SUBMISSION TO

THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE SAME-SEX RELATIONSHIPS (EQUAL TREATMENT IN COMMONWEALTH LAWS - SUPERANNUATION) BILL 2008

from

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My background

I am a Professor of Law and was Chair of the Family Law Council, a statutory body which advises the federal Attorney-General, from 2004-2007. Prior to that (from 2001-04) I was a member of the Council. I also chaired the Ministerial Taskforce on Child Support (2004-05) that led to the new Child Support Scheme that was introduced recently. I have written widely on family law issues and am a member of the Executive Council of the International Society of Family Law.

I am writing this submission in my personal capacity.

Summary of position on the Bill

The Bill's intent is entirely proper and I support it, however, the drafting of the Bill leaves much to be desired, and it is appropriate for the Senate, in its historic role as a House of review, to insist that the Government resolve these serious drafting problems before proceeding with the enactment of the Bill.

The parliamentary drafters have adopted a minimalist approach to drafting these amendments. That is, they have sought to make amendments to the existing legislation using as few different words as possible to the Acts they are amending. Thus 'marital relationship' becomes 'couple relationship' and a child 'born of a relationship' leads to the addition of 'a child who is a product of a relationship'.

The drafters may have saved a few words for the Statute Book, but these minimalist amendments will cause a legal quagmire, and have also raised serious concerns of a moral and social nature which could easily be resolved with less minimalist drafting to reflect the different context of the relationships now sought to be covered by the Bill.

The problems, with the definition of 'couple relationship' and 'product of the relationship', are explained in this submission and solutions are proposed for the Government to be able to redraft the Bill.

For ease of reference, I have taken the Judges' Pensions Act 1968 as the example of the legislation sought to be amended. It seems to be typical of much of the legislation in this area which is covered by the Bill, and the amendments proposed for this Act can be transposed to the other Acts which the Government seeks to amend.

Recommendations

1. That the term *couple relationship* be replaced with references to being in a "married or de facto relationship".
2. That the definition of de facto relationship essentially follow the definition currently proposed for a couple relationship as far as it concerns those couples who are not legally married. A proposed text for the legislation is contained herein.
3. That the Government abandon the terminology of 'product of the relationship' as being unworkable and reconsider, in relation to each piece of legislation to be amended by the Bill, whether there is any need to use some similar term in order to fulfil the purposes for which the legislation is enacted. Where some inclusion of children is needed, the Government should use either the test of whether the child was dependent upon the person entitled to the pension or superannuation benefit, or whether a person was in a relationship with a parent of that child, as is appropriate in the context of each statute.
4. That the Government give consideration to a comprehensive review of Commonwealth law, examining how family relationships are defined and for what purposes across Commonwealth law in order to have a consistent approach in legislation, based upon a coherent family policy that recognises both the diversity of family forms in Australia, and the differences between different kinds of family structure.

1. The definition of 'couple relationship'

The drafters have sought to replace the words 'marital relationship' with 'couple relationship', and 'husband and wife' with 'partner'. At present, and rather confusingly, the superannuation/pensions legislation typically refers to a 'marital relationship' to include people in heterosexual de facto relationships who are not married. For example, here is the current definition from the Judges' Pensions Act 1968, s.4AB:

Marital relationship

(1) For the purposes of this Act, a person had a ***marital relationship*** with another person at a particular time if the person ordinarily lived with that other person as that other person's husband or wife 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 husband or wife 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 husband or wife 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 person's husband or wife for a continuous period of less than 3 years up to that time and the Attorney-General, having regard to any relevant evidence, is of the opinion that the person ordinarily lived with that other person as that other person's husband or wife 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 marital 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;

(c) the persons had a child who was:

(i) born of the relationship between the persons; or

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

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

(5) For the purposes of this section, a person is taken to be living with another person if the Attorney-General is satisfied that the person would have been living with that other person except for a period of:

(a) temporary absence; or

(b) absence because of special circumstances (for example, absence because of the person's illness or infirmity).

The amendments change ‘marital’ to ‘couple’ and remove the language of husband and wife. This makes sense, perhaps, as a form of minimalist amendment to broaden the scope of the law to include same sex relationships, but it has social implications that perhaps the parliamentary drafters have not considered. Does the Parliament really want so to downgrade marriage that it is lost within the variety of forms of couple relationship?

There are many good social reasons why the Parliament should seek to maintain marriage as a distinct and honoured legal status in legislation, given the much greater instability of non-marital cohabiting relationships throughout the western world. Marriage is almost entirely lost in this Bill. It is not only absorbed into a broader definition of couple relationships, but being legally married is just one among many ways of proving that you are in such a relationship.

