



***Human Rights and Equal  
Opportunity Commission***

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**Submission of the**

**HUMAN RIGHTS AND EQUAL OPPORTUNITY  
COMMISSION (HREOC)**

**to the**

**Senate Legal and Constitutional Affairs  
Committee**

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

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**Human Rights and Equal Opportunity Commission  
Level 8, 133 Castlereagh St  
GPO Box 5218  
Sydney NSW 2001  
Ph. (02) 9284 9600**

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## Introduction

1. The Human Rights and Equal Opportunity Commission (HREOC) makes this submission to the Senate Legal and Constitutional Affairs Committee in its Inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 (the Bill).
2. HREOC welcomes the introduction of this Bill.
3. In June 2007, *Same-Sex: Same Entitlements*, the report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (the Same-Sex: Same Entitlements Inquiry) was tabled in the federal Parliament.
4. The Same-Sex: Same Entitlements Inquiry found that at least 58 federal laws relating to financial and work-related entitlements discriminated against same-sex couples and in many cases, their children. These laws breach the *International Covenant on Civil and Political Rights*. Many of these laws also discriminate against the children of same-sex couples and fail to protect the best interests of the child in the area of financial and work-related entitlements. These laws also breach the *Convention on the Rights of the Child (CRC)*.
5. The Commonwealth superannuation laws amended by this Bill were amongst those identified by HREOC as discriminating against same-sex couples and their children.
6. The Same-Sex: Same Entitlements Inquiry noted that superannuation is one of the main ways of saving for retirement. It is designed to provide financial security for individuals and their families in retirement; or when a person dies unexpectedly. Further, superannuation is often a person's largest asset apart from the family home. Most people expect that their superannuation entitlements will be inherited by a partner, children or other dependants. But for people in same-sex couples and families, this is not currently always the case.
7. The Same-Sex: Same Entitlements Inquiry recommended:

- The federal government should amend the discriminatory laws identified by this Inquiry to ensure that same-sex couples and opposite-sex couples enjoy the same financial and work-related entitlements.
  - The federal government should amend the discriminatory laws identified by this Inquiry to ensure that the best interests of children in same-sex and opposite-sex families are equally protected in the area of financial and work-related entitlements.<sup>1</sup>
8. The Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 removes the discrimination experienced by same-sex couples and their children in Commonwealth superannuation schemes.

## Recommendations

9. HREOC recommends:

**Recommendation 1:** The amendments to Commonwealth superannuation legislation inserting the new terms ‘couple relationship’ and ‘partner’ should proceed.

**Recommendation 2:** Commonwealth superannuation legislation should be amended to remove any connection between being ‘legally married’ and receiving superannuation entitlement.

**Recommendation 3:** All superannuation trust deeds made according to the requirements of the *Superannuation Industry (Supervision) Act 1993* (Cth) should be required to interpret the term ‘spouse’ in a manner that includes same-sex couples.

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<sup>1</sup> Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements*, Report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (Same-Sex: Same Entitlements), April 2007.

**Recommendation 4:** An ‘interdependency’ category that includes same-sex couples should not be introduced into Commonwealth legislation governing superannuation.

**Recommendation 5:** Commonwealth superannuation laws that extend benefits to a ‘step-child’ should recognise a child under the care of a person in a ‘couple relationship’ with the birth mother or birth father.

**Recommendation 6:** Gay and lesbian couples should have equal rights as opposite-sex couples to apply to adopt an unrelated child.

## **The new definition of ‘couple relationship’**

10. The Senate requested that the Committee inquire into the definition of ‘couple relationship’.<sup>2</sup>
11. HREOC welcomes the new definition of ‘couple relationship’ that this Bill inserts into Commonwealth superannuation and related legislation. This new definition ensures that same-sex and opposite-sex couples enjoy equal access to superannuation death benefits flowing from Commonwealth superannuation schemes.
12. As noted above, the primary recommendation of the Same-Sex: Same Entitlements Inquiry was that discriminatory legislation should be amended so that same-sex and opposite-sex couples enjoy the same financial and work-related entitlements. The amendments contained within this Bill achieve this aim.

