

COMSUPER ACTION COMMITTEE

SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE REGARDING SAME SEX RELATIONSHIPS(EQUAL TREATMENT IN COMMONWEALTH LAWS - SUPERANNUATION) BILL 2008.

1. Comsuper Action Committee (COMSAC)

COMSAC was established in 2006 when I discovered that the Howard Government was not taking any further action to implement the promise, given by the Prime Minister and Assistant Treasurer, Senator Helen Coonan, in June 2004 to recognize same sex couples and other interdependent relationships for superannuation death benefits in all Commonwealth defined benefit superannuation schemes.

I first started lobbying for this reform when I retired in 1988. Neither of the major political parties was interested. In 2004 I discovered, by accident, that the Howard Government had recognized same sex couples for superannuation death benefits in the Superannuation Choice Bill. I thought the problem was solved, until I discovered that it only applied to private sector funds. Reading Hansard I discovered that Senator Coonan had promised the Democrats that the Government would immediately extend the reforms to the Commonwealth's defined benefit superannuation funds. At considerable expense under FOI, I obtained a copy of the letter Senator Coonan sent out, with John Howard's approval, on June 22nd.2004, to Senator Minchin, Mr. Ruddock and Dr. Nelson, as Ministers responsible for the Government's superannuation schemes, asking them to take immediate action to ensure that superannuation funds in their portfolios conformed with the Government's new policy of recognizing same-sex couples and other interdependent relationships for death benefits. By the beginning of 2006 very little work had been done and the momentum for reform lapsed, aided by the fact that the two Democrat Senators who had promoted the reform, Senators Grieg and Cherry, were no longer in Parliament to monitor its progress.

Armed with Senator Coonan's letter I set up the COMSUPER ACTION COMMITTEE to press Ministers for implementation of the Government's promise. Extensive correspondence was carried on with Prime Minister Howard, Senator Minchin and Mr. Ruddock, with no effect except the oft-repeated excuse that the reform was "technically difficult and had serious budget implications". Prompted by COMSAC, Senator Sherry and Senator Murray repeatedly raised the issue at Senate Estimates hearings throughout 2006 and 2007, with Senator Minchin initially denying that the Government had ever made a commitment to carry out this reform. The then Member for Leichardt, Warren Entsch, took up the cause and used the case of myself and my partner Arthur Cheeseman, as an example of the financial injustices suffered by same-sex couples, to try and persuade the Howard Government to remove this and other forms of discrimination.

2. Personal History

I will be 80 in September. As a former ABC Senior officer I receive a Commonwealth Defined Benefit indexed pension, paid fortnightly. My partner Arthur Cheeseman is 76 and worked as a pharmacist under the Shop Assistant's award, which did not include superannuation. If I die first he will not be entitled, under existing laws, to the 2/3 reversionary pension which a wife or heterosexual de facto partner would receive.

My partner and I have lived together since 1967 (over 40 years) and have always owned our residence in common and had joint bank accounts and mortgages. While we both worked we lived on Arthur's weekly cash wages so that my salary went into the bank to pay the mortgage and bills. I also paid extra money into superannuation so as to get the maximum pension. This means that my pension belongs to both of us. It is the core income we have to live on. If I predecease Arthur, before this new Bill is passed into law, he will lose this core source of income, which would continue to be available to a wife or heterosexual de facto partner through the reversionary pension.

3. Discrimination

The discrimination involved in the existing laws is not something that will only affect Arthur in the future. We are already suffering financial disadvantage because of this discrimination. For many years our financial planning has been adversely affected. Because we could not rely on the fact that this discrimination would be removed in my lifetime - despite John Howard's promise of reform - we have had to tie up a very large sum of money in investments to make sure that Arthur is adequately provided for and doesn't have to rely on a social security pension, if I should die first. If we knew for certain that Arthur would receive the 2/3 reversionary pension, these investment funds would be freed up for other purposes.

We live in a modest one-bedroom flat; we have a simple Toyota Corolla car; we live comfortably but carefully. Once this reform is implemented our financial situation will be substantially improved immediately.

4. Health

Arthur has macula degeneration and his eyesight is deteriorating; he has difficulty reading; he can't use a computer or do phone banking; he had to give up studying Japanese because he couldn't see the characters. In a couple of years he will be technically blind.

