

**Submission to The Senate Legal and Constitutional Affairs Committee**

**Inquiry into the Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008**

## **Submission**

To

**The Legal and Constitutional Affairs Committee**

Of

**The Australian Senate**

Inquiry Into

**The Same-sex Relationship (Equal Treatment  
in Commonwealth Laws-Superannuation) Bill  
2008**

**and other matters.**

Prepared by

**Paul Russell**

Senior Officer

The Office of Family and Life

The Catholic Archdiocese of Adelaide

39 Wakefield Street,

ADELAIDE SA 5000

GPO Box 1364,

ADELAIDE SA 5001

Phone: 08 82108188 Fax: 08 82232307

Email: [prussell@adelaide.catholic.org.au](mailto:prussell@adelaide.catholic.org.au)

---

**Submission to The Senate Legal and Constitutional Affairs Committee**

**Inquiry into the Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008**

**TABLE OF CONTENTS**

- 1. Introduction.**
- 2. Executive Summary.**
- 3. Marriage: A Unique Relationship.**
- 4. De Facto Marriage.**
  - 4.1. Public Policy
- 5. The same-sex debate.**
- 6. Discrimination and Justice.**
- 7. Interdependent Relationships.**
- 8. Entitlements: A means to an end.**
- 9. Other matters.**

## **Submission to The Senate Legal and Constitutional Affairs Committee**

### **Inquiry into the Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008**

#### **1. Introduction**

Thank you for the opportunity to comment on the Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008.

We note that this bill will “shortly be followed by further reforms that will end same-sex discrimination in a wide range of Commonwealth laws.”<sup>1</sup> A great deal of the observations that follow, we hope, will be instructive of our position in a general sense in addition to issues particular to the bill in question.

It is encouraging to note statements from both sides of politics confirming the status of Marriage as being a union of one man and one woman and stressing the importance of preserving the Marriage Act in this form. We are concerned, however, that while the intention in respect to Marriage is indeed honourable and most welcome, the bill under consideration does not fit with that intention.

Notwithstanding the Human Rights and Equal Opportunity Commission’s inquiry into discrimination, we believe there is still room for legitimate debate about rights and discrimination. We intend to make some observations on this matter later in this submission.

At this point, however, we simply want to stress that our principle concerns relate to Marriage itself; how this bill and this type of arrangement undermine Marriage.

---

<sup>1</sup> News Release. The Attorney-General, The Hon Robert McClelland MP. #036/2008, 28<sup>th</sup> May

Submission to The Senate Legal and Constitutional Affairs Committee

Inquiry into the Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008

**2. Executive Summary.**

The state has a legitimate interest in legislating for Marriage because of the benefits Marriage brings to society. The state has no such interest in same-sex relationships.

De facto relationships are recognised and accepted broadly as either as a form of Marriage or a Marriage-like relationship. It is not open to re-interpret this to include same-sex relationships.

We find unacceptable the possibility that same-sex relationships be thrown together with de facto Marriage relationships under the one banner. We cannot simply manipulate these terms to group together relationships that are different in nature for the sake of creating a legal instrument that confers benefits.

The formal recognition of same-sex relationships in law is a direct threat to the very institutions upon which our society is built: Marriage and the family. We cannot disturb the foundations of our society without expecting to see structural damage.

Without denying anyone their right to be treated with dignity and respect we affirm the teaching of the Catholic Church that asserts that same-sex relationships are inherently different to marital relationships. For the state to discriminate between relationships that are intrinsically different is not necessarily wrong.

It would be wrong to apply justice principles to remove unjust discrimination against one section of the community while allowing the same unjust discrimination to remain for other Australians.

The developing lack of distinction between Marriage and same-sex unions will inevitably invite a challenge to the Federal Marriage Act. At that time there will be few, if any, reasons remaining to argue against the creation of same-sex marriage.

## Submission to The Senate Legal and Constitutional Affairs Committee

### Inquiry into the Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008

#### 3. Marriage: A unique relationship

**The state has a legitimate interest in legislating for Marriage because of the benefits Marriage brings to society. The state has no such interest in same-sex relationships.**

The Church has a clear interest in Marriage. We believe that Jesus Christ raised Marriage to the level of a sacrament; that the covenant entered into freely by a man and a woman has, therefore, a clear spiritual dimension. More broadly, we also recognise the important role that Marriage plays in the organization of society.