### ***What did the Same-Sex: Same Entitlements Inquiry recommend to remove discrimination against same-sex couples?***

13. The Same-Sex: Same Entitlements Inquiry report argued that the preferred drafting approach for bringing equality to same-sex couples is to:

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<sup>2</sup> Senate Hansard, Tuesday 17 June 2008, p33.

- retain the current terminology used in federal legislation (for example retain the term ‘spouse’ in the *Superannuation Act 1976* (Cth))
- redefine the terms in the legislation to include same-sex couples (for example, redefine ‘spouse’ in the *Superannuation Act 1976* (Cth) to include a same-sex partner)
- insert new definitions of ‘de facto relationship’ and ‘de facto partner’ which include same-sex couples.<sup>3</sup>

***The new definitions of ‘couple relationship’ and ‘partner’ remove discrimination against same-sex couples***

14. Although the Bill has used the terminology of ‘couple relationship’ rather than ‘de facto relationship’, the approach of this Bill reflects HREOC’s recommendations in that current terminology such as ‘spouse’ or ‘eligible spouse’ is retained and redefined.<sup>4</sup> This has been achieved through the following measures:

- In some of the superannuation legislation amended by this Bill, ‘spouse’ is redefined to include a person who is in a ‘couple relationship’ rather than a ‘marital relationship’, and the phrase ‘husband and wife’ is replaced with the term ‘partner’.<sup>5</sup>
- In some of the superannuation legislation amended by this Bill, the phrase ‘as the husband or wife of the person’ is replaced with the phrase ‘in a relationship as a couple (whether the persons are the same sex or different sexes)’.<sup>6</sup>

15. Retaining the terminology of ‘spouse’ and ‘eligible spouse’ ensures that the amendments do not alter the treatment of married or opposite-sex de facto

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<sup>3</sup> Same-Sex: Same Entitlements, section 18.5.1, p383.

<sup>4</sup> For example, Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Schedule 1, Items 4, 25.

<sup>5</sup> For example, Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Schedule 1, Items 6, 27.

<sup>6</sup> For example, Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Schedule 4, Items 1, 5, 7, 10.

couples. This point is made repeatedly in the Explanatory Memorandum accompanying the legislation:

The effect of [these amendments] is to ensure that the definition of a relationship, for the purpose of the payment of death benefits, includes a same-sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.<sup>7</sup>

16. This Bill does not insert a new definition of ‘de-facto relationship’ with a comprehensive list of factors that may be evidence of the existence of the relationship, as recommended by the Same-Sex: Same Entitlements Inquiry. However, HREOC recognises that this Bill aims to retain, as far as possible, the current framework of recognising relationships within Commonwealth superannuation legislation. Further, the common law criteria against which de facto relationships are assessed is well established.<sup>8</sup> For these reasons, HREOC is not opposed to the omission of a comprehensive list of factors against which to assess a de facto relationship.
17. HREOC supports the replacement of the term ‘marital relationship’ with that of ‘couple relationship’. The combined effect of replacing the term ‘marital relationship’ with ‘couple relationship’ and replacing the phrase ‘husband and wife’ with ‘partner’ ensures the equal treatment of same-sex and opposite-sex relationships.
18. HREOC supports the explicit reference to same-sex couples in the definition of partner. The new definition of ‘partner’ that explicitly refers to same-sex couples

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<sup>7</sup> Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Explanatory Memorandum, paras 33, 78, 110, 113, 149, 159, 161, 193, 194, 225, 242, 248, 266.

