persons;

(ii) adopted by the persons during the period of the relationship; or

(iii) the product of the relationship between the persons;

(d) the persons jointly owned a home which was their usual residence.

Aside from the principal public policy reason that benefits given to married couples should not be extended to those in other relationships, this new terminology is extremely offensive to married persons. It reduces the unique relationship of marriage as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life” to a mere piece of possible evidence that two persons are in a “couple relationship”.

Recommendation 2:

The belittling of marriage as if it was just another form of “couple relationship” is undesirable public policy and should be abandoned. As this depreciation of marriage is an intrinsic feature of this Bill, the Bill should not be supported.

5. Support for State and Territory relationship registers

The Bill provides, for example in Clause 10 of Schedule 1, for a “couple relationship” to be evidenced by the persons’ relationship being “registered under a law of a State or Territory prescribed for the purposes of paragraph 4AB(4)(ba) of the *Judges’ Pensions Act 1968*, as a kind of relationship prescribed for the purposes of that paragraph”.

Tasmania’s Relationship Act 2003, Victoria’s Relationships Act 2008 and the Australian Capital Territory’s Civil Partnerships Act 2008 each provide for the registration of “couple relationships” including both male-female and same-sex relationships.

The Australian Constitution gives the power to legislate with respect to *marriage* to the Commonwealth Parliament.¹⁴ However, the legal significance of marriage is that it is a legally recognised relationship between a man and a woman, entered by a formal legal procedure, which creates a legally recognised status for the purpose of granting certain rights and benefits.

The State and Territory laws providing for the registration of “couple relationships” have created a similar legally recognised relationship, to be known as a “registered relationship” or “civil partnership”, in direct competition with *marriage* defined under Commonwealth law.

Furthermore, provision for registration of non-marital couple relationships by the registrars of births deaths and marriages creates an expectation that such registered relationships would be given additional legal rights and benefits of marriage, including those affecting children such as access to adoption and IVF services.

5.1 Impact on marriage

Legislation to provide for legal registration of non-marital couple relationships for the purpose of granting them marital rights and benefits is not justice; it is injustice. The concepts of equality and justice are often confused. Only the similar treatment of similar situations promotes justice, and it is this principle that created the common law.¹⁵ Insistence on treating different situations equally does not promote justice.

5.1.1 Marriage ‘lite’

Provision for unmarried male-female couples to register their relationships has introduced into State or Territory law a legally recognised “marriage-lite” – granting the benefits of marriage without the obligations.

Marriage celebrants are required, under the Marriage Act 1961, to remind a man and woman about to be married that the relationship they are about to enter is “to the exclusion of all others”.¹⁶ This exclusive nature of marriage originally derives from the biblical commandment: “You shall not commit adultery.”¹⁷ Adultery represents a fundamental breach of marital vows.

Most Australian married couples expect faithfulness from each other. The very public separation of Shane and Simone Warne over famous spin bowler Shane's repeated infidelities is indicative of that expectation.¹⁸

The Australian Marriage Act 1961 also requires a civil celebrant at a wedding to say: "I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter ... for life."¹⁹ This is an enduring promise - for life. Not all marriages endure, but most first marriages do last until the death of one party.²⁰

In contrast, registered relationships and civil partnerships do not require any enduring commitment.

For example in Victoria, to be a registrable relationship the law only requires that "one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other".²¹

Registered relationships are inherently temporary and can be terminated at will by either party through simply serving a termination notice on the other party and waiting 90 days.²² Consequently, registered relationships do not foster endurance. Instead they cultivate a culture of transience that would undermine the ideal of lifelong commitment in marriage.

While it would not be permitted to register a relationship if either of the persons is in another "registrable relationship"²³ or married, no ongoing commitment to exclusivity is required.

Given the detrimental impact of laws providing for registered relationships and civil partnerships on the status of marriage, it is inappropriate that the Commonwealth Parliament which has responsibility for upholding and preserving marriage give any further status to such relationships through a Commonwealth law.

5.1.2 Same-sex unions

Provision for same-sex couples to register their relationships mimics marriage by granting them the benefits of marriage – but without the obligations.

