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Submission to the Inquiry on the *Same-Sex Relationship (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008*

The provisions of the *Same-Sex Relationship (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008* give effect to the recommendations of the 2007 HREOC Report (*Same-Sex: Same Entitlements*) regarding reversionary superannuation and related benefits. These recommendations seek to retain but redefine the legislative terminology of relationships in relevant legislation as the most "direct route[1]" to ensuring that the benefits offered therein extend to same-sex couples.

By examining the work-related and financial entitlements and benefits currently afforded to married couples by law, the HREOC Report is able to present a detailed comparative picture of the situations in which same-sex couples live and work without being able to access these entitlements. The bill under inquiry focuses exclusively on superannuation and related benefits drawn from Chapter 13 of the Report.

<u>False premises</u>

At first glance, the motives of the Report may seem plausible. The credibility of these motives is further aided by the application of the language of "non-discrimination". After all, why should those deprived of the ability to contract a legal marriage be denied at the least those helps that married couples are offered as they live and work together in a relationship? Surely this state of affairs is unjust and must be rectified?

On closer inspection, however, it is evident that the HREOC Report and the terms of reference of the

[1] Human Rights and Equal Opportunities Commission, 2007, *Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, HREOC, Sydney, p. 382.

bill under inquiry are grounded on false premises. Firstly, the concepts of discrimination and equal opportunity are misapplied. The issue of human rights has become paramount in our times and rightly so, considering the abuses and injustices of recent history. But all too often, without reference to any universal and objective standard, these "rights" can be easily confused with an exaggerated notion of individual freedom within a democratic society and can come to be applied to things which are not rights at all. The situation can become so confused that some can claim the right to certain benefits that are beyond the natural order of what one is entitled to and any opposition to the fulfilment of these claims is too readily interpreted as discrimination or worse, vilification. The highest virtue extolled in this ideological framework that is so perceptible in social policy today is that of non-discrimination or "tolerance". And so we can become afraid of putting any fences in place when it comes to addressing moral issues in the legislative sphere. But policy makers have forgotten that it is not only licit but obligatory to exercise this differentiating function as a necessary part of their office.

Discrimination – a word which did not always carry the negative connotations that it does today – is only unacceptable when it is contrary to justice. But denying what does not and cannot belong to a certain entity is not unjust. On the contrary, justice – the primary function of making social policy - requires it. So a recognition that same-sex relationships are not marital and cannot be marital is not unjust discrimination. It may be compared to the example quoted in the submission by Family Voice Australia that it is not unjust discrimination to withhold a veteran's service pension from one who has never served in the military. For this reason it is misleading to paint the laws which provide the necessary financial support of married couples as exclusive of and discriminatory towards persons in same-sex relationships as the HREOC document consistently does. Indeed, the Report confuses the issues to such an extent that it claims the current legislation is not only discriminatory (in the unjust sense) but states that the laws are "an endorsement of homophobia[2]." There is a hystericism that properly belongs to ideology and gives a biased rendition of the issues involved. In this case it is clear that the agenda is set to dismiss any opposition to the aims of the politically correct gay "movement" conveniently with an accusation of an undefined but emotionally charged label of "homophobia". Why else would such an illogical and exaggerated claim be made? It is certain that no government establishing these laws did so out of homophobic tendencies and it is equally certain that no government that maintained the language of these laws as referring to marriage only is likewise acting solely out of an inner fear of homosexuality. There are reasons beyond ideology for maintaining the privileges for married couples within these pieces of legislation.

Why do the financial benefits of the bill belong exclusively to marriage?

The Report and the Bill are based on the supposition that gender is irrelevant to the type of relationship that ought to be afforded protection and security by the state. If there is no difference between a heterosexual and homosexual relationship, of course each should be awarded the same superannuation and entitlement benefits to live together in their respective relationships.

The issue at hand, however, is not the sexual orientation of the scheme member. The issue is the state interest in marriage as a social institution. The nuclear family, described by the United Nations Universal Declaration of Human Rights as "the natural and fundamental group unit of society…entitled to protection by society and the state[3]" has been "such an obvious presupposition of our culture that it has not been well articulated, let alone explained or justified[4]." Indeed, bearing the burden of proof across centuries that it is the natural and ideal setting for the propagation of the human race and the

[2] Ibid. p. 363.
[3] Article 16 (3).
[4] Bruce C. Hafen, *Puberty, Privacy, and Protection: The Risks of Children's "Rights,"* 63 A.B.AJ. 1383, 1383 (1997), quoted in William C. Duncan, 2004, *The State Interests in Marriage*, Ave Maria Law Review.

proper context for the security and development of children, it has not needed to be explained. Today, however, when there are so many attempts to redefine the family, either from the disillusionment of the personal experience of broken families, or from a more radical and philosophical perspective of the abolition of traditional gender roles and the place of the family in society (Marxism, for example, and some feminist schools of thought), it is necessary to reconsider what value society ought to place on the traditional family and why.

