

Peter Hallahan
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100,
Parliament House Canberra ACT 2600

Dear Mr Hallahan,

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

Thank you for inviting the Law Council to make a submission to the above inquiry.

The Law Council supports the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill* and the objectives it seeks to pursue.

The Law Council regards the Bill as important first step towards ending the discrimination that same-sex couples often encounter when attempting to access financial and work related entitlements and benefits.

In that respect, the Law Council believes that the Bill, if passed, will help bring Australia closer to meeting its obligations under Article 26 of the International Covenant on Civil and Political Rights. That article requires that all persons must be treated as equal before the law and are entitled without any discrimination to the equal protection of the law.

The Law Council is pleased that the important research and policy work conducted by the Human Rights and Equal Opportunity Commission in this area¹ has been afforded the attention it deserves and has been allowed to develop into legislative reforms which will have tangible and positive impact on people's lives.

The Law Council expects that, as foreshadowed, this Bill will be followed by a broader legislative reform package, which will address the discrimination experienced by same-sex couples under a myriad other Commonwealth Acts.

¹ HREOC, *Same-Sex: Same Entitlements Inquiry* (2007). Report available at www.hreoc.gov.au/Human_RightS/samesex/report/index.html

In the meantime, I am pleased to advise that the Superannuation Committee of the Law Council's Legal Practice Section has reviewed the Bill and has provided some practical suggestions about the steps that might be required to help ensure its smooth implementation. The Committee's comments are set out in Attachment "A".

If you have any questions or wish to discuss the Law Council's submission further, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read "Bill Grant". The signature is written in a cursive style with a large initial "B" and "G".

Bill Grant
Secretary-General

29 July 2008

Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008

Comments prepared by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia for the Senate Legal and Constitutional Affairs Committee

Date 25 July 2008

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1. Introduction

1.1 The Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 (Bill) was passed by the House of Representatives on 4 June 2008, and introduced into the Senate on 16 June 2008, where it was referred to the Senate Legal and Constitutional Committee (Committee). This submission is in response to the Committee’s request for submissions in relation to this Bill.

1.2 The Bill purports to address the perceived discrimination against same-sex couples and the children of same-sex couples in the legislation governing superannuation regimes, with particular emphasis on the availability of death benefits to same-sex partners and children of same-sex couples.

1.3 To this end, the Bill inter alia proposes to make amendments to legislation governing specific Commonwealth superannuation schemes and to the regulatory superannuation legislation, including the following legislation supervised by Treasury: Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act), the Retirement Savings Accounts Act 1997 (Cth) (RSA Act) and the Income Tax (Transitional Provisions) Act 1997 (Cth) (Tax Act).

1.4 This submission will address the amendments to be made to these Acts.

2. Proposed amendments to the SIS Act

Section 10 definition of ‘child’

2.1 Section 10 of the SIS Act currently defines ‘child’ as “in relation to a person, includes an adopted child, a step-child or an ex-nuptial child of the person”. The Bill proposes to amend this definition to read:

“in relation to a person, includes:

- (a) an adopted child, a step-child or an ex-nuptial child of the person; and
- (b) if at any time, the person was in a relationship as a couple with another person (whether the persons are the same sex or different sexes) – a child who is the product of the person’s relationship with that other person.”

2.2 In addition, a new section 10(5) is inserted, providing guidance on when a child will be the product of a person’s relationship, stating that:

“A child cannot be the product of a relationship between two persons (whether the persons are the same sex or different sexes) for the purposes of this Act unless the child is the biological child of at least one of the persons, or is born to a woman in the relationship”.

2.3 We note that the concept of dependant is used in the SIS Act and related regulations in the context of:

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- (1) a superannuation fund trustee's provision of superannuation benefits for members of the superannuation fund and their dependants (SIS Act sections 16, 62, 64; SIS regulation 6.41);
 - (2) the release of superannuation benefits on compassionate grounds (SIS regulation 6.19A); and
 - (3) a recipient of a superannuation fund member's death benefit being a dependant (SIS Act section 59; SIS regulations 6.17A, 6.21, 6.22, 6.26).

2.4 Thus the extended definition of 'child' has the effect of ensuring that children of same-sex couples (within the definition) are contemplated as part of the object of the operation of a superannuation fund.

2.5 In addition, the extended definition of child will impact on other SIS Act and SIS Regulation provisions, including in the following contexts:

- (1) references to 'relatives' in certain sections of the SIS Act are defined to include a child of the relevant individual, including for example sections 17A (definition of a self managed superannuation fund) and 65 (prohibition against lending to members or relatives of members by a superannuation fund);
- (2) the definition of a Part 8 associate of a company or individual; and
- (3) the cashing of a member's benefits in relation to a child (SIS regulation 6.21).

Section 10 definition of 'spouse'

2.6 The current definition of 'spouse' in the SIS Act is "in relation to a person, includes another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person."

2.7 The Bill amends the definition by omitting the words "as the husband or wife of the person" and substitutes the words "in a relationship as a couple (whether the persons are the same sex or different sexes)".

2.8 In doing, the Bill abolishes the gendered definition of 'spouse' to give the same entitlements to same-sex couples as opposite-sex de facto couples.