The experience of Canada is instructive in this regard. At one stage. the Law Commission of Canada proposed the downgrading of marriage and put forward the idea that Canadian federal legislation should just refer to couple relationships in a generic way: Law Commission of Canada, *Recognising and Supporting Close Personal Relationships Between Adults* (2000).Their proposals met with much resistance from the Canadian people and were eventually abandoned. The drafters of this Bill have probably not thought through the important social implications of losing marriage as a distinctive legal status within a broader definition of couple relationships. No doubt they thought that they were just giving effect to the intent of the Government in the most simple way, given the structure of the legislation that the Government sought to amend.

This is not the Bill in which to make a major social statement that the Government no longer considers marriage to be important. I doubt that this is the view of the Government in any event, but even if there are those in the Government or Parliament who do not regard legal marriage as important and significant, there must be a better time and place to debate that very important moral and social question. A Bill concerned with same sex superannuation entitlements is not the best vehicle for engaging in that debate.

The problem can readily be resolved by replacing the 'couple relationship' terminology with reference to 'married or de facto relationships'. This is the Judges' Pensions Act 1968, s.4AB and ff, with my proposed revision:

s.4AB: Marital relationship

> For the purposes of this Act, a person had a ***marital relationship*** with another person at a particular time if the person was legally married to that other person.

s**.4ABB: De facto relationship**

> (1) A person is in a de facto relationship with another person for the purposes of this Act 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.
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> (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:
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> (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
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> (b) the person had been living with that other person as that other person's

partner for a continuous period of less than 3 years up to that time and the Attorney-General, 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.

(3) For the purposes of this Act, a de facto 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 had a child who was:

(i) born of the relationship between the persons; or

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

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

(6) For the purposes of this section, a person is taken to be living with another person if the Attorney-General is satisfied that the person would have been living with that other person except for a period of:

(a) temporary absence; or

(b) absence because of special circumstances (for example, absence because of the person's illness or infirmity).

Then whenever the term 'marital relationship' currently appears, the words 'marital or de facto relationship' should be used instead, rather than 'couple relationship'. This is very close to the present version in the Bill, but it avoids causing all the concern that this Bill has caused. It is a drafting approach that could equally be used in s.8A of the Superannuation Act 1976 and no doubt in other legislation as well.

2. Children as 'product' of the relationship

This is again the result of a minimalist approach to drafting, trying to keep as close as possible to the existing form of the legislation. The Bill also adopts a minimalist approach to the inclusion of children. There is not a completely consistent use of language throughout the Bill. In the Judges' Pensions Act, the term that is used is 'the product of the relationship *between* the persons'. In the Superannuation Act s.3, definition part, the proposed terminology is "a child who is the product of the person's relationship *with* that partner," but another amendment to the same section uses the word 'between', (proposed s.3(10)) and this is also used in s.8A(4)(c) and elsewhere. I will assume that the word 'between' is intended to be used consistently throughout this Bill.

By way of comparison, in the Family Law Amendment (De Facto Financial Matters

And Other Measures) Bill 2008 (proposed amendment s.90RB), an entirely different kind of definition, with different consequences, is used for 'children of a de facto relationship' based upon an extension to s.60H of the Family Law Act. Presumably a different drafter was responsible for that Bill. There is a need for consistency in Government policy.

The term 'product of the relationship' seems to be derived from another term already used in the superannuation/pensions law, which is a child 'born of' a relationship. Thus the drafter has simply added something as close to 'born of the relationship' as he or she can.

(a) Do we need the amendment at all?

On my reading of the legislation, I am not at all convinced that the Government needs this 'product of the relationship' definition in order to achieve its policy intent at all:

(i) The definition of children of a couple relationship is redundant: The definition of child of a marital relationship in the current version of the Judges' Pension Act appears to be entirely redundant. The term appears nowhere else in the Act. The *concept* of a child of a marital relationship has some utility in s.4AB, but the term is not actually used therein, and 'child' for these purposes is redefined there. So the definition in s.4 should really be repealed, not amended.

(ii) The term is not needed in s.4AB: The only reason that 'child' needs to be defined for the purposes of s.4AB is to provide one way of establishing whether the couple are in a committed relationship. It is really not necessary here, as there are plenty of other forms of evidence to which the section refers, that can establish the existence of a couple relationship.