<sup>8</sup> See for example, *Roy v Sturgeon* (1986) 11 NSWLR 454; *Weston v Public Trustee* (1986) 4 NSWLR 407. See also Australian De Facto Relationships Cases (looseleaf) (2005) 9-695.

removes any doubt about whether same-sex relationships are included in the category ‘couple relationship’.<sup>9</sup>

19. HREOC supports the addition of registration of a relationship under a state or territory scheme as evidence of the existence of a ‘couple relationship’.<sup>10</sup> The Same-Sex: Same Entitlements Inquiry heard that the ability to use relationship registration as evidence of a relationship is important to same-sex couples and recommended that such registration be recognised as evidence of a de-facto relationship.<sup>11</sup>
20. Some state registration schemes allow registration of non-couple relationships as well as couple relationships.<sup>12</sup> To avoid any extension of superannuation benefits to non-couple relationships, the legislation could specify that only the registration of a couple can serve as evidence of the existence of a ‘couple relationship’.
21. **Recommendation 1:** The amendments to Commonwealth superannuation legislation inserting the new terms ‘couple relationship’ and ‘partner’ should proceed.
22. HREOC notes that some Commonwealth superannuation legislation continues to discriminate on the basis of marital status. For example, in the amended section 8B of the *Superannuation Act 1976* (Cth), a spouse may be entitled to a superannuation death benefit if they are still ‘legally married’ to the fund member, although not currently in a marital relationship.<sup>13</sup> While this discrimination affects both opposite-sex and same-sex de facto couples, same-sex couples are currently unable to marry.

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<sup>9</sup> *Parliamentary Contributory Superannuation Act 1948* (Cth), s4(1): ‘a person is the partner of another person if the two persons have a relationship as a couple (whether the persons are the same sex or different sexes)’.

<sup>10</sup> *Judges’ Pensions Act 1968* (Cth), new s4AB(4)(ba): ‘the person’s relationship was registered under a prescribed law of a State or Territory as a prescribed kind of relationship’.

<sup>11</sup> Same-Sex: Same Entitlements, p76, p384.

<sup>12</sup> *Relationships Act 2003* (Tas).

<sup>13</sup> See also *Parliamentary Contributory Superannuation Act 1948* (Cth), s4C; *Federal Magistrates Act* (Cth), s9E; *Judges’ Pensions Act 1968* (Cth), s4AC; *Defence Force Retirement and Death Benefits Act 1973* (Cth), s6B.



23. **Recommendation 2:** Commonwealth superannuation legislation should be amended to remove any connection between being ‘legally married’ and receiving a superannuation entitlement.

### ***What impact will the new definitions have on private superannuation schemes?***

24. The *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) regulates private superannuation schemes. Where private superannuation trust deeds refer directly to the definitions contained in the SIS Act, they will have the immediate effect of including same-sex couples. However, the legislation does not require all trust deeds to incorporate these definitions. HREOC supports a mechanism that ensures that all superannuation trust deeds interpret the term ‘spouse’ in a manner that includes same-sex couples.
25. **Recommendation 3:** All superannuation trust deeds made according to the requirements of the *Superannuation Industry (Supervision) Act 1993* (Cth) should be required to interpret the term ‘spouse’ in a manner that includes same-sex couples.

### **Interdependency relationships are not the same as same-sex relationships**

26. The Senate requested that the Committee inquire into:  
whether the definition of ‘couple relationship’ should be amended to incorporate other interdependent relationships and, if so, whether the definitions should be broadened to include those relationships or whether a separate definition is required.<sup>14</sup>
27. HREOC does not have a view as to whether people in interdependent relationships should also receive superannuation benefits from Commonwealth superannuation schemes. However, same-sex relationships are not appropriately

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<sup>14</sup> Senate Hansard, Tuesday 17 June 2008, p33.

categorised as interdependent and should not be subsumed into a general ‘interdependency’ category.