I do not want him to be left on his own without a regular fortnightly pension, having to manage an income derived from investments with little or no sight to supervise them. This is what is behind my efforts and my passion to see this reform implemented. Everyday that it is delayed adds to my concern that my partner of over 40 years will be left in this situation. People around 80 are vulnerable, no matter how good their health appears to be. In the past two years six friends around my age have suddenly died. A retired RAAF Wing Commander, Neil Murray, an active member of COMSAC, who is aged 65, has suddenly suffered major heart failure and his situation is precarious. He is desperately concerned for the welfare of his same sex partner of over twenty years.

For these reasons COMSAC was very grateful that the Attorney-General, Robert McClelland, agreed to our suggestion that in implementing the HREOC Report priority should be given to reforming the Commonwealth Superannuation Funds by July 1st. 2008, and we are extremely disappointed that the Opposition has added to the anxiety of many elderly and frail superannuants by delaying passage of these reforms for several months for reasons which have no foundation.

5. Opposition Concerns

In speaking to this Bill in the House on June 4th.the Leader of the Opposition, Dr.Nelson, asked the Senate Legal and Constitutional Affairs Committee to examine the Bill “with a view to ensuring that :

“a.The centrality of marriage is not devalued whether by the use of inappropriate language or otherwise.

b.The rights and status of children are properly protected.

c.The rights and status of people in interdependent relationships other than same-sex relationships are recognized and properly protected.”

COMSAC offers the following comments on each of these issues:

6.Centrality of Marriage

COMSAC fully supports the SAME SEX RELATIONSHIPS BILL in its present form because it gives full equality to same sex-couples, as recommended by the Human Rights and Equal Opportunity Commission (HREOC)Report.

COMSAC fully agrees with the terminology of the Bill which deletes the words “husband”, “wife” and “spouse” (which are the words causing the discrimination) from superannuation laws and replaces them with the term “couple relationship” which includes married couples, de facto couples and same-sex couples - a simple, logical solution. In the existing Commonwealth superannuation laws married couples and de facto hetero-sexual couples have the same status, are treated equally and receive the same reversionary death benefit entitlements; this does not devalue marriage. Why should the addition of same-sex de facto couples to this list be seen as threatening or detracting from the status of marriage, particularly when the legal definition of marriage is quarantined in Definition of Marriage Act.

Senior Shadow Cabinet Ministers, Malcolm Turnbull and Christopher Pyne gave unqualified support to the Bill and expressed no concern on these grounds. Liberal MP, Petro Georgiou was explicit in his rejection of this reason for delaying the Bill : **“With respect to any concerns that this Bill devalues marriage, I have to say frankly that these concerns are unfounded.”**

7.The Rights and Status of Children

COMSAC and its associates include many married couples with families and grandchildren.All of these fully support the Bill in its present form because it recognizes the reality and diversity of modern family life in Australia and gives children of all family types equal access to entitlements.

8.Interdependent Relationships

The central recommendation of the Human Rights and Equal Opportunity Commission Report “SAME-SEX: SAME ENTITLEMENTS” Report is to **“Introduce an inclusive definition of de facto relationship into Federal law (4.6.2)**. This Bill fully achieves that aim with regard to Federal Superannuation Law.

The Report states that HREOC has **“no strong preference for the term ‘de facto relationship’ above terms such as ‘domestic relationship’ or ‘significant**

relationship' “. It can reasonably be assumed that HREOC would fully approve of the “couple relationship” terminology used in the Bill, which fully achieves the aims of the Report.

The HREOC Report explicitly notes that “ **The ‘interdependency category’ does not give full equality to same-sex couples (18.3.2)**” because it mischaracterizes genuine same-sex couples as different and inferior to a genuine opposite-sex couple, and, further, it places more onerous criteria on same-sex couples than on opposite-sex couples to prove entitlements.

Like the Opposition, the Comsuper Action Committee highly esteems the examples of interdependent relationships cited by Dr. Nelson, such as “two unmarried sisters living together” or “ a woman who gives up marriage and children for life to care for an invalid brother” and agrees that such interdependent relationships are deserving of support and encouragement from the government. However, we submit that such support is not based on the principle of removing sexual discrimination, nor on principles of social justice and equality, and therefore has no place in this Bill. Rather, it is a welfare measure. In advocating such welfare measures, the Opposition has an obligation to provide evidence of the number of people in such relationships and the cost of providing this welfare measure - something which it discovered it was unable to do when in government. We agree with the Attorney-General’s proposal that the proper place to consider support for such interdependent couples is in the House Committee examining the needs of carers.