(iii) It is not needed for the definition of an eligible child. The importance of establishing a parent-child relationship is really for the purposes of s.4AA. This defines an 'eligible child' who may benefit from a judge's pension entitlements. However, an eligible child is either a child of the judge *or* a child who qualifies because the Attorney-General is of the opinion that:

- at the time of the death of the deceased Judge, the child was wholly or substantially dependent on the deceased Judge; or
- but for the death of the deceased Judge, the child would have been wholly or substantially dependent on the deceased Judge.

So if the issue arises that a child who is not the biological child of a judge is a child who is being brought up in the same sex household of the judge, then the Attorney-General could apply the substantial dependency test without having to get into the interpretative quagmire of which children are, and are not, a product of the relationship.

In the time available to me, I cannot track through whether the definition of 'product of the relationship' is more needed in other legislation than in the Judges' Pensions Act, but I note for example that in the Superannuation Act 1976, the legislation already makes reference to "a child of the person with whom the pensioner had that

marital relationship" (see eg. s.110(7A)(b)(iii)) and language of that kind would cover a co-parent without the need to get into messy definitions of the 'product of a relationship'. Another option is to include children for whom a person has parental responsibility, since gay and lesbian parents can and do apply for such recognition from the courts under the Family Law Act 1975.

(b) Problems with the definition of 'product of the relationship'

'Product' is an ugly word. It suggests that children are things that are made, like household appliances or widgets. Beyond the ugliness of the language, this attempt to cover children who are in some way associated with same sex unions but where the contributor does not have a biological connection to the child and nor has formal recognition as a parent by court order, is fraught with difficulty. The definitions used in the legislation do not provide any clarity about which children are meant to be included within the scope of the legislation and which are not. This lack of clarity is likely to lead to expensive litigation, perhaps involving resort to the appeal courts to make rulings on the meaning of the legislation. The Parliament should seek to avoid that by making its intent clear.

As a professor of law, I have very little idea what the Government intends by the language it has chosen to cover children who have a connection with a same-sex relationship. I can only offer, at best, some possible interpretations. It is at least clear from the Bill that the Government only intends to include children who have a biological connection with at least one of the partners.

So what children living in same sex relationships are included in the definition? Children born through normal heterosexual relationships are clearly not within the scope of the legislation. It is not uncommon for gay men to have children from a marriage, or some other heterosexual relationship. At a later stage, they may come out as homosexual and form a same-sex relationship. In a situation where the gay father has primary care of the child (and this is not at all unknown), the child may live for some years in a same-sex household. However, the child is clearly not the product of the same sex relationship. He or she is the product of the heterosexual relationship.

There the certainty ends. The word 'product' suggests the outcome of a process, and that both partners in that relationship have had some involvement in 'producing' or creating it. This is reinforced by the word 'between', which suggests that in some way both same-sex partners have been involved.

Consider the following fact situations which are all taken from the cases decided by the Family Court of Australia in the last few years:

1. A man agrees to help a lesbian couple have a baby by having normal vaginal sexual intercourse with one of the lesbian partners. Is this child a product of the relationship between the man and the woman, or the woman and the woman? The ordinary meaning of the words would suggest that the child is the product of the male-female relationship. The child is in no sense the product of the woman's relationship with the other woman, since the other woman has had no involvement in the 'production' of that child. By way of contrast, the man and woman have clearly been in a sexual relationship leading to the conception and birth of the child

(and this may have involved much more caring and intimacy than a one night stand between heterosexuals - this relationship may have lasted for some weeks or even months before the child was conceived).

2. The participating adults are the same, but the child is conceived in the privacy of the home by inserting the semen into the woman by means other than vaginal intercourse. Here there is no sexual relationship between the biological father and the mother. There is, of course, no meaningful sense in which the child was the 'product' of the female-female relationship here either. The child was certainly not created 'between' them. However, clearly it must be the intent of the Government to recognise the child's relationship with both lesbian partners (given the name of the Bill), so perhaps it intended to create a legal fiction that the child should be deemed to be the 'product' of that relationship. That term could only be used in the most non-literal way, because as a matter of scientific fact, the lesbian partner who was not the mother, did not help to 'produce' the child in the sense of having any essential role in the creative process, and nor did anything happen 'between' the two of them that led to the creation of the child in a physical sense.

These cases illustrate the point that the Government's Bill involves creating arbitrary and capricious distinctions between children in lesbian relationships based upon the fine details of the child's conception. A child born for the purposes of being raised by a lesbian couple and conceived through vaginal intercourse is probably not a product of the relationship, whereas if the child is conceived with assistance from a common kitchen implement, it is. Hundreds of thousands of dollars could turn on the use or otherwise of that kitchen implement to aid impregnation.

