

SUPPLEMENTARY 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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During the course of our discussions in Sydney on August 5th, the Chair of the Committee, Senator Crossin, asked me to indicate how I would amend *the Parliamentary Contributory Superannuation Act 1948* in particular, to avoid defining children in some way that involves judges having to make fine, (and probably capricious) distinctions between children based upon the manner of their conception or birth into same-sex relationships.

1. No need to define children as products of a relationship

An examination of this Act, just like the Judges' Pension Act, reveals that there is no need whatsoever for the Parliament to insert an extra definition that a child is a 'product of the relationship'. This definition, in the current version of the Bill, serves two functions:

1. An evidential function, to help prove the existence of a couple relationship.
2. As a criterion for eligibility for benefits when neither the former member of Parliament, nor his or her partner, is alive.

a) The evidential function

I propose that instead of adding the term 'product of the relationship', an additional means of proving a de facto relationship should be that "both persons had parental responsibility for a child by operation of law or by order of a court". This encompasses situations where same sex partners have parental responsibility by virtue of a state or territory enactment or by going to the Family Court or Federal Magistrates Court for orders under the Family Law Act. It is thus a very inclusive definition.

This addition would fulfil a similar function to the proposed amendment in the current Bill, but even without it, a de facto relationship between same sex couples could still be shown by providing relevant evidence that includes, but is not limited to, evidence establishing any of the following:

- the person was wholly or substantially dependent on that other person at the time;
- 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
- the persons had a child who was adopted by the persons during the period of the relationship
- the persons jointly owned a home which was their usual residence.

b) *Eligibility for benefits*

If, as the Bill proposes, the definition of 'spouse' in the Act will now encompass same sex de facto partners, then a child of the couple is already included, by virtue of that amendment alone, in the category of children who will benefit from the deceased person's superannuation. This is because the key definition in the Act is that the deceased:

“was or is survived by a child of the deceased person **or of a former spouse of the deceased person**, being a child who:

- (i) was dependent on the deceased person; and
- (ii) is an eligible child.”

That is, it already covers stepchildren (de iure or de facto). It follows that by extending the meaning of the word 'spouse' for the purposes of the Act to include same sex partners:

- if the female deceased was in a same sex relationship and was the biological mother of the child, then the child will benefit
- if the female deceased was in a same sex relationship with a woman who was the biological mother of the child, then the child will benefit
- if the male deceased was in a same sex relationship and was the biological father of the child, then the child will benefit
- if the male deceased was in a same sex relationship with a man who was the biological father of the child, then the child will benefit.

This achieves exactly the same result as under the current Bill, which requires that one of the partners be the biological parent of a child.

2. Other Acts of Parliament

I am sure that by going through all the other Acts of Parliament amended by this superannuation Bill a similar approach could be achieved. It requires simply:

- (i) looking at each Act to determine what is the purpose of defining 'child' in that Act
- (ii) seeing whether by redefining 'de facto relationship' or 'spouse' to include same sex partners, children of same sex relationships are already included by virtue of that amendment
- (iii) if they are not, making amendments that ensure equal treatment by either

- (a) referring to a child of the deceased person or of a former spouse of the deceased person and/or
- (b) defining a child as eligible if he or she was substantially dependent on the deceased.

3. Amending the Parliamentary Contributory Superannuation Act 1948

Here is a complete set of amendments to this Act needed to achieve the intentions of the Government and to avoid the minefields of collapsing marriage into a generic term ‘couple relationship’ and trying to define which children are the ‘product’ of a same sex relationship.

I have set them out more fully here than Parliamentary Counsel might do, for the purposes of clarity; however there are actually fewer amendments needed to the legislation on my approach than under the current Bill.

1. Subsection 4(1) (definitions)

Insert new definition:

partner: a person is the *partner* of another person if the two persons have a relationship, other than a marital relationship, as a couple (whether the persons are the same sex or different sexes).

2. Subsection 4(1) (definitions)

Insert new definition:

spouse has a meaning affected by section 4C.

3. Section 4B

Omit the section and substitute:

s.4B: 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.

4. New Section 4BA

Insert new section

s.4BA: 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.

(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 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' 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; or

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

(iii) for whom both persons had parental responsibility by operation of law or by order of a court;

(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).

5. Section 4C

Omit subsections (2) and (3) and substitute as follows:

For the purposes of this Act, a person is a spouse who survives a deceased person if:

(a) the person had a marital relationship with the deceased person at the time of the death of the deceased person (*the death*); or

(b) the person had a de facto relationship with the deceased person at the time of the death of the deceased person (*the death*);

and

(b) in the case of a deceased person who was a retired member at the time of the death:

- (i) the marital or de facto relationship began before the retired member became a retired member; or
- (ii) the marital or de facto relationship began after the retired member became a retired member but before the retired member reached 60; or
- (iii) in the case of neither subparagraph (i) nor (ii) applying—the marital or de facto relationship had continued for a period of at least 5 years up to the time of the death.

(3) In spite of subsection (2), a person is taken to be a spouse who survives a deceased person if:

(a) the person had previously had a marital or de facto relationship with the deceased person; and

(b) the person did not, at the time of the death, have a marital relationship with the deceased person but was legally married to the deceased person; and

(c) in the case of a marital or de facto relationship that began after the deceased person became a retired member and reached 60—the relationship began at least 5 years before the deceased person's death; and

(d) in the Trust's opinion, the person was wholly or substantially dependent upon the deceased person at the time of the death.

6. Paragraph 19AA(2)(d)

Insert 'de facto' after 'marital'.

7. Paragraph 19AA(2B)(a)(i)

Insert 'de facto' after 'marital'