The state, too, has a legitimate interest in Marriage. The benefits accrued by the state to married couples and their families are not simply some relic of an era when Christian morality more closely resembled that of the state. The relationship between the state and Marriage is of mutual benefit – the state recognises that many of the goods of Marriage support society and the state is willing, therefore, to give over certain advantages in protecting and supporting Marriage to that end.

The state can also undermine Marriage, either symbolically (affecting the public perception) or practically (affecting the public benefits attached to Marriage).

Some clearly believe that the only way that legislation can affect Marriage is through amendment(s) to the Commonwealth Marriage Act. While such an action would directly affect Marriage, it is certainly not the only way.

Including any other form of relationship as a Marriage-like relationship also undermines Marriage. Changing the use of terms that clearly describe marital relationships to include same-sex relationships (e.g. *De facto* or *Couple*) blurs the natural distinctions. As The Hon Danna Vale MP observed: “Words are important tools. It is well known that words are the first salvo in any assault of cultural change.”<sup>2</sup>

Granting all or most of the benefits given to Marriage to any other form of relationship diminishes Marriage. It eliminates the obvious attraction to, and advantages of the married state, making it far less attractive.

---

<sup>2</sup> House of Representatives Hansard, Second Reading Speech, Dr Nelson, 4 June 2008. Page 76.

## Submission to The Senate Legal and Constitutional Affairs Committee

### Inquiry into the Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008

#### 4. De Facto Marriage.

**De facto relationships are recognised and accepted broadly as either as a form of Marriage or a Marriage-like relationship. It is not open to re-interpret this to include same-sex relationships.**

De facto Marriage relationships were granted status in law for two main reasons: to protect property rights of spouses and the interests of children of the relationship. De facto Marriage relationships are, as the title suggests, relationships recognised by the fact of their existence in the absence of a formal commitment to Marriage and, in most cases, after the fact.

What would our society now look like had laws in relation to de factos not been enacted? One view would be that, recognizing the pitfalls of cohabitation (remedied by de facto laws), couples would have perhaps thought more deeply and prepared more thoroughly before committing to a relationship with a higher likelihood of being formalized in Marriage.

While protecting the rights of spouses and children is good in itself, removing some of the imperatives to seeking Marriage has had a deleterious effect on the institution of Marriage, contributing to the increase incidence of informal cohabitation and the consequential decline in the number of formal Marriages. The view often heard that Marriage is little more than 'a piece of paper and a ceremony' would seem to have its genesis somewhere in that period of change.

#### 4.1 Public Policy

**We find unacceptable the possibility that same-sex relationships be thrown together with de facto Marriage relationships under the one banner. We cannot simply manipulate these terms to group together relationships that are different in nature for the sake of creating a legal instrument that confers benefits.**

While not formally married, either in civil or religious terms, de facto Marriage relationships have been accepted in public policy terms as holding some of the public goods of Marriage - particularly in relation to children. The accrual of many of the benefits given over to Marriage by the state to de factos suggests as much.

While there is a great deal of sociological data that points to higher success rates and higher levels of fulfillment in formal and sacramental Marriage, it is broadly

## Submission to The Senate Legal and Constitutional Affairs Committee

### Inquiry into the Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008

accepted that longstanding relationships that are marital in form (that is: between one man and one woman) do contribute to the betterment of society in some of the same ways as Marriage. And, while the Church retains an obvious preference for formal Marriage, it is clear that society recognises de facto relationships as a form of Marriage. The term 'de facto' (meaning: *in fact*) is an accepted colloquialism referring exclusively to the union of a man and a woman in a Marriage-like relationship.

We note that many of the Acts amended by the Bill under consideration use the term 'marital relationship' which we take to be inclusive of Marriages - in terms of the Federal Marriage Act and de facto Marriages - in terms of various State and Territory Acts. 'Couple relationship' is evocative of a similar understanding; under the Bill in question it is being re-defined as inclusive of same-sex relationships. This we find to be unacceptable.

#### **5. The same-sex debate**

The Catholic Church's opposition to same-sex Marriage is widely known. Some have argued that this opposition is (or should be) restricted to a defence of formal Marriage only. As we have already pointed out, our concern extends naturally to relationships that are marital in type for reasons that include concerns for society as a whole.