COMSAC is concerned that the Opposition’s real intention in raising the question of the needs of interdependent couples is to provide a means of disassociating same-sex couples from opposite sex de facto couples and married couples. The Oppositions aim seems to be to create a separate generic category called interdependent relationships, in which to place same-sex relationships and other carer style relationships, such as the “two unmarried sisters”. It is puzzling that Dr. Nelson, who is a doctor, and whose brother died of aids, does not understand that gay relationships are sexual relationships and have nothing in common with platonic, asexual, carer-type relationships, such as the “two unmarried sisters living together”. As the evolution of the Coalition’s policy on this matters shows, the Opposition continues to be uncomfortable with the sexual connotations of same-sex relationships. Liberal MP, Danna Vale, summed up the Opposition’s lack of understanding and empathy with same-sex couples, when she told the House : **“Why should such relationships depend on a definition that describes the sexual nature of the relationship ? At this juncture one can honestly ask: what has sex got to do with it?”**

9. The Origins of the Oppositions Policy

Some Senators may not be aware of the origin of the Opposition’s policy of extending superannuation death benefits to same-sex couples via recognizing them as interdependent relationships. The policy goes back to 2003 when the then Minister for Revenue and Assistant Treasurer, Senator Coonan, introduced the Superannuation

Choice Bill. The Opposition opposed the Bill, and much to Senator Coonan's and Prime Minister Howard's chagrin, the Democrats refused to pass the Bill in the Senate unless it was amended to include same-sex couples. After twelve months negotiations with Senators John Cherry and Brian Grieg, Senator Coonan finally came up with the idea of sanitizing same-sex relationships by calling them "interdependent relationships" and associating them with more respectable couples, such as "two elderly sisters residing together" or "the woman who gives up marriage and children for life and cares for an invalid brother". Although having reservations about the appropriateness of the terminology, the Democrats agreed to pass the legislation, as it was the only way of getting the Howard Government to give some form of recognition and entitlements to same-sex couples.

When the Bill was finally debated and passed in the Senate on June 22nd.2004 the Democrat Senator John Cherry asked Senator Coonan to give an undertaking that the recognition of same-sex couples in the Bill, which only applied to private sector superannuation funds, would immediately be extended to the Government's own superannuation funds, such as the Comsuper Fund. Senator Coonan gave this undertaking, and as an indication of the Government's commitment to this reform, she told the Senate that she would be writing that same day to the Ministers responsible for Commonwealth super funds asking them **"to ensure that superannuation arrangements within your portfolio be reviewed with a view to ensuring consistency with the Governments policy to recognize interdependent relationships for superannuation death benefits"**. The letter notes that the definition of interdependent relationship includes an element of "personal care". Thus was the "interdependent relationship policy" set in stone.(cf attachment 1)

In response to Senator Coonan's letter, the Dept. of Finance and Administration set up a working party and issued a discussion paper for reforms to the Commonwealth Defined Benefit Superannuation Scheme administered by Senator Minchin. In order to budget for the recognition of "interdependent relationships" for Comsuper death benefits, DoFA, in September 2004, commissioned Mercer Consulting to provide actuarial estimates of the numbers of same-sex couples and other interdependent couples in the Comsuper Scheme. This initial report from Mercer Consulting was revised and brought up to date in 2006.

At Senate Estimates hearing throughout 2006 and 2007, the Shadow Minister for Superannuation, Senator Sherry, Democrat Senator Andrew Murray, and Green Senator, Kerry Nettle, repeatedly asked for copies of the Mercer Report and budget costs for this reform, because COMSAC suspected that the costs were being exaggerated as an excuse for not carrying out this promise. FOI requests for the Mercer reports by Senator Sherry and myself were refused.