2.9 The concept of 'spouse' is used broadly throughout the SIS Act and Regulations, including in the following contexts:

- (1) the definition of 'dependant' (discussed above);
- (2) references to 'relatives' in certain sections of the SIS Act which are defined to include spouses, including for example section 17A (definition of a self managed superannuation fund), section 65 (prohibition against lending to members or relatives of members by a superannuation fund);
- (3) the definition of a Part 8 associate of a company or individual; and
- (4) references to 'non-member spouses' in numerous sections of the SIS Regulations.

2.10 Thus, the amendments are proposed to allow a superannuation fund trustee to make death benefit distributions to same-sex partners and the relevant children of same-sex couples in the same way as these would be made to couples of different sexes and their children.

3. Proposed amendments to the RSA Act

3.1 The amendments proposed to be made to the RSA Act are similar in nature to those to be made to the SIS Act discussed above, consisting of amendments to the RSA Act definitions of 'child' and 'spouse'. The RSA Act uses these definitions in the context of defining a 'dependant' in section 20. The Bill will amend these definitions using the same wording as discussed above.

3.2 As such, the impact of the Bill's proposed amendments to the RSA Act and associated regulations is limited to where the concept of 'dependant' is used. This concept is used in the following contexts:

- (1) the provision of RSA benefits upon the death of an RSA holder to their legal representative or dependants (section 15);
- (2) release of RSA benefits on compassionate grounds, including scenarios affecting a holder's dependants (regulation 4.22A);
- (3) cashing of RSA benefits upon the death of the holder in relation to a dependant (regulations 4.24, 4.26); and
- (4) the definition of 'untaxed splittable contributions' (regulation 4.38).

4. Proposed amendments to the Tax Act

Definition of 'spouse' and 'child' in section 295-465

4.1 The Bill inserts a new section 295-485A which amends the definitions of 'spouse' and 'child' in relation to tax deductions available for trustees of superannuation funds making lump sum payments of death benefits for the 2008-2009 income year.

4.2 The existing definitions of 'spouse' and 'child' contained in the Tax Act mirror the existing definitions contained in the SIS Act. The Bill operates to amend the definitions of 'spouse' and 'child' with reference to the definitions to be contained in the SIS Act as amended by the Bill.

Definition of 'death benefit dependant'

4.3 The Bill inserts a new section 302-195A into the Tax Act which provides the definition of 'death benefit dependant' in the 2008-2009 income year.

4.4 Currently, the definition of 'death benefit dependant' contained in section 302-195 of the Income Tax Assessment Act 1997 (Cth) (ITAA) includes reference to a

‘deceased person’s spouse or former spouse’ (section 302-195(1)(a)) and a ‘deceased person’s child, aged less than 18’ (section 302-195(1)(b)).

4.5 The new section of the Tax Act as included by the Bill provides that, for the 2008-2009 income year, the sections 302-195(1)(a) and (b) are replaced to define ‘spouse’ and ‘child’ with reference to the definitions contained in the SIS Act as amended by the Bill.

4.6 The new section 302-195A provides that the definition of ‘death benefit dependant’ as amended for the 2008-2009 income year will extend to the following sections of the ITAA:

- (1) subdivision 82-B relating to the tax treatment of death benefit termination payments received by individuals;
- (2) division 302 relating to the tax treatment of superannuation death benefit payments; and
- (3) section 303-5 relating to the tax treatment of a superannuation lump sum arising from a commutation received as a death benefits dependant.

4.7 Hence, these amendments are intended to ensure that death benefit distributions made to same-sex couples and the relevant children of same-sex couples will be provided on a “tax-free” basis (provided they are under 18 years of age).

5. Practical implications of the proposed amendments

5.1 The Law Council wishes to note that the proposed changes are likely to require the provision of guidance material to trustees, in order to ensure that the extended concept of a dependant is properly considered in the context of death benefit distributions.

5.2 As a starting point it is worth noting that the payment of death benefit distribution from a superannuation fund is required to be made in accordance with the relevant provisions of the trust deed (or governing rules).

5.3 Whilst many trust deeds for superannuation funds rely on a definition of a dependant which expressly adopts the same definition in section 10 of the SIS Act, some trust deeds will not contain this feature.

5.4 Thus the ability of the relevant trustee to make death benefit distributions in a manner which covers the proposed new classes of a dependant will require a trustee to:

- (1) conduct a review of their trust deed to determine whether these new classes are automatically captured under their relevant definitions; and
- (2) if required, insert new definitions into the trust deed by way generally of a deed of amendment.

5.5 The further comments below reflect in part the experience of the industry when the concept of a dependant for superannuation death benefit distribution purposes under the SIS Act was extended to accommodate persons in a an ‘interdependency relationship’.

Evidence required to establish the requisite spousal relationship/ child relationship

5.6 The wording employed to redefine 'spouse' to remove any gender bias consists of the use of the phrase "lives with the person on a genuine domestic basis in a relationship as a couple (whether the persons are the same sex or different sexes) [emphasis added]".