Pope Benedict declared,

*"The call for homosexual partnerships to receive a legal form that is more or less the equivalent of Marriage...departs from the entire moral history of mankind...If this relationship [Marriage] becomes increasingly detached from legal forms, while at the same time homosexual partnership are increasingly viewed as equal in rank to Marriage, we are on the verge of a dissolution of our concept of man, and the consequences can only be extremely grave."*<sup>3</sup>

We believe that this is a threshold moment in our history that will define, for better or worse, the shape of our society for generations to come. Marriage and family life is under constant pressure from external forces. More than that, the same-sex revolution will seriously challenge the identity of Marriage and the family, threatening it, as it were, from within.

**The formal recognition of same-sex relationships in law is a direct threat to the very institutions upon which our society is built: Marriage and the**

---

<sup>3</sup> J. Ratzinger, *Values in a Time of Upheaval* (San Francisco: Ignatius: 2006)

## Submission to The Senate Legal and Constitutional Affairs Committee

### Inquiry into the Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008

family. We cannot disturb the foundations of our society without expecting to see structural damage.

#### 6. Discrimination and Justice

The Human Rights and Equal Opportunity Commission's 2007 report entitled: *Same-sex: Same Entitlements* is cited as the primary source document behind the changes to federal law of which the Bill in question is the first tranche.<sup>4</sup>

For the sake of our argument, we simply accept at face value that there may well be numerous instances in State and Federal law where same-sex couples are treated differently to Married couples.

Discrimination itself is neither good nor bad – it is a value-free term. It was not so long ago that, to be 'discriminating' was considered to be a positive character trait.

When we look at the modern usage we need to determine firstly whether or not the claimed discrimination is justified and, if unjust, then how it should be properly rectified.

**Without denying anyone their right to be treated with dignity and respect we affirm the teaching of the Catholic Church that asserts that same-sex relationships are inherently different to marital relationships. For the state to discriminate between relationships that are intrinsically different is not necessarily wrong.**

If the demands of justice require that particular entitlements to be given over to same-sex couples, then we would expect that a just argument would be made in support of such action. Such an argument cannot, we believe, be based upon a false appeal to equal status to Marriage. In short, we accept that the HREOC report has proven that Married couples and same-sex couples are treated differently – but they have not proven that such treatment is unjust.

For this reason, we seriously doubt whether the pending omnibus legislation can deliver upon principles of justice. Firstly, to create a situation where other relationships receive virtually all the benefits associated with Marriage is to effectively diminish Marriage itself. Secondly, the nature of an omnibus bill is such that it relies on an underlying assumption that a general principle in justice applies for all the amendments; namely: that same-sex relationships are fundamentally the same as marital relationships - which is not the case. We can

---

<sup>4</sup> Cf. News Release, Attorney-General, The Hon Robert McClelland MP, 30 April 2008 (#022/2008)



## Submission to The Senate Legal and Constitutional Affairs Committee

### Inquiry into the Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008

only suggest, therefore, that other arguments need to be made in respect to the individual entitlements claimed.

In respect to superannuation and the bill in question there may be an argument that could be applied:

Over the last thirty years or more, superannuation has changed from being principally an income protection scheme for spouses and families of a deceased breadwinner to a universal retirement savings plan. It could be argued, therefore, that all Australians should enjoy equal treatment in the distribution and taxation regimens of superannuation law.

If this is the case then we are left to consider the means by which this end can be achieved.

#### **7. Interdependent Relationships.**

**It would be wrong to apply justice principles to remove unjust discrimination against one section of the community while allowing the same unjust discrimination to remain for other Australians.**

If we are to apply justice and equity principles properly, legislative amendments should be framed in the broadest terms possible. As the Leader of the Opposition, The Hon Brendan Nelson MP, observed, "We should not deal with one set of injustices by creating others."<sup>5</sup>

Already recognised in federal legislation (and in various States and Territories under different titles), *Interdependent Relationships* describes people who share a common life of mutual support in financial, emotional and other practical ways. Same-sex couples clearly fall within this category; yet the authors of the HREOC report clearly do not believe that this is the appropriate vehicle for advancing entitlements.

