Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008

July 2008

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Executive Summary

The Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008 seeks to grant same-sex couples and their children equal rights to access a partner's or parent's superannuation benefits. It does this by amending laws relating to the Commonwealth Government's (defined benefit) superannuation schemes and related tax laws and other acts regulating the superannuation industry.

The Australian Christian Lobby is not against the removal of unjust discrimination, particularly where dependents are affected and accepts that same-sex couples and the children they are responsible for should be able to benefit from one another's superannuation. However, whilst ACL supports the intent of this bill, we have grave concerns about the terminology used which:

- Obliterates reference to marriage and removes its distinction by including it as just one relationship in the new catch-all category of 'couple relationships';
- Seeks to write a biological impossibility into Commonwealth law by redefining a child as the product of a couple relationship, providing one partner is linked biologically to the child or where one partner is the birth mother.

ACL believes that the bill succeeds in granting same-sex couples, and any children they may be legally responsible for, access to a partner's or parent's superannuation. However, as currently drafted, the bill fails certain key tests relating to marriage and parenthood and the preservation of the unique terminology that describes them.

ACL's recommendations on these points are outlined in more depth below but in brief, it is our view that the bill should be amended to:

- Reflect the important distinction between married and unmarried relationships:
    - References to marriage and its related terminology of 'husband', 'wife' and 'spouse' should be used when referring to a legal marriage;
    - Non-marital relationships, whether heterosexual or homosexual, should be termed 'de facto relationships' as the Government currently proposes in its Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008;
    - The catch-all category of 'couple relationship' should be abandoned and replaced with reference to 'married or de facto relationship' throughout the bill;

- Cease trying to define a child by the manner of its conception, and therefore cease promoting the fallacy that a child can be ‘produced’ by a same-sex couple. Instead the criterion should be whether the child was substantially dependent upon the member of the superannuation scheme (a concept currently found in the Judges’ Pension Act 1968). If this is not appropriate in some of the Acts to be amended by this bill, then another test could be whether the person entitled to the benefit was in a relationship with a parent of the child.

Acceptable Provisions

The Australian Christian Lobby is not against the removal of unjust discrimination, particularly where dependents are affected and accepts that same-sex couples and the children they are responsible for should be able to benefit from one another’s superannuation.

Children should not be penalised because of the relationship between the adults in their lives, therefore financial entitlements to a child cared for by a same-sex couple should mirror the entitlements to a child of a heterosexual couple.

Areas of Concern

To the extent outlined above, ACL accepts the intent of the bill. However, we believe that, as currently drafted, the bill actually trades far more than financial entitlements: it radically redefines marriage and parenthood to serve the minority agenda of homosexual activists and thus fails to reflect the reality that most couples are male-female, that it always takes a man and a woman to conceive a child, and that most children start life with their own two biological parents, a construct of natural law which research affirms is best for the development of a child and for society.

Marriage

The bill rolls all relationships into one new category of ‘couple relationship’. References to husband and wife are replaced with references to a ‘partner’. ‘Marital relationship’ is replaced by ‘couple relationship.’

The explanatory memorandum states that ‘the inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto

couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.' It is hard to see how removing references to marriage does not undermine marriage.

We also note that in his second reading speech, the Attorney-General commented that 'it will also be necessary to consider the need for consistency in Commonwealth legislation in relation to the use of terms such as 'partner' and 'spouse' but these issues can be given further consideration after we proceed with the expeditious passage of this very important first tranche of legislative reform.' This may indicate that references to marriage and associated terminology will be removed in other legislation too, an issue that causes ACL considerable concern.

Marriage, by nature of its public commitment to a lifelong, exclusive union, is fundamentally different from non-marital relationships, which are often of shorter duration. According to the 2006 census, nearly 60% of Australians were in a registered marriage. For those people who got married in 1985–1987 and 2000–2002, the expected average duration of their total married life remained unchanged at around 32 years. Even the regrettable 33% of marriages which end in divorce last for about 11-16 years on average[1]. In contrast, only 9% of those who began cohabiting in the early 1990s and only 2% of those who began cohabitating in the 1980s were still living with the same partner in 2001[2], leading the Australian Institute of Family Studies to comment that 'cohabiting relationships tend to be less stable than marriages'[3]. It seems the overwhelming majority of married couples still keep their vow of "til death parts us."

Given the significant benefits of marriage, it is important that it be recognised as a unique relationship. The terminology used in the legislation must not create a presumption that all relationships are the same and so unwittingly undermine the intent of the Marriage Act.

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[1] Australian Social Trends – Lifetime Marriage & Divorce Trends 2007, Australian Bureau of Statistics.

[2] Data from Wave 1 of the Household, Income and Labour Dynamics in Australia (HILDA) Survey, funded by the Australian Government through the Department of Families, Community Services and Indigenous Affairs, as reported by Ruth Weston and Lixia Qu, 'Trends in Couple Dissolution', *Family Relationships Quarterly*, Newsletter 2, 2006.

[3] Ruth Weston and Lixia Qu, 'Trends in Couple Dissolution', *Family Relationships Quarterly*, Newsletter 2, 2006, Australian Institute of Family Studies

Whilst we understand that, under the present superannuation law, the definition of marital relationships has been extended to include heterosexual de facto couples, it is our view that ‘marital relationship’ and the associated terminology of ‘husband’, ‘wife’ and ‘spouse’ should refer to legal marriage only. Non-marital relationships, whether heterosexual or homosexual, should be termed ‘de facto relationships’ with the related term ‘partner’ as the Government currently proposes in its Family Law Amendment De Facto Financial Matters and Other Measures) Bill 2008. The catch-all category of ‘couple relationship’ which implies that all types of relationship are the same, should be abandoned and replaced with references to ‘married or de facto relationship’ and the associated terminology of ‘spouse or partner’ throughout the bill.