Finally at the May 2007 Senate Estimates Senate Minchin revealed that the estimate for the unfunded liability over a ten year period for the reform was two billion dollars, split 50/50 between same-sex couples and other forms of interdependent relationships. Here was a clear admission by Senator Minchin that the Mercer Report had been unable to estimate the number of other forms of interdependent couples and had simply doubled the actuarial estimate of the number of same sex couples, for which there was a reliable actuarial basis. Senator Minchin also admitted under questioning that the costs of the

reform were not as high as the Government had expected, but that “other considerations” were delaying what he called “the controversial reform”. It is understood he was referring to the backlash which the Government feared from the Australian Christian Lobby and similar groups.

The Howard Government finally considered its response to the HREOC Report at a Cabinet meeting on August 21st. 2007. After a two hour discussion Cabinet was unable to agree to a position and the matter was left to Prime Minister Howard to decide. At a meeting with representatives of COMSAC in his electoral office on Sept 21st. Malcolm Turnbull advised us that the Government had changed its position and had moved away from the “interdependent relationship” formula for delivering same-sex entitlements in favour of giving same sex couples equal status with heterosexual de facto couples. Malcolm explained that the reason for this change was that it was impossible to calculate the additional number of interdependent relationships, other than same-sex couples, and therefore to calculate the cost, -another pointer to the findings of the Mercer Consulting actuarial report. This conversation with Malcolm Turnbull was placed on record in a letter from COMSAC to Dr. Nelson, copied to Malcolm Turnbull. Dr. Nelson acknowledged COMSAC’s letter but did not deny the account of this conversation; neither did Mr. Turnbull when interviewed about it by a journalist from “The Australian”. (cf attachment 2)

It was therefore surprising that when Malcolm Turnbull announced, in the last stages of the election campaign, that the Government would, if re-elected, introduce legislation to recognize same sex couples for Commonwealth superannuation death benefits, the Government again reverted to the interdependent relationships terminology. The official press release issued by Senator Minchin did not even contain the words “same-sex couples”, possibly for fear of upsetting ultra conservative Christian voters.

Perhaps it was not so surprising that the Coalition reverted to the “interdependent relationships” formula, because it was reported in “The Australian” on 13th. September 2007 that Prime Minister Howard had told the party room that he was adamant that “gay and lesbian couples should not be given the same rights as de facto heterosexual couples”

By attempting to overthrow the central recommendation of the HREOC Report, namely to equate same couples with opposite-sex de facto couples, which this Bill elegantly achieves, and by closeting same-sex couples in amongst other interdependent couples, the Opposition is not only harking back to the social attitudes of a bygone era, which was squeamish about homosexuality, but is being economically irresponsible by trying to impose on the Rudd Government a formula for delivering superannuation death benefit entitlements which it knows, from its own experience in Government, cannot be properly budgeted for and could have the potential to double the annual cost of this reform and double the unfunded liability attached to it.

10. Public Service Practice

While at the ABC I was the first Senior Officer to sign a statutory declaring that I was living in a de facto relationship with a same-sex partner, and received travel allowances based on the rate for married officers.

In 1999, as part of my campaign to convince the Government to change the Comsuper Act to recognize same-sex couples, I conducted a survey of Commonwealth Departments to see what was the general practice throughout the Public Service in dealing with same sex couples. With the exception of the Defence Forces, all Commonwealth Departments recognized same sex couples as de facto relationships. The Department of Foreign Affairs and Trade replied as follows: **“Consistent with Australian Public Service practice, the definition of ‘spouse’ includes de facto relationships, including same-sex partners. Recognition of and thus entitlements for a spouse are automatic where the spouse normally resides with the officer.”**(cf attachment 3)

So while the Howard Government was trying to hide same-sex couples from sight under euphemisms such as “interdependent relationships” in its law making, it was openly recognizing same sex couples as de facto couples, fully equal in entitlements to married couples and opposite sex de factos, in its day to day administration. The most outstanding example of the public recognition of same-sex couples as de facto relationships by the Government was the occasion in February 1999 when the Australian Ambassador to Copenhagen, Stephen Brady, with the full approval of the Department of Foreign Affairs and Trade, was accompanied by his same-sex partner, Peter Stevens, when presenting his credentials to Queen Margrethe of Denmark.

The Same Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Bill removes this blatant inconsistency between Commonwealth law and Commonwealth administrative practice. The Opposition amendment continues this inconsistency.