Registration of same-sex partners, like the registration of unmarried male-female partners, involves no commitment for the relationship to be either exclusive or enduring. While some homosexual partners remain together for lengthy periods, most are relatively brief. Dr James Dobson, of Focus on the Family, has said: "Studies show that homosexual men in particular have a difficult time honouring even the most basic commitments of 'marriage'. A recent study conducted in the Netherlands ... found that the average homosexual relationship lasts only 1.5 years and that gay men have an average of eight sexual partners per year outside of their "primary" relationship..."²⁴

Registration of same-sex relationships strikes at the foundations of society by ignoring the most fundamental reason for marriage: to safeguard our future as a nation. Every society which wants to continue - whether secular or religious - must encourage the bearing and raising of children as good future citizens. Every society therefore has a vital interest in protecting the family as the basic social unit of society and marriage as the heart of the family. Relationship registers undermine the special status of marriage and the natural family and thereby place at risk the future of the society.

Research shows that marriage is the most enduring of human sexual relationships - more stable than male-female cohabitation and far more stable than homosexual cohabitation. Children raised by their married parents do better than those raised by cohabiting parents, who do better than children raised by same-sex partners. Children brought up in non-marriage contexts have higher rates of physical and mental health problems, child abuse, criminality, drug abuse and poor academic performance. See for example the careful study by Associate Professor Sarantakos of Charles Sturt University in NSW

“Children in three contexts”²⁵ and the report by Barbara Schneider, Allison Atteberry and Ann Owens.²⁶

Recommendation 3:

As the Bill would give recognition in Commonwealth law to “registered relationships” or “civil partnerships” established in competition to marriage under State or Territory laws, it should not be supported.

6. Children as “the product of a couple relationship”

The Bill would introduce a radical change into the definition of a “child” in Commonwealth law.

This change is to add (see for example Clause 17 of Schedule 1) the following definition of a child to the various statutes being amended:

child, in relation to a person, means a child of the person, including:

- (a) an adopted child or an ex-nuptial child of the person; and
- (b) if, at any time, the person had a partner (whether the persons are the same sex or different sexes)—a child who is the product of the person’s relationship with that partner.

An interpretive provision (see for example Clause 5 of Schedule 1) would specify that:

A child cannot be the product of the relationship between two persons (whether the persons are the same sex or different sexes) for the purposes of this Act unless the child is the biological child of at least one of the persons or is born to a woman in the relationship.

No positive guidance is given as to how a child can be “a product” of a relationship. It can only be assumed that the Bill is intended to include the following scenarios:

- a child born to a woman in a “couple relationship”. This child would be considered also the child of the other person in that couple relationship regardless whether the other person is either a woman or is a man who is not the biological father of the child. This could apply to two women in a lesbian relationship if one of them was artificially inseminated or underwent IVF, whether legally or otherwise. (IVF for fertile women is illegal in some States.)
- a child born as a result of a surrogacy arrangement, whether commercial or altruistic, (commercial surrogacy is illegal in nearly all Australian jurisdictions and altruistic surrogacy is illegal in Queensland) in which one partner in the couple relationship is a biological parent of the child. This could apply to two males in a same-sex relationship if either of them provided sperm for the conception of the child.

In this Bill the effect of the new definition is twofold. Firstly, the existence of a “child who is the product of the relationship” is one of the possible evidences for the existence of a couple relationship. Secondly, such a child becomes a potential “orphan child” eligible for certain benefits under the various superannuation and pension schemes.

The first effect is objectionable because it honours a socially undesirable event, namely the conception of a child who is deliberately denied the right to know and be raised by either a father or a mother.

As detailed above (Section 3.3) children do best when raised by a mum and dad who are married to one another. The Commonwealth should not be doing anything to encourage or give apparent

approval to means of bringing children into existence that deny them their fundamental right expressed in Principle 6 of the *Declaration on the Rights of the Child* which states:

“The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother.”²⁷

The second effect may incidentally provide some financial benefit to a handful of children but any such financial benefit is outweighed by the overall harmfulness of the policy.

Recommendation 4:

The proposed new definition of a child as the product of a relationship should not be supported.

7. Endnotes

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 19. *Marriage Act 1961*, s 46(1).
 20. "Family facts: divorce trends," *Family Matters* (Australian Institute of Family Studies) No 35, August 1993, pp 28-29.
 21. *Relationships Act 2008*, Section 5.
 22. *Relationships Act 2008*, Section 15, cf. *Tasmanian Relationships Act 2003*, s 15.
 23. *Relationships Act 2008*, Section 6.
 24. *Family News From Dr James Dobson*, September 2003, p 5, citing a study by Xiridou, Maria *et al.*, "The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection Among Homosexual Men in Amsterdam," *AIDS*, 17 (2003): 1029-38.
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 26. Barbara Schneider, Allison Atteberry and Ann Owens, *op.cit.*
 27. <http://www.unhchr.ch/html/menu3/b/25.htm>