5.7 As such, this will create an evidentiary issue as to what constitutes living on a genuine domestic basis in a relationship as a couple.¹ This is similar to current position in relation to establishing whether a purported dependant was a heterosexual de facto spouse of a deceased fund member; which can require the trustee to draw on relevant criteria established under the general law.² We note however that the relevant leading cases in this area have not considered a de facto relationship in the same sex content. Accordingly, guidance may be required as to the suggested evidential requirements that trustees should properly consider in this area.

5.8 Evidence will also be required to support a claim that a person is a 'child' in the context of a same sex relationship.

¹ We note that paragraph 266 of the explanatory memorandum to the Bill notes that this does not change or re-define any indicia of a relationship.

² See *Hourn v Farm Plan Pty Limited* [2003] FCA1122, which applied the reasoning of Powell J in *Roy v Sturgeon* (1986) 11 NSWLR 455, in relation to the requirements necessary to establish a de facto relationship. From that it identified the following factors requiring consideration:

- (a) the duration of the relationship;
- (b) the nature and extent of the common residence;
- (c) whether or not a sexual relationship existed;
- (d) the degree of financial interdependence, and any other arrangements for support between or by the parties;
- (e) the ownership, acquisition and use of property;
- (f) the procreation of children;
- (g) the performance of household duties;
- (h) the degree of mutual commitment and support; and
- (i) reputation and "public" aspects of the relationship.

Also note that this decision involved an unsuccessful challenge to a trustee's findings that a recipient of a death benefit distribution was a de facto spouse of the deceased member; and that the basis of the claim was that the subject trustee should have identified and considered potentially contradictory evidence.

Interaction of the categories of 'dependants'

5.9 For superannuation death benefit distribution purposes, the following discrete categories of 'dependants' are to be created:

- (1) spouses (including de-facto spouses and now same-sex couples);
- (2) children (including adopted, ex-nuptial and step-children, and now the children who are products of a person's relationship with another person where the child is the biological child of at least one party to the relationship or born to the woman in the relationship);
- (3) financial dependants (as held in *Faull v Superannuation Complaints Tribunal* [1999] NSWSC 1137); and
- (4) persons in an interdependency relationship (as defined in section 10A of the SIS Act and section 20A of the RSA Act).

5.10 Given the recent experiences associated with the introduction of the new category of dependant in the SIS Act (i.e. interdependency relationship) we are concerned to ensure that there is no potential confusion or overlap associated with the proper categorisation of individuals for death benefit distribution purposes.

5.11 This is most relevant in the context of determining how a superannuation death benefit distribution is to be taxed; and whether a different categorisation of a person will create a different tax result. For example a superannuation death benefit payable to an adult child is generally not tax free; and consequently a trustee considering a death benefit distribution to an adult child may properly consider re-classifying that person in order to obtain a tax-free benefit payment (i.e. re-classifying that person as being in an interdependency relationship with the relevant deceased fund member).

Review of binding and non-binding death benefit nominations

5.12 Given that death benefit nominations are a common feature of superannuation funds, it is important to consider these proposed changes in light of existing nominations (which have been effected under the current regime).

5.13 Given that it is proposed for new classes of dependant to receive a superannuation death benefit distribution, we note that current nominations may need to be revisited (and updated). This may also require interested fund members to obtain financial planning advice.

Disclosure and training requirements

5.14 In order to implement the proposed changes, trustees will need to update disclosure documents, claims payment forms (and processes) and conduct training seminars for relevant administration staff members.

5.15 Trustees may also consider issues 'significant event' notices as contemplated by section 1017B of the Corporations Act 2001 (Cth) – especially in light of the potential impact on death benefit nominations.

Inconsistency in the definition of 'spouse'

5.16 The amendments to be made by the Bill in relation to the expanded definition of 'spouse' result in inconsistencies between the definition of 'spouse' contained in the legislation discussed above, and the definitions contained in other legislative regimes including the Family Law Act 1975 (Cth) and Social Security Act 1991 (Cth); which currently do not contemplate same-sex couples.³

5.17 Also, for tax purposes the amended definition of 'spouse' will only apply for the purposes of concessional tax treatment of death benefits and the availability of deductions for death benefits (including anti-detriment payments). The general definition of spouse in section 995-1(1) of the ITAA is not changed by the Bill. This means that the tax offset for 'eligible spouse contributions' under section 290-230 will still only be able to be claimed by opposite sex partners. This seems to be an anomaly.

5.18 Thus, from a practical perspective, if the changes proposed by the Bill are not reflected in other related laws same-sex couples may require involved financial planning advice to navigate potentially inconsistent statutory regimes.

Please note that the Law Council is able to make further submissions on the interaction of these amendments with other legislative regimes if required.

³ We note that the proposed changes to remove same-sex discrimination are based on the findings of a national inquiry into the issue conducted by the Human Rights and Equal Opportunity Commission. The report from the inquiry outlines a number of amendments which need to be made to a number of statutes; including the Family Law Act (in particular section 90MD definition of 'spouse') and also the Social Security Act. The Federal Government committed to removing same-sex discrimination in legislation based on the report (Attorney General's media release 30 April 08). Accordingly, we expect that current anomalies created by the Bill may be remedied via these proposed further changes.