28. The clear purpose of the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 is to:  
eliminate discrimination against same-sex couples and the children of same-sex relationships in ... [Commonwealth Acts] that provide for reversionary superannuation benefits upon the death of a scheme member, and in related taxation treatment of superannuation benefits’.<sup>15</sup>
29. The Same-Sex: Same Entitlements Inquiry noted that there are currently three different areas of federal law which incorporate an ‘interdependency’ category: superannuation (and superannuation tax) law; migration law; and Australian Defence Force instructions relating to certain defence force personnel. These definitions will generally include people in a same-sex relationship. They may also include people in other forms of interdependency relationships – for example, two elderly friends or siblings living with, and caring for, each other.
30. However, the Same-Sex: Same Entitlements Inquiry found that the ‘interdependency’ category has not brought full equality to same-sex couples. HREOC has a range of concerns about the operation of the ‘interdependency’ category. These are set out in detail in section 4.3 and section 13.4.2 of the Same-Sex: Same Entitlements report.
31. Firstly, the criteria for establishing an interdependency relationship may be more difficult to establish than those for an opposite-sex married or de facto couple. This is the case with the ‘interdependency’ category as defined in the SIS Act. These arguments are set out in detail in section 13.4.2 of the Same-Sex: Same Entitlements report. In summary:
  - it is harder to prove an ‘interdependency relationship’ than a de facto ‘spouse’ relationship:

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<sup>15</sup> Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Explanatory Memorandum, para 1.

- the criteria for establishing an ‘interdependency relationship’ are much more prescriptive than the general criteria for proving a genuine domestic relationship for opposite-sex couples
- the criteria for establishing an ‘interdependency relationship’ contain additional criteria that do not otherwise appear in the statutes or case law regarding opposite-sex couples
- the legislative definition of ‘interdependency relationship’ emphasises a carer role
- proving an ‘interdependency relationship’ creates great uncertainty for same-sex couples.<sup>16</sup>

32. Secondly, the characterisation of same-sex relationships as ‘interdependent’ relationships suggests that there is something different about the quality of a same-sex relationship to that of an opposite-sex relationship.<sup>17</sup> The ‘interdependency’ term suggests that same-sex couples are different to, and lesser than, similarly situated opposite-sex couples. Members of same-sex couples repeatedly expressed this view to the Same-Sex: Same Entitlements Inquiry. For example:

In a general philosophical sense, it causes discomfort, embarrassment or even anger among lesbian and gay people, that their relationship should be defined in that way. It’s a lessening, a diminishment and a failure to acknowledge the depth and sincerity of same-sex relationships by using that kind of language.<sup>18</sup>

33. Thirdly, the ‘interdependency’ category may confer financial entitlements on people who are not in a couple. There are very few instances where financial benefits like superannuation death benefits, tax, social security and worker’s compensation are intended to extend to a broader range of non-couple relationships. Using an ‘interdependency’ relationship as a tool for including same-sex couples could have the unintended consequence of covering non-couple relationships.

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<sup>16</sup> Same-Sex: Same Entitlements, pp295-299.

<sup>17</sup> Same-Sex: Same Entitlements, p68, p298.

<sup>18</sup> Same-Sex: Same Entitlements, p299; Brian Greig, Perth Hearing, 9 August 2006.

34. The definition of ‘couple relationship’ is clearly intended to include those who are a couple, whether they are of the same or opposite sex. This definition should not be confused by broadening to include those who are in ‘interdependent relationships’.
35. **Recommendation 4:** An ‘interdependency’ category that includes same-sex couples should not be introduced into Commonwealth legislation governing superannuation.

## **The new definitions of ‘child’ and ‘child of a couple relationship’**

36. The Senate requested that the Committee inquire into ‘the legal and fiscal implications of the definitions referred to in (v), particularly as they relate to the rights, obligations and liabilities of co-parents (i.e., the parent in a couple relationship that does not have a biological connection to a child of that relationship)’.<sup>19</sup>
37. Protecting the best interests of a child is one of the most important principles of international law and the CRC in particular. Ensuring that children in same-sex families have the same entitlements as children in opposite-sex families is fundamental to protecting the best interests of these children.
38. The clear purpose of this Bill is to ensure that the children of a same-sex relationship can receive death benefits from a non-biological parent. HREOC supports the removal of this discrimination.
39. However, HREOC is concerned that there is still discrimination against children from a previous relationship who now live under the care of a same-sex couple.