This consideration is relevant to the bill in question because, although having no explicit part in the debate about civil unions or relationship registration, the provisions of the bill effectively apply the benefits of marriage to relationships that are not marital. This renders these relationships "marital" in a legal sense without calling them so. Indeed, in his submission, David Skidmore, who describes himself as a gay "activist" supporting same-sex marriage, claims that though the bill clearly does not address the issue of "marriage", it can be considered *"in lieu of same-sex marriage"*. The transparency of the government position on maintaining that marriage is between a man and a woman only but that all should be able to live as married is obvious and will only disappoint both camps in which it seeks to have a foot.

But why are these superannuation privileges "benefits of marriage" and why can they not belong properly to any relationship? The problem is that they do already belong to de facto relationships. This is why the HREOC Report initially wanted to use the terminology of *de facto partner* in addressing the legislation in question. Because of the rise of cohabitation, certain legislation was addressed to make things easier and to include cohabiting couples. This already weakened the position of marriage in that it became clear to our society that one need not necessarily marry in order to live with the person of their choice and to access the benefits that made life easier to do so. But the subsequent breakdown of relationships and the involvement of children has only created more complications for the family courts and a lack of stability in so many family situations. The benefits endowed by the state on the institution of marriage are simply a recognition that marriage is good for the state, not just the spouses. Two people who enter into this exclusive institution make the sacrifice of their lives to one another to commit themselves to raising the family that is the natural consequence of their union. This stable environment needs to be supported by the state and so has been surrounded with certain financial and other privileges to assist the spouses in their obligations and responsibilities.

When these privileges became open, as it were, to non-married couples, the incentive to marry or stay married declined. And with this, so did the stability of family life. With the change in language suggested by the bill under inquiry, the question is, why marry at all? "Omit 'marital relationship', substitute 'couple relationship'" is a theme occurring throughout the text of the bill. But what seems a simple change toward inclusive language hides the larger effect this state-sanctioned attitude toward relationships will have on societal perceptions of marriage and its purposes. Of course marriage will remain but it will no longer be proffered and protected as a social good above and beyond other arrangements. It will be simply an option among many held out by the state and I do not think policy makers have thought hard enough about the effect this may have. We have certainly moved from a focus on the responsibilities of relationships toward personal and individual choice and this may not be the wisest course for a society working together.

Final considerations

- Unjust discrimination and vilification against persons with same-sex attraction can never be supported. All people living together in a society need to respect each other. The particular needs and problems of persons with same-sex attractions have been largely ignored by our

society and culture as many have been marginalised and rejected by those who have betrayed their duty of care to offer support. The issue is most important but the encouragement of the formation of state-sanctioned relationships to address the problems is not appropriate, helpful or just to any persons involved.

- With the transience of relationships today it is important to preference by benefits those that are permanent for the sake of the stability of future generations of children. Although the divorce rate is relatively high, there is evidence of much higher breakdown in relationships among cohabiting and same-sex couples.

- The Family Court, which is already overburdened, may experience new demands and a delay in resolving issues that are important to couples with children who need to access court time.

- There may be unintended consequences of reverse discrimination if such bills are passed.

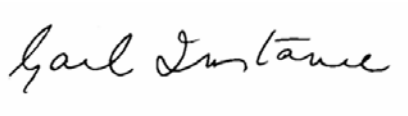
- There are other means of taking care of reversionary financial matters such as the use of a will or recourse to legal advice.

I would like to close by quoting the conclusion of the article referenced above:

"However, a lack of understanding of the social good of marriage is no reason to abandon the institution or to appropriate its legal structure so as to advance the cause of securing approbation for other relationships. It is not too much to encourage courts [and governments] to exercise humility before weighing the value of society's core social institution and finding it wanting. With so much at stake for current and future generations, deference to the accumulated wisdom of humanity is the least that [they] can provide[5]."

Or as G. K. Chesterton put it,

"One must never take down a fence without first asking why it was put up."



Gail Instance,
Director

[5] William C. Duncan, 2004, *The State Interests in Marriage*, Ave Maria Law Review, Vol. 2.1, p. 182.