11. Backdating

In order to remove the anxiety from the many elderly and frail Commonwealth public servants and Defence Force personnel who are concerned for the future security of their same sex partners, COMSAC requests the Senate Legal and Constitutional Affairs Committee to seriously consider recommending that the application of this Bill be backdated to July 1st. 2008, which was the date which the Government set for its inception when the Bill was first announced.

We particularly draw the attention of Opposition Senators to the speech on Malcolm Turnbull supporting the Bill in the House in which he devoted much of his speech to urging the Government to backdate the Bill, which he said was easily done. Mr. Turnbull provocatively challenged the Government to backdate the Bill to Nov. 9th. 2007, which was the date he announced the Coalition’s election promise to pass legislation recognizing same sex couples for superannuation death benefits. Had Malcolm Turnbull been consistent in his argument, he would have proposed back-dating the legislation to June 22nd. 2004, which was the date the Howard Government initially promised this reform.

12. Evidence Bill

The Comsuper Action Committee supports the amendments to the Evidence Bill 2008, so that, like opposite sex de facto couples, same-sex de facto couples are not compelled to give evidence against one another.

13 Family Law Act

Same-sex relationships are neither more nor less fragile than marital relationships or heterosexual de facto relationships, and, as taxpayers, same sex couples should be entitled to the services and assistance of the Family Court to resolve relationship breakdowns. COMSAC fully supports the proposed amendments to the Family Law Act to give same-sex couples the same access to the Family Court as married couples and heterosexual de facto couples.

14 Acknowledgements.

The Comsuper Action Committee acknowledges the commitment of the Australian Democrats and the Greens to the policy of removing all forms of sexual discrimination since their inception. In particular we acknowledge the pioneering work of Senators Brian Greig and John Cherry in securing the first legal recognition of same sex couples for superannuation death benefits, albeit with inappropriate terminology, in 2004. We thank Senators Andrew Murray and Senator Lynn Allison of the Democrats, and Green Senator Kerry Nettle for pursuing this reform at every available opportunity in the Senate and Senate Estimates hearings.

On the Coalition side we acknowledge the sustained efforts of an unexpected ally in the person of "Entschie", the former Liberal member for Leichardt, who, with Malcolm Turnbull, Peter Lindsay and Greg Hunt, formed a "gay rights quartet", and kept doggedly raising the matter in the party room and with the Prime Minister. More recently Petro Georgiou, Christopher Pyne, Senator Marise Payne and Senator Sue Boyce have deserved our thanks for their supportive interventions. We also express our thanks to many unpublicized supporters of same sex reforms in the Cabinet and party room.

On the Labor side, the Comsuper Action Committee acknowledges the active promotion of this issue by Tanya Plibersek, Anthony Albanese and Senator Sherry, while in Opposition, and the work of then Shadow Attorney-General, Joel Fitzgibbon in steering the policy of giving same sex couples equal entitlements and standing as de facto couples through the Labor Party's National Conference. Since gaining office, we are grateful to Attorney-General Robert McClelland and Minister for Superannuation, Senator Sherry for their willingness to consult with gay groups; for their speedy response to the HREOC Report and for the careful and creative drafting work that has led to this landmark superannuation Bill.

Most of all we record our appreciation for the work of Graeme Innis and the staff of the Human Rights and Equal Opportunity Commission for the research, public consultations and writing effort that went into the preparation of their landmark report "Same Sex: Same Entitlements", which has helped to create a wide public opinion supporting these reforms and provided the intellectual and legal foundation for the Attorney General's office to work on.

We urge all members of the Senate Legal and Constitutional Committee to read the report in full, particularly the chapter on superannuation, as part of their Inquiry. We hope that it

will help Senators, particularly Coalition Senators, to be comfortable with the idea that same sex couples are ordinary,law-abiding taxpayers, who are loved and valued by their families and friends, and are not seen by their fellow citizens as a moral threat to the fabric of society or any of its institutions, least of all to the institution of marriage.

I was reliably informed that, when malcolm Turnbull told George Bush at an APEC dinner that the Government was grappling with the moral problem of recognizing same-sex couples for social benefits,George Bush replied: **“That’s not a moral problem, its just social justice”**.

The Comsuper Action Committee strongly urges the Senate Legal and Constitutional Affairs Committee to unanimously recommend to the Senate that this Bill be passed into law without amendment and without further delay.

John Challis,
Convener,
COMSUPER ACTION COMMITTEE(COMSAC)

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