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<sup>19</sup> Senate Hansard, Tuesday 17 June 2008, p33.

## ***What did the Same-Sex: Same Entitlements Inquiry recommend regarding the legal recognition of children?***

40. The Same-Sex: Same Entitlements Inquiry report made the following recommendations regarding the legal recognition of children:
- a. Federal laws without a definition of ‘child’ should include a definition which recognises the children of a birth mother, birth father, lesbian co-mother or gay co-father.
  - b. Federal laws should ensure that a lesbian co-mother of an Assisted Reproductive Technology (ART) child can access the same financial and work-related entitlements available to a birth mother and a birth father (a legal parent).
  - c. Federal financial and work-related laws should include a definition of ‘step-child’ which recognises a child under the care of a ‘de facto partner’ of a birth mother or birth father.
  - d. ‘Step-parent adoption’ laws should more readily consider adoption by a lesbian co-mother or gay co-father.
  - e. Gay and lesbian couples should have equal rights to apply for adoption of an unrelated child.
  - f. Where access to financial or work-related benefits is intended to extend beyond the legal parents, federal laws should explicitly recognise the eligibility of a person who has a parenting order from the Family Court of Australia.
  - g. There should be a public information and education campaign to ensure that gay and lesbian families are aware of their rights and entitlements under federal financial and work-related laws.

## ***The new definitions of ‘child’ and ‘child of a couple relationship’ remove discrimination***

41. The definitions of ‘child’ and ‘child of a couple relationship’ in the Bill remove discrimination by including the children of most same-sex relationships. This is achieved by broadening of the definition of child to include reference to a person who is the ‘product of a relationship’ with a partner: ‘if, at any time, the person had a partner (whether the persons are the same sex or different sexes) – a child who is the product of the person’s relationship with that partner’.<sup>20</sup>

42. The Explanatory Memorandum states that:

The new definition expands the classes of children that may be taken to be a child of the member for the purposes of determining eligibility for ... benefits. It adds a new criteria that, if at any time the person had a partner, a child who is the product of the person’s relationship with that partner may be taken to be the member’s child.<sup>21</sup>

43. To determine whether a child is the product of a relationship the Bill states that:

a child cannot be the product of the 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.<sup>22</sup>

44. The amendments in the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 ensure that children born into same-sex families have the same rights and entitlements to superannuation benefits as children born into opposite-sex families.

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<sup>20</sup> For example, Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Schedule 1, Item 17, amending *Parliamentary Contributory Superannuation Act 1948* (Cth), s19AA(5); Schedule 2, Item 14, amending the *Judges’ Pensions Act 1968* (Cth) s4(1).

<sup>21</sup> Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Explanatory Memorandum, para 47.

<sup>22</sup> Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Schedule 1, Items 5, 26. (*Parliamentary Contributory Superannuation Act 1948* (Cth), new s4(7)).

## ***The new definitions do not protect children from previous relationships***

45. The new definition of ‘child’ clearly intends to exclude children from previous relationships, as set out in Example 3 in the Explanatory Memorandum.<sup>23</sup> A child from a previous relationship cannot be considered a ‘product’ of a current relationship.
46. However, the superannuation legislation generally provides for entitlements to be given to a ‘step-child’.<sup>24</sup> As the term is not defined in the legislation itself, it will likely be interpreted to exclude a child under the care of his or her biological parent’s same-sex partner. This is because courts have interpreted the term to mean that the child’s biological parent must marry the intended step-parent.<sup>25</sup> That interpretation discriminates against same-sex couples and opposite-sex de facto couples.
47. If a couple is married, then a child from a previous relationship is considered a step-child of the non-biological parent. If a couple is not married, a child from a previous relationship does not qualify as a step-child. A child in a same-sex family will never be able to be considered a ‘step-child’ while the members of a same-sex couple are unable to marry.<sup>26</sup>
48. **Recommendation 5:** Commonwealth superannuation laws that extend benefits to a ‘step-child’ should recognise a child under the care of a person in a ‘couple relationship’ with the birth mother or birth father.