*'However, the 'interdependency' category has not brought full equality to same-sex couples, primarily because it treats genuine same-sex couples differently to genuine opposite-sex couples.'*<sup>6</sup>

To treat relationships as though they were the same when they are not does not advance justice. As Senator Bernardi commented recently, "...to treat them as the

---

<sup>5</sup> House of Representatives Hansard, Second Reading Speech, Dr Nelson, 4 June 2008. Page 67.

<sup>6</sup> *Same-sex: Same Entitlements*, HREOC Report May 2007 Section 18.3.2 page 375.

## Submission to The Senate Legal and Constitutional Affairs Committee

### Inquiry into the Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008

same is to suspend common sense.”<sup>7</sup> To treat same-sex relationships and Marriage differently in law is simply to acknowledge reality: they are different.

*Interdependent Relationships*, as a separate category, does not affect the status of Marriage in a direct way.

- It does not devolve marital relationships into couple relationships as ‘one-form-among-many’.
- It does not create a falsehood by including same-sex relationships within de facto marriage.

In respect to the bill in question, if the argument is about entitlements, *Interdependency* is a vehicle that may provide this end which we believe would probably be acceptable to most Australians. If the supporters of this legislation are holding out for equity over entitlements, then we can only conclude that they are concerned more about a symbolic change in status than any financial benefits that might flow to them.

Notwithstanding our comments about the possibility, in some limited circumstances, of applying *Interdependent Relationships* as a vehicle for granting a benefit, we remain convinced that legal recognition of same-sex unions does not advance the common good. The Congregation for the Doctrine of the Faith has some practical advice in this area:

*‘Nor is the argument valid according to which legal recognition of homosexual unions is necessary to avoid situations in which cohabiting homosexual persons, simply because they live together, might be deprived of real recognition of their rights as persons and citizens. In reality, they can always make use of the provisions of law – like all citizens from the standpoint of their private autonomy – to protect their rights in matters of common interest. It would be gravely unjust to sacrifice the common good and just laws on the family in order to protect personal goods that can and must be guaranteed in ways that do not harm the body of society.’<sup>8</sup>*

## 8. Entitlements: A means to an end.

In California a US Supreme Court sanctioned same-sex marriage in May of this year. California had been progressing towards equality between Marriage and same-sex unions for sometime.

---

<sup>7</sup> *Honourable ideals still degrade marriage*, The Advertiser, Friday 20<sup>th</sup> June 2008.

<sup>8</sup> Congregation for the Doctrine of the Faith. *Considerations regarding proposals to give legal recognition to unions between homosexual persons*. n. 9. 2003

## Submission to The Senate Legal and Constitutional Affairs Committee

### Inquiry into the Same-sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008

According to *MercatorNet*, California first introduced registered domestic partnerships in 1999. In 2000, more benefits were added for domestic partners and, again in 2002, inheritance changes were made. In 2003 domestic partners were required in law to pay alimony and child support. Jennifer Morse reports that domestic partners held virtually all of the benefits of Marriage in California.<sup>9</sup>

Whether we call it domestic partnerships, same-sex partnerships, couple relationships or any other title, the granting of the benefits related to Marriage to same-sex relationships to the point where treatment in law is no different to Marriage will eventually beg the question: 'what's the difference?' If there is a practical parity between Marriage and Same-sex relationships in law, entitlement and status then, if all that remains as a difference is 'a piece of paper and a ceremony'.

**The developing lack of distinction between Marriage and same-sex unions will inevitably invite a challenge to the Federal Marriage Act. At that time there will be few, if any, reasons remaining to argue against the creation of same-sex marriage.**

#### **9. Other matters.**

We acknowledge that a number of other bills have been referred to the Legal and Constitutional Affairs Committee for consideration in relation to same-sex matters.

We regret that time constraints have rendered us unable to offer particular comments on these other matters. However, the principles we have outlined in this submission, we believe, should be taken as instructive of our position across all matters dealing with issues of same-sex unions.

29 July 2008

---

---

<sup>9</sup> See article: [http://www.mercatornet.com/articles/beyond\\_same\\_sex\\_marriage/](http://www.mercatornet.com/articles/beyond_same_sex_marriage/) by Jennifer Morse. Accessed 28 July 2008