3. Two men in a same sex relationship travel overseas and commission a surrogate mother on a commercial basis, paying her 'expenses' of $75,000. One of the men provides the semen through which the child is conceived. After the birth, they bring the child, a little girl, back to Australia. This example raises the same interpretative issues as before. The child was clearly created with the intention that she be brought up by the gay couple. Yet it is hard to see that she is a 'product' of their relationship or that the child was created *between* them. She was conceived *between* the biological father and the surrogate mother.

Again, perhaps the Government intended to use the term 'product of the relationship' as a legal fiction and intended to include this situation as well. However it is clear from the proposed amendment in the Family Law Amendment (De Facto Financial Matters And Other Measures) Bill 2008 (proposed amendment s.90RB) that the Government does not intend to include children born for the purpose of being raised by same sex male couples within the definition of 'children of a de facto relationship' for the purposes of that legislation,[1] so it is not entirely clear what the Government intends in this legislation.

Consider also another scenario known to me: a lesbian woman decides to have a child

[1] Section 90RB operates to give an extended definition of s.60H of the Family Law Act for the purposes of that part of the Act. However, it only recognises the partner of a child born to a *woman*, and so it includes lesbian relationships but not gay male relationships.

and goes to a clinic where she is artificially inseminated. About eight weeks into the pregnancy, she begins a relationship with another lesbian woman. The child is born into that relationship and both women are involved in nurturing the child for a period. Was the child the 'product of the relationship'? Under the proposed amendment to the Family Law Act by the Family Law Amendment (De Facto Financial Matters And Other Measures) Bill 2008, such a child would not be a child of the lesbian de facto relationship, because the artificial conception procedure was not carried out with both parties' consent (they were not a couple at the time). I really have no idea what the result would be under this Bill.

The language of children being a 'product of the relationship' of course misses the point. There is no good reason in public policy to pretend that clay can be turned into gold, that pigs can fly or that two women or two men can produce a child. None of these things are possible, and they are not made possible because Parliament deems them to be possible. There may, however, be very good reasons of public policy to recognise, for certain purposes, that a person who helps *nurture* a child within a same sex relationship may be important to the child and the child important to them.

It would be much more sensible to focus on nurture and dependence rather than 'production' as the basis of Government policy. Whether children are substantially dependent on an adult, and have been brought up within that household, ought to be the relevant criteria for financial purposes such as defining entitlements to shares of a pension. I note in passing that

(a) there does not seem to be any coherent government policy on this (for example the definition of eligible child in the Superannuation Act appears to require a biological connection whereas in the Judges' Pension Act it does not);

(b) Whatever policy the Government adopts in this regard to children who are associated with a same-sex relationship ought to be applied equally to stepchildren, since it is hard to see any policy justification for including the lesbian co-parent mother but not the heterosexual stepparent mother when it comes to financial benefits.

c) *Endorsing the manner of children's conception*

It may be impossible to recognise children of some same-sex relationships without implicitly endorsing the manner of the child's conception. That raises some profound moral and social issues, and also gives rise to some human rights concerns.

The problem may be illustrated by considering again the circumstances in which a child could be said to be the 'product' of a male same-sex relationship. There is actually only one way this can occur, if it can occur at all, and that is through altruistic or commercial surrogacy, involving the provision of semen by one of the gay partners: see the third example given above. If the Government is effectively endorsing surrogacy by saying that children who are the 'product of' a male same-sex relationship can be recognised for the purposes of superannuation and no doubt many other purposes, where does that leave it in formulating a coherent policy on surrogacy? There are huge debates about commercial surrogacy. What are the human rights implications if the surrogate mother was living in a third world country and

entered into the surrogacy arrangement under physical or economic duress? There is no indication that the Government has considered the moral and social issues involved in commercial surrogacy before preparing this legislation, yet if it endorses it implicitly by this legislation, it will be very hard for the Commonwealth to argue against it in other contexts that may arise in future.

Conclusions

The brief of the Senate Committee, in the context of this Inquiry, is to review the text of the Superannuation Bill. The issues raised in this submission have much wider implications, given that the Government has announced its intention to bring forward to Parliament an omnibus Bill with amendments to many other statutes concerning same-sex relationships.

It is important therefore that the Senate insists on ensuring that the problems in this Bill are rectified, and that the Government revisits the issues to ensure that the Bill gives effect to its policy intent without creating a legal quagmire. What is really needed is a thorough review of family policy in Australia, looking at how family relationships are defined and for what purposes across Australian law in order to have a consistent approach.