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<sup>23</sup> Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Explanatory Memorandum, para 53.

<sup>24</sup> For example, Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Schedule 1, Item 21; Schedule 4, Items 2, 9.

<sup>25</sup> *Panochini v Jude* [1999] QCA 444; *Basterfield v Gay* (1994) 3 Tas R 293. See also the definition in *Family Law Act 1975* (Cth), s4.

<sup>26</sup> The following Acts amended by the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 contain the term ‘step-child’: *Superannuation Act 1976* (Cth); *Defence Force Retirement and Death Benefits Act 1973* (Cth); *Retirement Savings Act 1997* (Cth); *Superannuation Industry (Supervision) Act 1993* (Cth).

## ***How do the changes work for children born to lesbian couples?***

49. A child born to a lesbian couple will generally have a birth mother and a lesbian co-mother (non-biological mother).
50. **Example A: Where one member of a lesbian couple gives birth using donated sperm.** In this case, the child will be recognised as a ‘product of the relationship’ of the lesbian couple and consequently a child of each partner of the relationship. (This is the situation outlined in Example 1 in the Explanatory Memorandum).<sup>27</sup>
51. **Example B: Where one member of a lesbian couple gives birth using donated sperm and a donated egg.** In this case, the child will be recognised as a ‘product of the relationship’ of the lesbian couple and consequently a child of each partner of the relationship. (This is the situation outlined in Example 2 in the Explanatory Memorandum).<sup>28</sup>
52. **Example C: Where one member of a lesbian couple gives birth following intercourse with a man.** In this case, the child will be recognised as a ‘product of the relationship’ of the lesbian couple and consequently a child of each partner of the relationship.
53. In each of these cases, the child may also be entitled to the superannuation benefits of the biological donor father. This issue is discussed further below.

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<sup>27</sup> Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Explanatory Memorandum, para 51.

<sup>28</sup> Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Explanatory Memorandum, para 52.



## ***How do the changes work for the children of gay couples?***

54. A child born to a gay couple will have two gay co-fathers as well as a birth mother. This family structure would only be achievable through either an informal or formal surrogacy arrangement. Formal surrogacy arrangements are extremely rare in Australia. All states other than New South Wales (NSW) and the Australian Capital Territory (ACT) either prohibit surrogacy agreements or limit access to the ART necessary to fulfil a surrogacy arrangement.
55. **Example D: Where a surrogate mother gives birth to a child for a gay couple using the donated sperm of one member of a gay couple.** In this case the child will be recognised as a ‘product of the relationship’ of the gay couple and consequently a child of each partner of the relationship. The child will also be recognised as the child of the birth mother. This means that the child may be entitled to the superannuation benefits of the gay couple and the birth mother.
56. No state or territory surrogacy laws oust the legal parentage of the birth mother. In the event that the mother wishes to transfer her parentage this can be achieved either through adoption, or in the case of the ACT, a parentage order.<sup>29</sup>
57. HREOC notes that the Standing Committee of Attorney’s General has agreed to ‘develop a unified framework for the legal recognition of parentage achieved by surrogacy arrangements’ and that the unified framework would contain the following feature:
- court orders will be available recognising the intended parents as the legal parents where the surrogacy arrangement meets legal requirements and is in the best interests of the child.<sup>30</sup>
58. Uniform reform of surrogacy laws in line with the mechanisms operating in the ACT may be the most appropriate mechanism to limit the extension of parental status in the case of surrogacy.

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<sup>29</sup> *Parentage Act 2004* (ACT).

<sup>30</sup> Standing Committee of Attorneys-General, Communique, 28 March 2008, item 7.