The Government has previously advised us that using the dual categories of ‘marital or de facto relationships’ would create insurmountable problems of interpretation, though we remain to be convinced of this case. Language such as ‘marital or de facto relationship’ is very widely used throughout Australian law, without any difficulties. Where an entitlement arises for people in a marital or de facto relationship, then falling within either definition will suffice, just as is the case where an entitlement arises for ‘men or women’ or ‘citizens or permanent residents’, or ‘people in same-sex or opposite sex relationships’. The language is plain and simple, and very unlikely to be misunderstood. No doubt there are people who can conceive of possible problems in anything, (and see problems in everything) but we do not think that the Government needs to be diverted by the remote possibility of bizarre and fanciful interpretations of the legislation from enacting plain English, common sense language to explain who is covered by the bill.

The amendments ACL has proposed represent the inclusion of only a few additional words in each relevant provision and would still deliver the financial entitlement to same-sex couples. However, such small changes would demonstrate that the Government remains committed to the intent of the Marriage Act and that its efforts to assist same-sex couples are not being made at the expense of marriage.

Parenthood

There is a long-standing presumption, which ACL wishes to see retained, that a child has one father and one mother. This biological reality is underscored by the wealth of studies showing that children do best when raised by their own father and their own mother.

British economist and Labour peer, Richard Lanyard, notes that if, by the age of a 16, a child lives with only one of its biological parents, it is likely to suffer multiple disadvantage compared to other children, including being 70% more likely to have a criminal conviction by age 15, twice as likely to leave school with no qualifications, twice as likely to become a teenage parent, 50% more likely to be doing nothing by age 20, more likely to die young, and more likely to get divorced[4].

Though the circumstances of life mean that some children are raised by only one parent (due to death, desertion or divorce), and some are raised by homosexual parents, ACL contends that these circumstances are less than ideal as they do not provide the different and complementary care of a mother and a father.

David Popenoe, Emeritus Professor of Sociology at Rutgers University in New Jersey argues that the different specific contributions of mothers and fathers must be respected:

> We should disavow the notion that 'mummies can make good daddies' just as we should disavow the notion of radical feminists that 'daddies can make good mummies'…The two sexes are different to the core and each is necessary – culturally and biologically – for the optimal development of a human being[5].

Elsewhere, Popenoe underlines the importance of a child being raised by its own mother and father:

> Based on accumulated social research, there can now be little doubt that successful and well-adjusted children in modern societies are most likely to come from two-parent families consisting of a biological mother and father[6].

The societal and, in many cases the legal presumption, is that a child has one father and one mother. Same-sex parenting is an exception to this rule and should be treated as such. We should treat this exceptional family type in an exceptional way, not change the rule itself. Unfortunately, as currently drafted, the bill does seek to change the rule itself by redefining a child as the product of a couple relationship where one partner is linked biologically to the

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[4] Richard Lanyard, Happiness: Has social science a clue? Lionel Robbins Memorial Lectures, London School of Economics 2003

[5] David Popenoe, Life Without Father: Compelling New Evidence That Fatherhood and Marriage are Indispensable for the Good of Children and Society, (New York: The Free Press 1996), p 197

[6] David Popenoe, 'Can the nuclear family be revived?' *Society,* no 36, pp28-30

child or where one partner is the birth mother[7]. Presumably this definition disinherits all adopted children.

It is a biological impossibility for a same-sex couple to produce children of their own. In certain states, a same-sex couple may choose to access fertility treatment utilising the services of a sperm donor or surrogate mother but this necessity underscores the fact that, whilst they may decide to bring a child into the world, their relationship can never, of itself, actually produce the child. A child can never be a product of a homosexual relationship in the same way that it can be the product of a heterosexual relationship. A better definition of child is needed to avoid writing a biological impossibility into Commonwealth law and to avoid giving implicit Government endorsement of practices such as altruistic or commercial surrogacy, on which the Government may not have reached a policy position.

ACL believes that, rather than trying clumsily to define the manner of a child's conception, and rather than promoting the fallacy that a same-sex couple can produce offspring, the legislation should instead focus on granting rights to those children who were substantially dependent upon the member of the superannuation scheme (a concept currently found in the Judges' Pension Act 1968). If this is not appropriate in some of the Acts to be amended by this bill, then another test could be whether the person entitled to the benefit was in a relationship with a parent of the child.

Other Comments

If the goal was to remove unfair discrimination, then ACL believes that unfair discrimination against those in other types of interdependent relationships should also be removed, allowing such people to opt-in to access one another's superannuation should they wish.

ACL is pleased that this bill deals with one area of law reform only, public superannuation schemes, allowing comments to be specifically tailored and allowing politicians to vote on the basis of this one issue. We remain concerned about the next tranche of legislative reform which we understand to be omnibus legislation covering a large number of different reforms. It is quite possible, even likely, that some groups and individuals will support some of these measures and oppose others but the nature of an omnibus bill does not allow such nuanced viewpoints to be easily expressed.

[7] A paraphrase based on various references in the bill and as summarised by the Attorney-General in his second reading speech

ACL urges the Government not to proceed with its upcoming omnibus legislation but instead to address areas of unfair financial discrimination against same-sex couples in specific legislation relevant to the benefit in question, thus allowing each case to be investigated and debated on its own merits rather than as part of a catch-all package.

Conclusion

The bill meets some of ACL's criteria but fails certain key points relating to marriage and parenthood and the preservation of the unique terminology that describes them. ACL's recommendations on these points are outlined above. It is our strong recommendation that the bill not proceed until these small but very significant amendments are made.

ACL National Office
July 2008