59. As it is unlikely that a gay couple will become parents through a surrogacy arrangement within Australia, adoption is also an important mechanism for gay couples. However, a same-sex couple can only adopt an unrelated child in Western Australia and the ACT.
60. In the unlikely event that there is a successful adoption by a gay couple, the adopted child will be entitled to the same superannuation benefits as any other adopted child. This result is unaffected by the new legislation.
61. **Recommendation 6:** Gay and lesbian couples should have equal rights as opposite-sex couples to apply to adopt an unrelated child.

### ***Does the new definition of child recognise anyone as a parent other than those in the couple relationship?***

62. As noted above, the definition of ‘child’ in each of the Acts maintains a parent-child relationship where there is a biological connection. This means a person may be the ‘child’ of a sperm donor to a lesbian couple and the ‘child’ of a birth mother to a gay couple.
63. Consequently, the new definition of child will mean that a child may be considered to be the ‘child’ of both partners in a same-sex couple and the child of the sperm donor or birth mother. It may also include the partner of the sperm donor or birth mother, if that couple are intended parents.
64. Where the male sperm donor or birth mother is a member of a superannuation fund this may have the impact of extending entitlements available to that child.
65. However, in the context of federal superannuation legislation, entitlement to benefits is generally restricted to an ‘eligible child’ who is dependent on person who is the member of a superannuation fund.<sup>31</sup> This means that where a child is not dependent on a donor who is a superannuation fund member they will have no entitlement to superannuation benefits.

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<sup>31</sup> For example, *Parliamentary Contributory Superannuation Act 1948* (Cth), s19AA.

66. Further, it is important to understand that gay and lesbian parenting arrangements often involve more than two people in the place of a parent. Where a male sperm donor is an active parent along with a lesbian couple, the recognition of parental status beyond the lesbian couple may be appropriate. Similarly, it may be important to recognise the status of a birth mother to a gay couple.

### ***Is there an alternative approach to the definition of 'child'?***

67. There is an alternative approach to removing discrimination against the child of a same-sex couple which would put a male sperm donor in the same position whether he donated to a lesbian or an opposite-sex couple.
68. This approach would also ensure greater consistency in the legal recognition of the parent-child relationship both in federal laws and between federal and state laws. However, it would restrict parental status to two parents only, which may not be appropriate for some gay and lesbian parenting arrangements.
69. This approach would involve:
- amendment of the parenting presumption in section 60H of the *Family Law Act 1975* (Cth) (Family Law Act) to include lesbian co-mothers
  - introduction of uniform state surrogacy laws that recognise gay co-fathers and provide a mechanism for the transfer of legal parentage from the birth mother
  - amendment of the Family Law Act to recognise parental status as conferred by state laws
  - amendment of the definition of 'child' in the Family Law Act include children born through intercourse, children lawfully adopted, children of parents recognised under section 60H and children of parents recognised by state laws
  - extension of the Family Law Act definition of 'child' to apply to all federal laws that grant rights or obligations based on a parent-child relationship.
70. However, it appears that there is currently no intention to amend the parenting presumptions in the Family Law Act. Further, there is no guarantee of uniform amendment of state surrogacy laws or that these amendments would include same-sex couples.

71. Consequently, in the absence of either amendment of section 60H of the Family Law Act or reform of state laws regarding surrogacy that is inclusive of same-sex couples, HREOC supports the amendments of the definition of 'child' contained in this Bill.

## **Conclusion**

72. HREOC welcomes the amendments contained within this Bill. The new definitions of 'couple relationship', 'partner' and 'child' remove discrimination experienced by same-sex couples and their families.
73. The interdependency category is not an appropriate vehicle through which to recognise same-sex relationship.
74. The new definition of 'child' removes discrimination experienced by the bulk of same-sex couples with children.
75. This legislation is an important first step on the path to removing discrimination against same-sex couples in all federal laws. HREOC looks forward to the introduction of the remainder of the legislation reforming recognition of same-sex relationships.